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Presidential Documents

Title 3—

The President

Proclamation 10130 of December 31, 2020

National Slavery and Human Trafficking Prevention Month, 2021

By the President of the United States of America

A Proclamation

Human trafficking is a horrific assault on human dignity that affects people in the United States and around the world. It tears apart communities, fuels criminal activity, and threatens the national security of the United States. During National Slavery and Human Trafficking Prevention Month, we reaffirm our commitment to eradicate this abhorrent evil, to support victims and survivors, and to hold traffickers accountable for their heinous crimes.

Tragically, through force, fraud, and coercion, human traffickers deprive millions of victims of their unalienable rights to life, liberty, and the pursuit of happiness. Often referred to as ''modern slavery,'' this intolerable blight on society involves exploitation for labor or sex and affects people of all ages, genders, races, religions, and nationalities. As the United States continues to lead the global fight against human trafficking, we must remain relentless in our resolve to dismantle this illicit and immoral enterprise in our cities, suburbs, rural communities, Tribal lands, and transportation networks.

My Administration has prioritized ending human trafficking since its earliest days. As one of my first acts as President, I instructed Federal agencies to do what was necessary to bring human traffickers to justice and assist survivors on their road to recovery. Since then, United States Immigration and Customs Enforcement, along with other Federal agencies, has aggressively pursued these criminals, dismantling the financial infrastructure of their networks and arresting over 5,000 human traffickers. In 2019 alone, Federal law enforcement agencies initiated more than 1,600 new investigations into human traffickers and the Department of Justice's (DOJ) human trafficking task forces opened more than 2,500 new cases on the frontlines. At my direction, the Department of Homeland Security (DHS) launched its new Center for Countering Human Trafficking, which utilizes personnel from 16 DHS components, including special agents, victim support specialists, and intelligence research specialists, to focus on disrupting and dismantling trafficking organizations and providing support and protection to victims.

A year ago, I was proud to host the White House Summit on Human Trafficking, honoring the 20th anniversary of the Trafficking Victims Protection Act of 2000 (TVPA). During this historic event, I signed an Executive Order on Combating Human Trafficking and Online Child Exploitation in the United States. Through this order, my Administration established the first-ever White House position focused solely on combating human trafficking. Last year, I also released a comprehensive National Action Plan to Combat Human Trafficking (NAP), built around the ''three pillars'' of the TVPA: prevention, protection, and prosecution. The NAP also includes a fourth pillar which recognizes the invaluable benefit of implementing collaborative and cooperative efforts that crosscut all three pillars and involve a multitude of stakeholders and professionals from various disciplines and sectors. Using this strategy, the United States Government will employ a

whole-of-government approach to improve our capabilities and build on existing momentum in our fight against human trafficking.

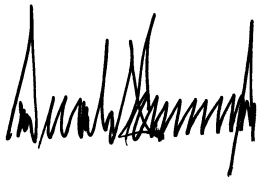
We remain focused on ensuring that survivors of these horrific crimes receive the care and support they need and deserve. My Administration is empowering and funding faith-based and community organizations to provide survivors with vital services, including medical and counseling services, safety planning, educational opportunities, and vocational training. Further, my Administration has doubled the amount of DOJ funding to combat human trafficking compared to the previous administration and funded the largest package of DOJ grants to fight these crimes in American history. I am proud that these grants included the first-ever funding for safe housing opportunities for survivors nationwide.

Despite the challenges posed by the pandemic this year, my Administration has been unwavering in its efforts to stop this scourge domestically and around the world. The DOJ and the Department of Health and Human Services engaged with State, local, Tribal, and territorial governments and nongovernmental organizations to understand the impact of coronavirus on human trafficking and published resource guides for those in the fight on how to operate and provide services during the pandemic. The Department of State also launched a year-long competition for proposed projects to address the pandemic's impact on efforts to combat modern slavery. Additionally, the United States Agency for International Development adapted their approach to overseas programmatic work to ensure that survivors are able to access the critical support services they need without delay. No matter the circumstances, we will remain relentless in this work and will spare no resource in offering hope to the victims and survivors of this global atrocity.

While we have reached new milestones in this fight for freedom, we must remain steadfast in our pursuit to end the evil practice of human trafficking and slavery. This month, we restore our commitment to bringing human traffickers to justice and to preserving the dignity and worth of every person.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do proclaim January 2021 as National Slavery and Human Trafficking Prevention Month, culminating in the annual observation of National Freedom Day on February 1, 2021. I call upon industry associations, law enforcement, private businesses, faith-based and other organizations of civil society, survivors and advocates, schools, families, and all Americans to recognize our vital roles in ending all forms of modern slavery and to observe this month with appropriate programs and activities aimed at ending and preventing all forms of human trafficking.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first day of December, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.



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Presidential Documents

Proclamation 10131 of December 31, 2020

Suspension of Entry of Immigrants and Nonimmigrants Who Continue To Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak

By the President of the United States of America

A Proclamation

In Proclamation 10014 of April 22, 2020 (Suspension of Entry of Immigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak), I suspended, for a period of 60 days, the entry of aliens as immigrants, subject to certain exceptions. In Proclamation 10052 of June 22, 2020 (Suspension of Entry of Immigrants and Nonimmigrants Who Present a Risk to the United States Labor Market During the Economic Recovery Following the 2019 Novel Coronavirus Outbreak), I determined that the considerations present in Proclamation 10014 remained, and I extended the suspension of entry imposed in Proclamation 10014 through December 31, 2020. I further noted that the Secretary of Labor and the Secretary of Homeland Security had reviewed nonimmigrant programs and found that the admission of workers within several nonimmigrant visa categories also posed a risk of displacing and disadvantaging United States workers during the economic recovery following the COVID–19 outbreak. Consequently, I suspended, through December 31, 2020, the entry of any alien seeking entry pursuant to certain nonimmigrants visas, subject to certain exceptions.

The 2019 Novel Coronavirus (COVID–19) continues to significantly disrupt Americans' livelihoods. While the November overall unemployment rate in the United States of 6.7 percent reflects a marked decline from its April high, there were still 9,834,000 fewer seasonally adjusted nonfarm jobs in November than in February of 2020.

The effects of COVID–19 on the United States labor market and on the health of American communities is a matter of ongoing national concern, and the considerations present in Proclamations 10014 and 10052 have not been eliminated. The current number of new daily cases worldwide reported by the World Health Organization, for example, is higher than the comparable number present during June, and while therapeutics and vaccines are recently available for an increasing number of Americans, their effect on the labor market and community health has not yet been fully realized. Moreover, actions such as States' continued imposition of restrictions on businesses still affect the number of workers that can be hired as compared with February of 2020.

Given these factors, an extension of Proclamations 10014 and 10052 is appropriate as the President continues to monitor the effects of the COVID–19 pandemic and assess whether a further continuation, modification, or termination of Proclamations 10014 and 10052 is warranted.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States, by the authority vested in me by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(f) and 1185(a)) and section 301 of title 3, United States Code, hereby find that the entry into the

United States of persons described in section 1 of Proclamation 10014, except as provided in section 2 of Proclamation 10014, and persons described in section 2 of Proclamation 10052, except as provided for in section 3 of Proclamation 10052 (as amended by Proclamation 10054 of June 29, 2020 (Amendment to Proclamation 10052)), would be detrimental to the interests of the United States, and that their entry should be subject to certain restrictions, limitations, and exceptions. I therefore hereby proclaim the following:

Section 1. *Continuation of Proclamation 10014*. Section 4 of Proclamation 10014 is amended to read as follows:

''**Sec. 4**. *Termination*. This proclamation shall expire on March 31, 2021, and may be continued as necessary. Within 15 days of December 31, 2020, and every 30 days thereafter while this proclamation is in effect, the Secretary of Homeland Security shall, in consultation with the Secretary of State and the Secretary of Labor, recommend any modifications as may be necessary.''

Sec. 2. *Continuation of Proclamation 10052*. Section 6 of Proclamation 10052 is amended to read as follows:

''**Sec. 6**. *Termination*. This proclamation shall expire on March 31, 2021, and may be continued as necessary. Within 15 days of December 31, 2020, and every 30 days thereafter while this proclamation is in effect, the Secretary of Homeland Security shall, in consultation with the Secretary of State and the Secretary of Labor, recommend any modifications as may be necessary.''

Sec. 3. *Severability*. It is the policy of the United States to enforce this proclamation to the maximum extent possible to advance the interests of the United States. Accordingly:

(a) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this proclamation and the application of its provisions to any other persons or circumstances shall not be affected thereby; and

(b) if any provision of this proclamation, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements to conform with existing law and with any applicable court orders.

Sec. 4. *General Provisions*. (a) Nothing in this proclamation shall be construed to impair or otherwise affect:

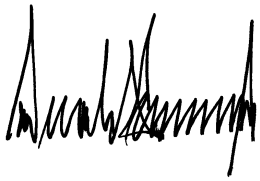
(i) the authority granted by law to an executive department or agency, or the head thereof; or

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

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first day of December, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.



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Presidential Documents

Executive Order 13970 of December 31, 2020

Adjustments of Certain Rates of Pay

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statutory Pay Systems.* The rates of basic pay or salaries of the statutory pay systems (as defined in 5 U.S.C. 5302(1)), as adjusted under 5 U.S.C. 5303, are set forth on the schedules attached hereto and made a part hereof:

(a) The General Schedule (5 U.S.C. 5332(a)) at Schedule 1;

(b) The Foreign Service Schedule (22 U.S.C. 3963) at Schedule 2; and

(c) The schedules for the Veterans Health Administration of the Department of Veterans Affairs (38 U.S.C. 7306, 7404; section 301(a) of Public Law 102–40) at Schedule 3.

Sec. 2. *Senior Executive Service.* The ranges of rates of basic pay for senior executives in the Senior Executive Service, as established pursuant to 5 U.S.C. 5382, are set forth on Schedule 4 attached hereto and made a part hereof.

Sec. 3. *Certain Executive, Legislative, and Judicial Salaries.* The rates of basic pay or salaries for the following offices and positions are set forth on the schedules attached hereto and made a part hereof:

(a) The Executive Schedule (5 U.S.C. 5312–5318) at Schedule 5;

(b) The Vice President (3 U.S.C. 104) and the Congress (2 U.S.C. 4501) at Schedule 6; and

(c) Justices and judges (28 U.S.C. 5, 44(d), 135, 252, and 461(a)) at Schedule 7.

Sec. 4. *Uniformed Services.* The rates of monthly basic pay (37 U.S.C. 203(a)) for members of the uniformed services, as adjusted under 37 U.S.C. 1009, and the rate of monthly cadet or midshipman pay (37 U.S.C. 203(c)) are set forth on Schedule 8 attached hereto and made a part hereof.

Sec. 5. *Locality-Based Comparability Payments.*

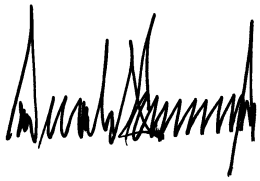
(a) Pursuant to section 5304 of title 5, United States Code, and my authority to implement an alternative level of comparability payments under section 5304a of title 5, United States Code, locality-based comparability payments shall be paid in accordance with Schedule 9 attached hereto and made a part hereof.

(b) The Director of the Office of Personnel Management shall take such actions as may be necessary to implement these payments and to publish appropriate notice of such payments in the *Federal Register*.

Sec. 6. *Administrative Law Judges.* Pursuant to section 5372 of title 5, United States Code, the rates of basic pay for administrative law judges are set forth on Schedule 10 attached hereto and made a part hereof.

Sec. 7. *Effective Dates.* Schedule 8 is effective January 1, 2021. The other schedules contained herein are effective on the first day of the first applicable pay period beginning on or after January 1, 2021.

Sec. 8. *Prior Order Superseded.* Executive Order 13901 of December 26, 2019, is superseded as of the effective dates specified in section 7 of this order.



THE WHITE HOUSE,

December 31, 2020.

Billing code 3295–F1–P

SCHEDULE 1--GENERAL SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

	1	2	3	4	5	6	7	8	9	10
GS-1	$19,738	$20,400	$21,056	$21,709	$22,365	$22,749	$23,398	$24,052	$24,078	$24,690
GS-2	22,194	22,722	23,457	24,078	24,349	25,065	25,781	26,497	27,213	27,929
GS-3	24,216	25,023	25,830	26,637	27,444	28,251	29,058	29,865	30,672	31,479
GS-4	27,184	28,090	28,996	29,902	30,808	31,714	32,620	33,526	34,432	35,338
GS-5	30,414	31,428	32,442	33,456	34,470	35,484	36,498	37,512	38,526	39,540
GS-6	33,903	35,033	36,163	37,293	38,423	39,553	40,683	41,813	42,943	44,073
GS-7	37,674	38,930	40,186	41,442	42,698	43,954	45,210	46,466	47,722	48,978
GS-8	41,723	43,114	44,505	45,896	47,287	48,678	50,069	51,460	52,851	54,242
GS-9	46,083	47,619	49,155	50,691	52,227	53,763	55,299	56,835	58,371	59,907
GS-10	50,748	52,440	54,132	55,824	57,516	59,208	60,900	62,592	64,284	65,976
GS-11	55,756	57,615	59,474	61,333	63,192	65,051	66,910	68,769	70,628	72,487
GS-12	66,829	69,057	71,285	73,513	75,741	77,969	80,197	82,425	84,653	86,881
GS-13	79,468	82,117	84,766	87,415	90,064	92,713	95,362	98,011	100,660	103,309
GS-14	93,907	97,037	100,167	103,297	106,427	109,557	112,687	115,817	118,947	122,077
GS-15	110,460	114,142	117,824	121,506	125,188	128,870	132,552	136,234	139,916	143,598

SCHEDULE 2--FOREIGN SERVICE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

Step	Class 1	Class 2	Class 3	Class 4	Class 5	Class 6	Class 7	Class 8	Class 9
1	$110,460	$89,505	$72,526	$58,767	$47,619	$42,570	$38,056	$34,021	$30,414
2	113,774	92,190	74,702	60,530	49,048	43,847	39,198	35,042	31,326
3	117,187	94,956	76,943	62,346	50,519	45,163	40,374	36,093	32,266
4	120,703	97,805	79,251	64,216	52,035	46,517	41,585	37,176	33,234
5	124,324	100,739	81,629	66,143	53,596	47,913	42,832	38,291	34,231
6	128,053	103,761	84,078	68,127	55,203	49,350	44,117	39,440	35,258
7	131,895	106,874	86,600	70,171	56,860	50,831	45,441	40,623	36,316
8	135,852	110,080	89,198	72,276	58,565	52,356	46,804	41,842	37,405
9	139,927	113,382	91,874	74,444	60,322	53,926	48,208	43,097	38,528
10	143,598	116,784	94,630	76,678	62,132	55,544	49,654	44,390	39,683
11	143,598	120,287	97,469	78,978	63,996	57,211	51,144	45,721	40,874
12	143,598	123,896	100,393	81,347	65,916	58,927	52,678	47,093	42,100
13	143,598	127,613	103,405	83,788	67,893	60,695	54,259	48,506	43,363
14	143,598	131,441	106,507	86,301	69,930	62,515	55,887	49,961	44,664

SCHEDULE 3--VETERANS HEALTH ADMINISTRATION SCHEDULES
DEPARTMENT OF VETERANS AFFAIRS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

Schedule for the Office of the Under Secretary for Health (38 U.S.C. 7306) and Directors of Medical Centers and Veterans Integrated Service Networks (38 U.S.C. 7401(4))*

	Minimum	Maximum
	$132,552	$199,300**
Physician, Dentist, and Podiatrist Base and Longevity Schedule*		
Physician Grade	$108,645	$159,353
Dentist Grade	108,645	159,353
Podiatrist Grade	108,645	159,353
Chiropractor and Optometrist Schedule		
Chief Grade	$110,460	$143,598
Senior Grade	93,907	122,077
Intermediate Grade	79,468	103,309
Full Grade	66,829	86,881
Associate Grade	55,756	72,487
Expanded-Function Dental Auxiliary Schedule****		
Director Grade	$110,460	$143,598
Assistant Director Grade	93,907	122,077
Chief Grade	79,468	103,309
Senior Grade	66,829	86,881
Intermediate Grade	55,756	72,487
Full Grade	46,083	59,907
Associate Grade	39,656	51,554
Junior Grade	33,903	44,073

* This schedule does not apply to the Director of Nursing Service or any incumbents who are physicians or dentists.

** Pursuant to 38 U.S.C. 7404(a)(3)(B), these positions are covered by a certified performance appraisal system and the maximum rate of basic pay may not exceed the rate of basic pay for level II of the Executive Schedule. For positions that are not covered by a certified performance appraisal system, the maximum rate of basic pay may not exceed the rate of basic pay for level III of the Executive Schedule.

*** Pursuant to 38 U.S.C. 7431, Veterans Health Administration physicians, podiatrists, and dentists paid under the Physician, Dentist, and Podiatrist Base and Longevity schedule may also be paid market pay and performance pay.

**** Pursuant to section 301(a) of Public Law 102-40, these positions are paid according to the Nurse Schedule in 38 U.S.C. 4107(b), as in effect on August 14, 1990, with subsequent adjustments.

SCHEDULE 4--SENIOR EXECUTIVE SERVICE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

	Minimum	Maximum
Agencies with a Certified SES Performance Appraisal System	$132,552	$199,300
Agencies without a Certified SES Performance Appraisal System	$132,552	$183,300

SCHEDULE 5--EXECUTIVE SCHEDULE

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

Level I	$221,400
Level II	199,300
Level III	183,300
Level IV	172,500
Level V	161,700

SCHEDULE 6--VICE PRESIDENT AND MEMBERS OF CONGRESS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

Vice President	$255,800
Senators	174,000
Members of the House of Representatives	174,000
Delegates to the House of Representatives	174,000
Resident Commissioner from Puerto Rico	174,000
President pro tempore of the Senate	193,400
Majority leader and minority leader of the Senate	193,400
Majority leader and minority leader of the House of Representatives	193,400
Speaker of the House of Representatives	223,500

SCHEDULE 7--JUDICIAL SALARIES

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

Chief Justice of the United States	$280,500
Associate Justices of the Supreme Court	268,300
Circuit Judges	231,800
District Judges	218,600
Judges of the Court of International Trade	218,600

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES
(Effective January 1, 2021)

Part I--MONTHLY BASIC PAY
YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18
COMMISSIONED OFFICERS											
O-10*	-	-	-	-	-	-	-	-	-	-	-
O-9	-	-	-	-	-	-	-	-	-	-	-
O-8	$11,329.50	$11,701.20	$11,947.50	$12,016.20	$12,323.40	$12,836.70	$12,956.40	$13,443.60	$13,584.00	$14,004.00	$14,611.80
O-7	9,414.30	9,851.40	10,053.90	10,215.00	10,506.00	10,794.00	11,126.70	11,458.20	11,791.20	12,836.70	13,719.30
O-6**	7,139.10	7,842.90	8,357.70	8,357.70	8,389.80	8,749.20	8,796.90	8,796.90	9,296.70	10,180.50	10,699.20
O-5	5,951.40	6,704.40	7,168.20	7,255.50	7,545.60	7,718.40	8,099.40	8,379.60	8,740.80	9,293.10	9,555.90
O-4	5,135.10	5,943.90	6,341.10	6,429.00	6,797.10	7,192.20	7,684.20	8,066.70	8,332.50	8,485.50	8,573.70
O-3***	4,514.70	5,117.70	5,523.30	6,022.80	6,311.70	6,628.20	6,832.80	7,169.40	7,345.20	7,345.20	7,345.20
O-2***	3,901.20	4,442.70	5,116.80	5,289.90	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50
O-1***	3,385.80	3,524.40	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60
COMMISSIONED OFFICERS WITH OVER 4 YEARS ACTIVE DUTY SERVICE AS AN ENLISTED MEMBER OR WARRANT OFFICER****											
O-3E	-	-	-	$6,022.80	$6,311.70	$6,628.20	$6,832.80	$7,169.40	$7,453.50	$7,617.00	$7,839.00
O-2E	-	-	-	5,289.90	5,398.50	5,570.40	5,860.50	6,084.90	6,251.70	6,251.70	6,251.70
O-1E	-	-	-	4,260.60	4,549.50	4,717.50	4,889.70	5,058.30	5,289.90	5,289.90	5,289.90
WARRANT OFFICERS											
W-5	-	-	-	-	-	-	-	-	-	-	-
W-4	$4,665.90	$5,018.70	$5,162.70	$5,304.60	$5,548.80	$5,790.30	$6,035.10	$6,402.60	$6,725.10	$7,032.00	$7,283.40
W-3	4,261.20	4,438.50	4,620.90	4,680.30	4,870.80	5,246.40	5,637.30	5,821.50	6,034.80	6,253.80	6,648.90
W-2	3,770.40	4,127.10	4,236.60	4,312.20	4,556.40	4,936.50	5,125.20	5,310.30	5,537.10	5,714.40	5,874.60
W-1	3,309.30	3,666.00	3,761.40	3,963.90	4,203.00	4,555.80	4,720.20	4,950.90	5,177.40	5,355.60	5,519.40

* Basic pay is limited to the rate of basic pay for level II of the Executive Schedule in effect during calendar year 2021, which is $16,608.30 per month, for officers at pay grades O-7 through O-10. This includes officers serving as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, Chief of Space Operations, Commandant of the Coast Guard, Chief of the National Guard Bureau, or commander of a unified or specified combatant command (as defined in 10 U.S.C. 161(c)).

** Basic pay is limited to the rate of basic pay for level V of the Executive Schedule in effect during calendar year 2021, which is $13,475.10 per month, for officers at pay grades O-6 and below.

*** Does not apply to commissioned officers who have been credited with over 4 years of active duty service as an enlisted member or warrant officer.

**** Reservists with at least 1,460 points as an enlisted member, a warrant officer, or a warrant officer and an enlisted member which are creditable toward reserve retirement also qualify for these rates.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 2)
(Effective January 1, 2021)
Part I--MONTHLY BASIC PAY
YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	Over 20	Over 22	Over 24	Over 26	Over 28	Over 30	Over 32	Over 34	Over 36	Over 38	Over 40
COMMISSIONED OFFICERS											
O-10*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*	$16,608.30*
O-9	16,012.50	16,243.80	16,576.80	16,608.30*	16,608.30*	16,608.30*	16,608.30*	16,608.30*	16,608.30*	16,608.30*	16,608.30*
O-8	15,171.90	15,546.00	15,546.00	15,546.00	15,546.00	15,935.40	15,935.40	16,333.20	16,333.20	16,333.20	16,333.20
O-7	13,719.30	13,719.30	13,719.30	13,789.80	13,789.80	14,065.80	14,065.80	14,065.80	14,065.80	14,065.80	14,065.80
O-6**	11,217.60	11,512.80	11,811.90	12,390.90	12,390.90	12,638.40	12,638.40	12,638.40	12,638.40	12,638.40	12,638.40
O-5	9,816.00	10,111.20	10,111.20	10,111.20	10,111.20	10,111.20	10,111.20	10,111.20	10,111.20	10,111.20	10,111.20
O-4	8,573.70	8,573.70	8,573.70	8,573.70	8,573.70	8,573.70	8,573.70	8,573.70	8,573.70	8,573.70	8,573.70
O-3***	7,345.20	7,345.20	7,345.20	7,345.20	7,345.20	7,345.20	7,345.20	7,345.20	7,345.20	7,345.20	7,345.20
O-2***	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50	5,398.50
O-1***	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60	4,260.60
COMMISSIONED OFFICERS WITH OVER 4 YEARS ACTIVE DUTY SERVICE AS AN ENLISTED MEMBER OR WARRANT OFFICER****											
O-3E	$7,839.00	$7,839.00	$7,839.00	$7,839.00	$7,839.00	$7,839.00	$7,839.00	$7,839.00	$7,839.00	$7,839.00	$7,839.00
O-2E	6,251.70	6,251.70	6,251.70	6,251.70	6,251.70	6,251.70	6,251.70	6,251.70	6,251.70	6,251.70	6,251.70
O-1E	5,289.90	5,289.90	5,289.90	5,289.90	5,289.90	5,289.90	5,289.90	5,289.90	5,289.90	5,289.90	5,289.90
WARRANT OFFICERS											
W-5	$8,296.20	$8,716.80	$9,030.60	$9,377.10	$9,377.10	$9,846.90	$9,846.90	$10,338.60	$10,338.60	$10,856.40	$10,856.40
W-4	7,528.50	7,888.20	8,183.70	8,520.90	8,520.90	8,691.00	8,691.00	8,691.00	8,691.00	8,691.00	8,691.00
W-3	6,915.00	7,074.30	7,243.50	7,474.50	7,474.50	7,474.50	7,474.50	7,474.50	7,474.50	7,474.50	7,474.50
W-2	6,066.90	6,193.20	6,293.10	6,293.10	6,293.10	6,293.10	6,293.10	6,293.10	6,293.10	6,293.10	6,293.10
W-1	5,718.60	5,718.60	5,718.60	5,718.60	5,718.60	5,718.60	5,718.60	5,718.60	5,718.60	5,718.60	5,718.60

* Basic pay is limited to the rate of basic pay for level II of the Executive Schedule in effect during calendar year 2021, which is $16,608.30 per month, for officers at pay grades O-7 through O-10. This includes officers serving as Chairman or Vice Chairman of the Joint Chiefs of Staff, Chief of Staff of the Army, Chief of Naval Operations, Chief of Staff of the Air Force, Commandant of the Marine Corps, Chief of Space Operations, Commandant of the Coast Guard, Chief of the National Guard Bureau, or commander of a unified or specified combatant command (as defined in 10 U.S.C. 161(c)).

** Basic pay is limited to the rate of basic pay for level V of the Executive Schedule in effect during calendar year 2021, which is $13,475.10 per month, for officers at pay grades O-6 and below.

*** Does not apply to commissioned officers who have been credited with over 4 years of active duty service as an enlisted member or warrant officer.

**** Reservists with at least 1,460 points as an enlisted member, a warrant officer, or a warrant officer and an enlisted member which are creditable toward reserve retirement also qualify for these rates.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 3)
(Effective January 1, 2021)

Part I--MONTHLY BASIC PAY

YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	2 or less	Over 2	Over 3	Over 4	Over 6	Over 8	Over 10	Over 12	Over 14	Over 16	Over 18
					ENLISTED MEMBERS						
E-9*	-	-	-	-	-	-	$5,637.00	$5,764.80	$5,925.90	$6,114.90	$6,306.60
E-8	-	-	-	-	-	$4,614.60	4,818.60	4,944.90	5,096.10	5,260.50	5,556.30
E-7	$3,207.60	$3,501.00	$3,635.40	$3,812.40	$3,951.30	4,189.50	4,323.90	4,561.80	4,760.10	4,895.10	5,039.10
E-6	2,774.40	3,053.10	3,188.10	3,318.90	3,455.40	3,762.60	3,882.90	4,114.50	4,185.30	4,236.90	4,297.20
E-5	2,541.60	2,712.90	2,844.00	2,978.10	3,187.20	3,405.60	3,585.30	3,606.90	3,606.90	3,606.90	3,606.90
E-4	2,330.40	2,449.80	2,582.40	2,713.50	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00
E-3	2,103.90	2,236.20	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80
E-2	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70
E-1**	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00
E-1***	1,650.30	-	-	-	-	-	-	-	-	-	-

* For noncommissioned officers serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, Senior Enlisted Advisor of the Space Force, Senior Enlisted Advisor to the Chairman of the Joint Chiefs of Staff, or Senior Enlisted Advisor to the Chief of the National Guard Bureau, basic pay for this grade is $9,109.50 per month, regardless of cumulative years of service under 37 U.S.C. 205.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 4)
(Effective January 1, 2021)

Part I--MONTHLY BASIC PAY

YEARS OF SERVICE (COMPUTED UNDER 37 U.S.C. 205)

Pay Grade	Over 20	Over 22	Over 24	Over 26	Over 28	Over 30	Over 32	Over 34	Over 36	Over 38	Over 40
					ENLISTED MEMBERS						
E-9*	$6,612.00	$6,871.50	$7,143.30	$7,560.30	$7,560.30	$7,937.70	$7,937.70	$8,334.90	$8,334.90	$8,752.50	$8,752.50
E-8	5,706.30	5,961.60	6,103.50	6,451.80	6,451.80	6,581.40	6,581.40	6,581.40	6,581.40	6,581.40	6,581.40
E-7	5,094.90	5,282.40	5,382.90	5,765.40	5,765.40	5,765.40	5,765.40	5,765.40	5,765.40	5,765.40	5,765.40
E-6	4,297.20	4,297.20	4,297.20	4,297.20	4,297.20	4,297.20	4,297.20	4,297.20	4,297.20	4,297.20	4,297.20
E-5	3,606.90	3,606.90	3,606.90	3,606.90	3,606.90	3,606.90	3,606.90	3,606.90	3,606.90	3,606.90	3,606.90
E-4	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00	2,829.00
E-3	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80	2,371.80
E-2	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70	2,000.70
E-1**	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00	1,785.00
E-1***	-	-	-	-	-	-	-	-	-	-	-

* For noncommissioned officers serving as Sergeant Major of the Army, Master Chief Petty Officer of the Navy or Coast Guard, Chief Master Sergeant of the Air Force, Sergeant Major of the Marine Corps, Senior Enlisted Advisor of the Space Force, Senior Enlisted Advisor to the Chairman of the Joint Chiefs of Staff, or Senior Enlisted Advisor to the Chief of the National Guard Bureau, basic pay for this grade is $9,109.50 per month, regardless of cumulative years of service under 37 U.S.C. 205.

** Applies to personnel who have served 4 months or more on active duty.

*** Applies to personnel who have served less than 4 months on active duty.

SCHEDULE 8--PAY OF THE UNIFORMED SERVICES (PAGE 5)

Part II--RATE OF MONTHLY CADET OR MIDSHIPMAN PAY

The rate of monthly cadet or midshipman pay authorized by 37 U.S.C. 203(c) is $1,185.00.

SCHEDULE 9--LOCALITY-BASED COMPARABILITY PAYMENTS

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

Locality Pay Area*	Rate
Alaska	29.67%
Albany-Schenectady, NY-MA	17.88%
Albuquerque-Santa Fe-Las Vegas, NM	16.68%
Atlanta—Athens-Clarke County—Sandy Springs, GA-AL	22.16%
Austin-Round Rock, TX	18.17%
Birmingham-Hoover-Talladega, AL	16.26%
Boston-Worcester-Providence, MA-RI-NH-ME	29.11%
Buffalo-Cheektowaga, NY	20.20%
Burlington-South Burlington, VT	16.89%
Charlotte-Concord, NC-SC	17.44%
Chicago-Naperville, IL-IN-WI	28.59%
Cincinnati-Wilmington-Maysville, OH-KY-IN	20.55%
Cleveland-Akron-Canton, OH	20.82%
Colorado Springs, CO	17.78%
Columbus-Marion-Zanesville, OH	20.02%
Corpus Christi-Kingsville-Alice, TX	16.56%
Dallas-Fort Worth, TX-OK	24.98%
Davenport-Moline, IA-IL	17.04%
Dayton-Springfield-Sidney, OH	19.18%
Denver-Aurora, CO	27.13%
Des Moines-Ames-West Des Moines, IA	15.95%
Detroit-Warren-Ann Arbor, MI	27.32%
Harrisburg-Lebanon, PA	17.20%
Hartford-West Hartford, CT-MA	29.49%
Hawaii	19.56%
Houston-The Woodlands, TX	33.32%
Huntsville-Decatur-Albertville, AL	19.85%
Indianapolis-Carmel-Muncie, IN	16.92%
Kansas City-Overland Park-Kansas City, MO-KS	17.13%
Laredo, TX	18.88%
Las Vegas-Henderson, NV-AZ	17.68%
Los Angeles-Long Beach, CA	32.41%
Miami-Fort Lauderdale-Port St. Lucie, FL	23.51%
Milwaukee-Racine-Waukesha, WI	20.96%
Minneapolis-St. Paul, MN-WI	24.66%
New York-Newark, NY-NJ-CT-PA	33.98%
Omaha-Council Bluffs-Fremont, NE-IA	16.33%
Palm Bay-Melbourne-Titusville, FL	16.73%
Philadelphia-Reading-Camden, PA-NJ-DE-MD	26.04%
Phoenix-Mesa-Scottsdale, AZ	20.12%
Pittsburgh-New Castle-Weirton, PA-OH-WV	19.40%
Portland-Vancouver-Salem, OR-WA	23.74%
Raleigh-Durham-Chapel Hill, NC	20.49%
Richmond, VA	19.95%
Sacramento-Roseville, CA-NV	26.37%
San Antonio-New Braunfels-Pearsall, TX	16.77%
San Diego-Carlsbad, CA	29.77%
San Jose-San Francisco-Oakland, CA	41.44%
Seattle-Tacoma, WA	27.02%
St. Louis-St. Charles-Farmington, MO-IL	17.65%
Tucson-Nogales, AZ	17.19%
Virginia Beach-Norfolk, VA-NC	16.51%
Washington-Baltimore-Arlington, DC-MD-VA-WV-PA	30.48%
Rest of U.S	15.95%

* Locality Pay Areas are defined in 5 CFR 531.603.

SCHEDULE 10--ADMINISTRATIVE LAW JUDGES

(Effective on the first day of the first applicable pay period beginning on or after January 1, 2021)

AL-3/A	$115,100
AL-3/B	123,900
AL-3/C	132,800
AL-3/D	141,800
AL-3/E	150,800
AL-3/F	159,400
AL-2	168,200
AL-1	172,500

[FR Doc. 2021–00040

Filed 1–5–21; 8:45 am]

Billing code 6325–39–C

Presidential Documents

Presidential Permit of December 31, 2020

Authorizing the City of Pharr, Texas, To Construct, Connect, Operate, and Maintain Bridge Facilities at the International Boundary Between the United States and Mexico

By virtue of the authority vested in me as President of the United States of America (the ''President''), I hereby grant this Presidential permit, subject to the conditions herein set forth, to the City of Pharr, Texas (the ''permittee''), in Hidalgo County, Texas. Permission is hereby granted to the permittee to construct, connect, operate, and maintain certain Border facilities, as described herein, at the international border of the United States and Mexico in the vicinity of Pharr, Texas, and Reynosa, Mexico.

This permit does not affect the applicability of any otherwise-relevant laws and regulations. As confirmed in Article 2 of this permit, the Border facilities shall remain subject to all such laws and regulations.

The term ''Facilities,'' as used in this permit, means the portion in the United States of the international bridge project—to be constructed adjacent to the existing Pharr International Bridge, authorized by a Presidential permit dated December 20, 1978—associated with the permittee's September 30, 2020, application for a Presidential permit, and any land, structures, installations, or equipment appurtenant thereto.

The term ''Border facilities,'' as used in this permit, means those parts of the Facilities consisting of the bridge, its approaches, and any land, structures, installations, or equipment appurtenant thereto.

This permit is subject to the following conditions:

Article 1. The Border facilities herein described, and all aspects of their operation, shall be subject to all the conditions, provisions, and requirements of this permit and any subsequent Presidential amendment to it. This permit may be terminated, revoked, or amended at any time at the sole discretion of the President, with or without advice provided by any executive department or agency (agency). The permittee shall make no substantial change in the Border facilities, in the location of the Border facilities, or in the operation authorized by this permit unless the President has approved the change in an amendment to this permit or in a new permit.

Article 2. The standards for, and the manner of, construction, connection, operation, and maintenance of the Border facilities shall be subject to inspection by the representatives of appropriate Federal, State, and local agencies. Officers and employees of such agencies who are duly authorized and performing their official duties shall be granted free and unrestricted access to said Border facilities by the permittee. The Border facilities, including the construction, connection, operation, and maintenance of the Border facilities, shall be subject to all applicable laws and regulations, including laws and regulations governing bridges or highway safety, or issued or administered by the Committee on Foreign Investment in the United States or by the United States Section of the International Boundary and Water Commission.

Article 3. Upon the termination, revocation, or surrender of this permit, unless otherwise decided by the President, the permittee, at its own expense, shall remove the Border facilities within such time as the President may specify. If the permittee fails to comply with an order to remove, or to

take such other appropriate action with respect to, the Border facilities, the President may direct an appropriate official or agency to take possession of the Border facilities—or to remove the Border facilities or take other action—at the expense of the permittee. The permittee shall have no claim for damages caused by any such possession, removal, or other action.

Article 4. When, in the judgment of the President, ensuring the national security of the United States requires entering upon and taking possession of any of the Border facilities or parts thereof, and retaining possession, management, or control thereof for such a length of time as the President may deem necessary, the United States shall have the right to do so, provided that the President or his designee has given due notice to the permittee. The United States shall also have the right thereafter to restore possession and control to the permittee. In the event that the United States exercises the rights described in this article, it shall pay to the permittee just and fair compensation for the use of such Border facilities, upon the basis of a reasonable profit in normal conditions, and shall bear the cost of restoring the Border facilities to their previous condition, less the reasonable value of any improvements that may have been made by the United States.

Article 5. Any transfer of ownership or control of the Border facilities, or any part thereof, or any changes to the name of the permittee, shall be immediately communicated in writing to the President or his designee, and shall include information identifying any transferee. Notwithstanding any such transfers or changes, this permit shall remain in force subject to all of its conditions, permissions, and requirements, and any amendments thereto, unless subsequently terminated, revoked, or amended by the President.

Article 6. (1) The permittee is responsible for acquiring any right-of-way grants or easements, permits, and other authorizations as may become necessary or appropriate.

(2) The permittee shall hold harmless and indemnify the United States from any claimed or adjudged liability arising out of construction, connection, operation, or maintenance of the Border facilities, including environmental contamination from the release, threatened release, or discharge of hazardous substances or hazardous waste.

(3) To ensure the safe operation of the Border facilities, the permittee shall maintain them and every part of them in a condition of good repair and in compliance with applicable law.

Article 7. To the extent authorized by law, and consistent with Donation Acceptance Agreements (DAAs) already executed with the permittee under the Donation Acceptance Authority found in 6 U.S.C. 301a and section 559 of title V of division F of the Consolidated Appropriations Act, 2014 (Public Law 113–76), as amended, as continued by 6 U.S.C. 301b, the permittee shall provide to U.S. Customs and Border Protection of the Department of Homeland Security and any other relevant United States Government agencies, at no cost to the United States, suitable inspection facilities, infrastructure improvements, equipment, and maintenance, as set forth in the DAAs. Nothing in this permit obligates such agencies to provide a particular level of services or staffing for such inspection facilities or for any other aspect of the port of entry associated with the Border facilities.

Article 8. The permittee shall file with the President or his designee, and with appropriate agencies, such sworn statements or reports with respect to the Border facilities, or the permittee's activities and operations in connection therewith, as are now, or may hereafter, be required under any law or regulation of the United States Government or its agencies. These reporting obligations do not alter the intent that this permit be operative as a directive issued by the President alone.

Article 9. Upon request, the permittee shall provide appropriate information to the President or his designee with regard to the Border facilities. Such

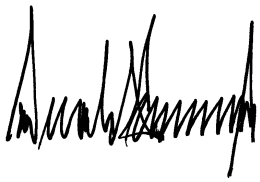
requests could include, for example, information concerning current conditions or anticipated changes in ownership or control, construction, connection, operation, or maintenance of the Border facilities.

Article 10. The permittee shall provide written notice to the President or his designee at the time that the construction authorized by this permit begins, at such time as such construction is completed, interrupted, or discontinued, and at other times as may be requested by the President.

Article 11. This permit shall expire 15 years from the date of its issuance if the permittee has not commenced construction of the Border facilities by that date.

Article 12. This permit is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

IN WITNESS WHEREOF, I, DONALD J. TRUMP, President of the United States of America, have hereunto set my hand this thirty-first day of December, in the year of our Lord two thousand twenty, and of the Independence of the United States of America the two hundred and forty-fifth.



[FR Doc. 2021–00041
Filed 1–5–21; 8:45 am]
Billing code 3295–F1–P

Rules and Regulations

Federal Register

Vol. 86, No. 3

Wednesday, January 6, 2021

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

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

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 760

[Docket ID: FSA–2020–0011]

RIN 0560–AI55

Agricultural Disaster Indemnity Programs

AGENCY: Farm Service Agency (FSA), Department of Agriculture (USDA).

ACTION: Final rule.

SUMMARY: This rule establishes the Quality Loss Adjustment (QLA) Program to provide assistance to producers who suffered eligible crop quality losses due to hurricanes, excessive moisture, floods, drought, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019. It also amends the provisions for the Wildfire and Hurricane Indemnity Program Plus (WHIP+) to be consistent with the Further Consolidated Appropriations Act, 2020, by adding excessive moisture and drought occurring in 2018 and 2019 as qualifying disaster events and clarifying eligibility of sugar beets. The changes to WHIP+ were self-enacting and were previously implemented by FSA.

DATES:

Effective date: January 6, 2021.

Comment due date: Comments are due by March 8, 2021.

ADDRESSES: We invite you to submit comments on this rule. You may submit comments by either of the following methods, although FSA prefers that you submit comments electronically through the Federal eRulemaking Portal:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for Docket ID FSA–2020–0011. Follow the instructions for submitting comments.
- *Mail:* Director, SND, FSA, U.S. Department of Agriculture, 1400 Independence Avenue SW, Stop 0522, Washington, DC 20250–0522. In your comment, specify the docket ID FSA–2020–0011.

Comments will be available for viewing online at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Kimberly Graham at (202) 720–6825 (voice); or by email at: *kimberly.graham@usda.gov.* Persons with disabilities who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Background

The Additional Supplemental Appropriations for Disaster Relief Act, 2019 (''Disaster Relief Act,'' Pub. L. 116–20) provided disaster assistance for necessary expenses related to losses of crops (including milk, on-farm stored commodities, crops prevented from planting in 2019, and harvested adulterated wine grapes), trees, bushes, and vines, as a consequence of hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019. The Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94), makes several changes to the provisions of the Disaster Relief Act, including:

- Specifying that assistance would be provided for crop quality losses;
- Adding excessive moisture as a qualifying disaster event;
- Adding drought as a qualifying disaster event if an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year; and
- Providing that sugar beet losses in 2018 and 2019 would be paid through cooperative processors (to be paid to producer members as determined by such processors).

This rule implements those provisions of the Further Consolidated Appropriations Act, 2020, by establishing the QLA Program to provide assistance for crop quality losses and amending the WHIP+ regulations to be consistent with the changes to qualifying disaster events and eligibility of sugar beet losses.

QLA Program

This rule establishes the QLA Program to provide disaster assistance for crop quality losses that were a consequence of hurricanes, excessive moisture, floods, qualifying drought, tornadoes, typhoons, volcanic activity, snowstorms, or wildfires occurring in calendar years 2018 and 2019. Eligible crops generally include crops for which FCIC crop insurance coverage or Noninsured Crop Disaster Assistance Program (NAP) coverage is available; however, value loss crops,[1] honey, and maple sap are not eligible. The QLA Program provides assistance for losses to crops that were sold or fed to livestock or are in storage; crops that were destroyed are not eligible. Assistance will be based on a producer's harvested affected production of an eligible crop that had a quality loss due to a qualifying disaster event and had at least a 5 percent quality loss due to all eligible disaster events.

Qualifying disaster events include hurricanes, floods, tornados, typhoons, volcanic activity, snowstorms, wildfires, excessive moisture, qualifying drought, and related conditions that occurred in the 2018 or 2019 calendar year. Assistance is available for eligible producers in counties that received a qualifying Presidential Emergency Disaster Declaration (declaration) or Secretarial Disaster Designation (designation) due to one or more of the qualifying disaster events or a related condition. As required by the Further Consolidated Appropriations Act, 2020, drought is only a qualifying disaster event if an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year (referred to as ''qualifying drought'' in this rule). Only producers in those counties that received a disaster declaration or designation qualify for the QLA Program based on the declaration or designation. Producers in counties that did not receive a qualifying declaration or designation may still apply; however, they must also provide supporting documentation to establish that the crop was directly affected by a qualifying disaster event and suffered the same

[1] Value loss crops include aquaculture, floriculture, mushrooms, ginseng root, ornamental nursery, sea grass and sea oats, Christmas trees, and turfgrass sod.

minimum loss as required by a crop in a disaster declared or designated county. Lists of counties with Presidential Emergency Disaster Declarations and Secretarial Disaster Designations for all qualifying disaster events for 2018 and 2019 are available at *farmers.gov/quality-loss.*

FSA recognizes that a crop may suffer quality losses due to multiple disaster events in a single crop year, and the portion of a crop's quality loss that can be attributed to a specific disaster event may be difficult to determine. Therefore, while a qualifying disaster event must have caused at least a portion of the affected production's quality loss, FSA will consider the total quality loss caused by all eligible disaster events for eligibility and payment calculation purposes. Eligible disaster events for the QLA Program include those listed for NAP in 7 CFR 1437.10, except that the QLA Program does not cover losses due to insect infestation.

The QLA Program does not cover losses due to disaster events occurring after a crop was harvested or due to crop deterioration while in storage. Quality losses that could have been mitigated using good farming practices are not eligible. For example, if a producer's corn crop received a quality discount due to high moisture content, the producer could have mitigated that quality loss by using best practices for drying and storing the crop; therefore, that producer's quality loss due to high moisture is not eligible. The QLA Program does not provide assistance for losses that cannot be determined to have occurred or for losses for which a notice of loss was previously disapproved by FSA, RMA, or an approved insurance provider selling and servicing Federal crop insurance policies unless that notice of loss was disapproved solely because it was filed after the applicable deadline.

The QLA Program does not provide assistance for certain quality losses that were already compensated under a Federal crop insurance plan, NAP, or WHIP+. This includes losses to affected production of:

- Multiple market crops already compensated under crop insurance or WHIP+;
- Crops for which production used to calculate a crop insurance indemnity or WHIP+ payment was adjusted based on a comparison of the producer's sale price to the FCIC established price;
- Crops that received a crop insurance indemnity, NAP payment, or WHIP+ payment based on the quantity of production that was considered unmarketable; and
- Crops for which production was reported as salvage value or secondary use.

The QLA Program also excludes quality losses to sugar beets that were compensated through cooperative agreements with cooperative processors.

Affected production of a subsequent crop grown on double cropped acreage is only eligible if the crop has been approved as an eligible double cropping practice by the FSA State committee.

Application

FSA will accept QLA Program applications from January 6, 2021, through March 5, 2021. To apply, producers must submit a completed QLA Program application either in person, by mail, email, or facsimile to an FSA county office. To be eligible, a producer must submit a complete application, which includes all of the following:

- FSA–898, Quality Loss Adjustment (QLA) Program Application;
- FSA–899, Historical Nutritional Value Weighted Average Worksheet (only for forage crops with verifiable documentation of historical nutrient factors from the 3 preceding crop years);
- FSA–578, Report of Acreage;
- FSA–895, Crop Insurance and/or NAP Coverage Agreement; and
- Required documentation, as discussed below.

The FSA–578, FSA–895, and FSA–899 forms, and other required documentation must be submitted to the producer's county office by March 19, 2021.

If not already on file with FSA, producers must also submit the following eligibility forms for each crop year within 60 days of the date the producer signs the application:

- AD–1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation (WC) Certification;
- CCC–902, Farm Operating Plan for Payment Eligibility;
- CCC–941 Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information; and
- CCC–942 Certification of Income from Farming, Ranching and Forestry Operations, if applicable.

Payments will not be made until all necessary eligibility documentation is received. Failure of an applicant to submit documentation timely may result in FSA not issuing a payment or, in the case of legal entities, a reduced payment if the required documentation for one or more members of the entity is not submitted timely.

Required Documentation

To support their applications, producers must submit documentation showing the quality loss and quantity of affected production by March 19, 2021. Documentation of the quality loss (total dollar value loss, grading factors, and nutrient factors, as applicable), must be verifiable. Verifiable documentation is documentation that can be verified by FSA through an independent source; FSA may verify the submitted records with records on file at the warehouse, gin, laboratory, or other entity that received or tested the reported production. Examples of acceptable, verifiable documentation include warehouse grading sheets, settlement sheets, sales receipts, and laboratory test results. Except for grain crops that have been sold, the documentation must be from laboratory tests or analysis completed within 30 days of harvest to be considered acceptable, unless the FSA county committee determines that the record is representative of the condition of the affected production within 30 days of harvest. For grain crops that were sold, the verifiable documentation can be from any time from harvest through the time of sale, unless the FSA county committee determines the record is not representative of the condition within 30 days of harvest. Producers who do not have acceptable, verifiable documentation are ineligible for the QLA Program.

For forage crops, all producers must submit verifiable documentation showing the nutrient factors for the affected production of the crop. Producers must also submit verifiable documentation of the historical nutrient factors for the 3 preceding crop years if available. The type of nutrient factors (such as relative feed value or total digestible nutrients) that must be documented for a particular crop will be determined by the FSA county committee based on the standard practice for the crop in that county. For all crops other than forage crops, producers must submit verifiable documentation of the total dollar value loss due to quality, if available, and verifiable documentation of grading factors due to quality.

Documentation to support the quantity of affected production included on the application must be verifiable for non-forage crops that receive a QLA payment based on the producer's total dollar value loss. For all other crops (non-forage crops without a producer's total dollar value loss and all forage crops), records to support the quantity of affected production must be reliable. Reliable production records means evidence provided by the participant that is used to substantiate the amount of production reported when verifiable

records are not available, including copies of receipts, ledgers of income, income statements of deposit slips, register tapes, invoices for custom harvesting, and records to verify production costs, contemporaneous measurements, truck scale tickets, and contemporaneous diaries that are determined acceptable by the FSA county committee. To determine whether the records are acceptable, the FSA county committee will consider whether they are consistent with the records of other producers of the crop in that area.

Payment Calculation

QLA Program payments will be calculated using different formulas based on the type of crop (forage or non-forage) and based on the type of documentation submitted. All QLA payments, regardless of whether they are forage or non-forage, and the type of documentation submitted, will be calculated using a 70 percent payment factor. Payments calculated based on a county average loss, as described below, will be subject to an additional payment factor of 50 percent.

For forage crops with verifiable documentation of both the nutrient factors for the affected production and historical nutrient factors for the 3 preceding crop years, payment will be equal to the amount of the producer's total affected production multiplied by the producer's verifiable percentage of loss, multiplied by the average market price determined by FSA, multiplied by 70 percent. The producer's verifiable percentage of loss is determined by comparing the nutrient factor test results for the affected production to the average from the 3 preceding crop years, as documented on the FSA–899, Historical Nutritional Value Weighted Average Worksheet. The average market price for the QLA Program is the price used for NAP established according to 7 CFR 1437.12.

For forage crops with verifiable documentation of nutrient factors for the affected production but without historical nutrient factors for the 3 preceding crop years, the payment will be equal to the amount of the producer's total affected production multiplied by the county average percentage of loss, multiplied by the average market price determined by FSA, multiplied by 70 percent, multiplied by 50 percent.

For affected production of non-forage crops with verifiable documentation of the total dollar value loss due to quality, the QLA Program payment is equal to the producer's total dollar value loss on the affected production of the crop, multiplied by a payment factor of 70 percent.

For non-forage crops without verifiable documentation of a total dollar value loss but with verifiable documentation of grading factors due to quality, the payment will be equal to the amount of producer's affected production multiplied by the county average loss per unit of measure, multiplied by 70 percent, multiplied by 50 percent.

To determine the county average percentage of loss (for forage crops) or the county average loss per unit of measure (for non-forage crops), FSA will calculate the average loss for a crop based on losses of producers applying with verifiable documentation of historical nutritional factors (for forage crops) or the total dollar value loss (for non-forage crops) if at least 5 eligible producers submitted that documentation in the county. If less than 5 eligible producers in a county submit verifiable documentation of their historical nutritional factors or their total dollar value loss, FSA will determine a county average percentage of loss or county average loss per unit of measure based on the best available data, including losses of other QLA Program participants in contiguous counties. If sufficient data is still not available after considering other sources, FSA may determine that a county average cannot be calculated and producers in that county applying for payment under the applicable calculation are ineligible.

Payments for the QLA Program will not be issued until the application period has ended in order to allow FSA to determine the county average losses, as well as the total payments requested under the QLA Program. The Further Consolidated Appropriations Act, 2020 provides funding for the QLA Program to be available until December 31, 2021, in an amount equal to the remaining funds provided under the Bipartisan Budget Act of 2018 (Pub. L. 115–123) for losses due to Hurricanes Harvey, Irma, Maria, and other hurricanes and wildfires occurring in calendar year 2017,[2] and remaining funds provided under the Disaster Relief Act for losses due to Hurricanes Michael and Florence, other hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019.[3] If the total amount of calculated QLA Program payments exceeds the amount of funding available, FSA will prorate all payments by a national factor.

A person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, up to $125,000 per crop year in QLA Program payments. FSA will use the notification of interest provisions in 7 CFR 1400.107 and payment attribution provisions in 7 CFR 1400.105 for attributing and limiting payments to persons and legal entities. FSA will also use provisions in 7 CFR 1400.104 when changes in a farming operation result in an increase in persons to which payment limitation applies. Payments made to a joint operation (including a general partnership or joint venture) cannot exceed $250,000 per person or legal entity that comprise the ownership of the joint operation. Payments made to a legal entity will be reduced proportionately by an amount that represents the direct or indirect ownership in the legal entity by any person or legal entity that has otherwise reached the maximum payment limitation. These rules for attributing and limiting payments are consistent with the programs FSA administers on behalf of the Commodity Credit Corporation.

A person or legal entity, other than a joint venture or general partnership, is ineligible for a 2018, 2019, or 2020 payment if the person's or legal entity's average adjusted gross income (AGI) is more than $900,000, unless at least 75 percent of that person's or legal entity's average AGI is derived from farming, ranching, or forestry-related activities. The average AGI for each of the program years 2018, 2019, or 2020, is determined using the average of the adjusted gross incomes for the 3 taxable years preceding the most immediately preceding taxable year. For example, for the 2019 program year, the producer's AGI would be based on the 2015, 2016, and 2017 tax years. If at least 75 percent of the person's or legal entity's AGI is derived from farming, ranching, or forestry-related activities and the participant provides the required certification and documentation, the person or legal entity is eligible to

[2] FSA provided assistance for losses due to Hurricanes Harvey, Irma, Maria, and other hurricanes and wildfires occurring in calendar year 2017 through the 2017 Wildfires and Hurricanes Indemnity Program (2017 WHIP) (final rule published July 18, 2018, 83 FR 33795–33809) and the Florida Citrus Recovery Grant Program.

[3] FSA has previously provided assistance for losses due to Hurricanes Michael and Florence, other hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019 through the Wildfires and Hurricanes Indemnity Program Plus (WHIP+), On-Farm Storage Loss Program, and Milk Loss Program (final rule published September 13, 2019, 84 FR 48518–48537), as well as through several grants and cooperative agreements with sugar beet cooperatives.

receive QLA Program payments up to the applicable payment limitation noted above. With respect to joint ventures and general partnerships, this AGI provision will be applied to each member of the joint venture and general partnership.

Requirement to Purchase Crop Insurance or NAP Coverage

The Disaster Relief Act requires all participants who receive QLA Program payments to purchase crop insurance or NAP coverage for the next 2 available crop years. The latest year for meeting compliance with this provision will be the 2023 crop year. In other words, if the 2 consecutive years of coverage are not met by 2023 coverage year, the participant is ineligible for and must refund QLP Program payments. Participants must obtain crop insurance or NAP, as may be applicable, at the 60 percent coverage level or higher. In situations where crop insurance is unavailable for a crop, the Disaster Relief Act requires that a QLA Program participant obtain NAP coverage. Section 1001D of the Food Security Act of 1985 (1985 Farm Bill) provides that a person or entity with AGI in amount greater than $900,000 is not eligible to participate in NAP; however, producers with an AGI greater than $900,000 may be eligible for the QLA Program if at least 75 percent of that person's or legal entity's average AGI is derived from farming, ranching, or forestry-related activities. Accordingly, in order to reconcile this restriction in the 1985 Farm Bill and the Disaster Relief Act's requirement to obtain NAP or crop insurance coverage, QLA Program participants may meet the Disaster Relief Act's purchase requirement by purchasing Whole-Farm Revenue Protection crop insurance coverage, if eligible, or they may pay the applicable NAP service fee and premium for the 60 percent coverage level despite their ineligibility for a NAP payment. In other words, the service fee and premium must be paid even though no NAP payment may be made because the AGI of the person or entity exceeds the 1985 Farm Bill limitation.

The crop insurance and NAP coverage requirements are specific to the crop and county (county where the crop is physically located for insurance and administrative county for NAP) for which QLA Program payments are paid. This means that a producer is required to purchase crop insurance or NAP coverage for the crop in the county for which the producer was issued a QLA Program payment. Producers who receive a payment on a crop in a county and who have the crop or crop acreage in subsequent years, as provided in this rule, and who fail to obtain the 2 years of crop insurance or NAP coverage must refund all QLA Program payments for that crop in that county with interest from the date of disbursement. This is a condition of payment eligibility specified by Disaster Relief Act and is therefore not subject to partial payment eligibility or other types of equitable relief. Producers who were paid under the QLA Program for a crop in a county but do not plant that crop in a subsequent year are not subject to the crop insurance or NAP purchase requirement. WHIP+ participants who already met the requirement to purchase crop insurance or NAP coverage as specified in 7 CFR 760.1517 are considered to have also met the requirement to purchase crop insurance or NAP coverage for QLA Program purposes, and they are not required to obtain additional years of crop insurance or NAP coverage as a result of also receiving a QLA Program payment for that crop.

Applicable general eligibility requirements, including recordkeeping requirements and required compliance with HELC and Wetland Conservation provisions, are similar to those for the previous ad hoc crop disaster programs and current permanent disaster programs. All information provided to FSA for program eligibility and payment calculation purposes, including production records, is subject to spot check.

WHIP+

FSA, on behalf of the Secretary of Agriculture, previously implemented provisions of the Disaster Relief Act by establishing WHIP+ through a final rule published on September 19, 2019 (84 FR 48518–48537). The Disaster Relief Act provided assistance for losses of crops, trees, bushes, and vines, as a consequence of hurricanes, floods, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019. WHIP+ covers only production losses of crops except in specific circumstances discussed previously in this document when the producer may have also been compensated for quality losses.

This rule amends 7 CFR 760.1500(c) and the definition of ''qualifying disaster event'' in § 760.1502 to include excessive moisture and qualifying drought. As under the QLA Program, drought is only considered a qualifying disaster event if an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year. This rule adds definitions of ''qualifying drought'' and ''U.S. Drought Monitor'' in § 760.1502.

The addition of these qualifying disaster events for WHIP+ was self-enacting as the text in the law clearly specified the required changes without need for interpretation; therefore, FSA began the sign-up period for losses due to excessive moisture and qualifying drought on March 23, 2020, and sign-up ended on October 30, 2020. Producers applying for WHIP+ assistance for losses due to excessive moisture or qualifying drought were required to meet all requirements in 7 CFR part 760, subpart O, including the requirement to purchase crop insurance for 2 years as specified in § 760.1517.

The Further Consolidated Appropriations Act, 2020 also directed the Secretary to pay sugar beet losses in 2018 and 2019 through cooperative processors. FSA has established cooperative agreements with sugar beet processors; those processors will be responsible for distributing assistance to their members. This rule amends the eligibility provisions in § 760.1517 to specify that members of cooperatives are not eligible for a WHIP+ payment for sugar beet losses.

FSA is also updating § 760.1510(a) to reflect the application deadline of October 30, 2020, and correcting references in §§ 760.1508(c) and (f) and 760.1511(a)(6).

Notice and Comment and Effective Date

The Administrative Procedure Act (5 U.S.C. 553) provides that the notice and comment and 30-day delay in the effective date provisions do not apply when the rule involves a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. This rule involves programs for payments to certain agricultural commodity producers and therefore falls within that exemption. Due to the nature of the rule and the need to implement the regulations expeditiously to provide assistance to agricultural producers, FSA finds that notice and public procedure are contrary to the public interest. Therefore, even though this rule is a major rule for purposes of the Congressional Review Act, FSA is not required to delay the effective date for 60 days from the date of publication to allow for Congressional review. Therefore, this rule is effective upon publication in the **Federal Register**.

Executive Orders 12866, 13563, 13771 and 13777

Executive Order 12866, ''Regulatory Planning and Review,'' and Executive

Order 13563, ''Improving Regulation and Regulatory Review,'' 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 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' established a Federal policy to alleviate unnecessary regulatory burdens on the American people.

The Office of Management and Budget (OMB) designated this rule as economically significant under Executive Order 12866, and therefore, OMB has reviewed this rule. The costs and benefits of this rule are summarized below. The full cost benefit analysis is available on *regulations.gov.*

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017. The OMB guidance in M–17–21, dated April 5, 2017, specifies that ''transfers'' are not covered by Executive Order 13771 but that requirements imposed apart from transfers in transfer rules may qualify as costs or cost savings under Executive Order 13771, for example the information collection requirements in this rule. This rule is not subject to the requirements of E.O. 13771 because this rule results in no more than de minimis costs.

Cost Benefit Analysis Summary

WHIP+ initially provided approximately $3 billion in supplemental assistance to producers for qualifying agricultural production losses. In the Further Consolidated Appropriations Act, 2020, Congress changed provisions of the Disaster Relief Act as follows:

1. Extended eligibility under WHIP+ to also cover [4]—

a. Crop production losses due to excessive moisture in calendar years 2018 and 2019;

b. Crop production losses due to drought in calendar years 2018 and 2019 if the area within the county in which the loss occurred was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year;

2. Provided assistance for sugar beet losses in 2018 and 2019 to be paid through cooperative processors; [5] and

3. Authorized assistance for crop quality losses that occurred in calendar years 2018 and 2019 through the QLA Program (implemented by this rule).

Eligible crops under the QLA Program include crops for which Federal crop insurance or NAP coverage is available. To be eligible for the QLA Program, a crop must have suffered a quality loss due to a qualifying disaster event and had at least a 5 percent quality discount due to a combination of the qualifying disaster event and any other QLA-eligible causes of loss. Eligible crops may have been sold, fed on farm to livestock, or been in storage at the time of application.

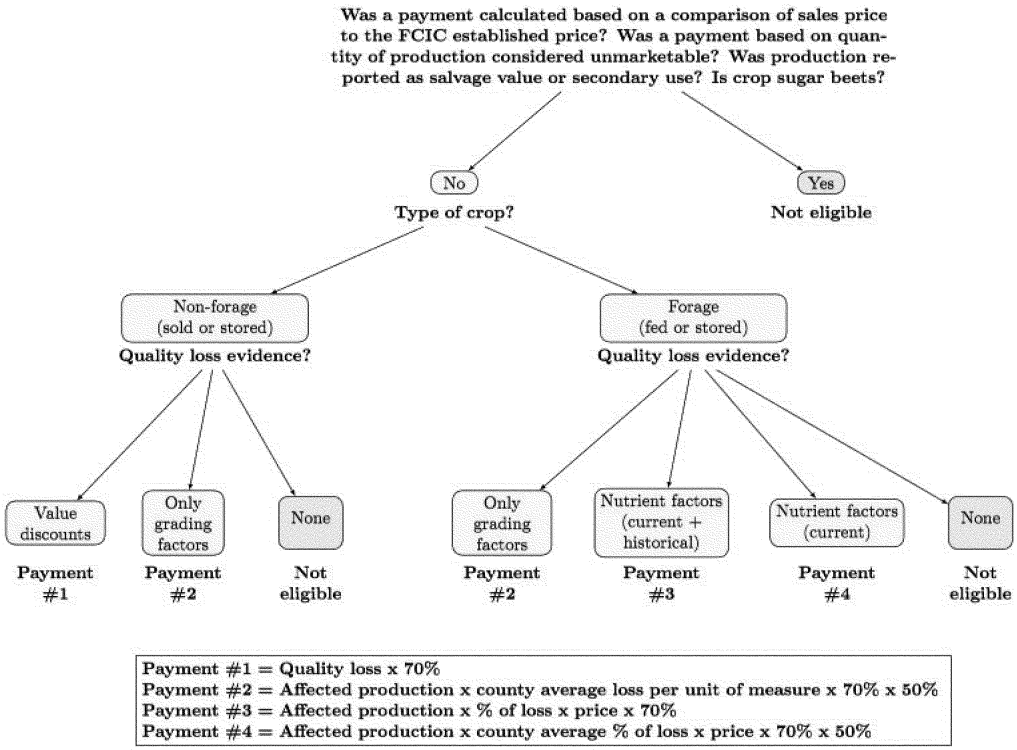
USDA estimates the Further Consolidated Appropriations Act, 2020 will provide approximately $950 million for the continuation of disaster assistance program delivery, including payments to eligible producers for production losses due to excessive moisture and extreme drought under WHIP+ and for quality losses covered by the QLA Program. Of that amount, USDA anticipates that an estimated $500 million will be available for QLA Program payments. However, the amount of funding ultimately available for the QLA Program will not be known until other payments, for example for excessive moisture and drought under WHIP+, are finalized.

The QLA Program payment calculation depends on several factors, as shown in Figure 1. A producer is ineligible for a QLA Program payment if they received a crop insurance indemnity, NAP payment, or WHIP+ payment for a crop that was unmarketable, sold for salvage value or secondary use, or if the payment was based on a comparison of the sales price of the affected production and the applicable reference price. Otherwise, payments or benefits received under the Federal crop insurance, NAP or WHIP+ do not affect a producer's eligibility or payment received from the QLA Program. The payment calculation depends on the use of production (non-forage or forage) and evidence at hand of the crop quality loss. Producers who do not have evidence of the quality loss are ineligible.

[4] The addition of excessive moisture and certain drought conditions as qualifying causes of loss under WHIP+ is specific, not open to interpretation, and is therefore self-enacting. Accordingly, the provision was previously implemented. FSA began the sign-up period on March 23, 2020, and sign-up ended on October 30, 2020.

[5] Assistance for sugar beet losses for members of cooperative processors is provided through a separate program.

Figure 1. Eligibility and Payment Calculation



Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA, Pub. L. 104–121), generally requires an agency to prepare a regulatory flexibility analysis of any rule whenever an agency is required by the Administrative Procedure Act or any other law to publish a proposed rule, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule is not subject to the Regulatory Flexibility Act because USDA is not required by Administrative Procedure Act or any law to publish a proposed rule for this rulemaking.

Environmental Review

The environmental impacts of this final rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and the FSA regulation for compliance with NEPA (7 CFR part 799). The legislative intent for implementing the QLA Program is to provide assistance to producers who suffered eligible crop quality losses due to hurricanes, excessive moisture, floods, drought, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019.

While OMB has designated this rule as ''economically significant'' under Executive Order 12866, ''economic or social effects are not intended by themselves to require preparation of an environmental impact statement'' (see 40 CFR 1502.16(b)), when not interrelated to natural or physical environmental effects.

For this rule, the FSA Categorical Exclusions found in 7 CFR 799.31 apply, specifically 7 CFR 799.31(b)(6)(iii), (iv), and (vi) (that is, § 799.31(b)(6)(iii) Financial assistance to supplement income, manage the supply of agricultural commodities, or influence the cost or supply of such commodities or programs of a similar nature or intent (that is, price support programs); § 799.31(b)(6)(iv) Individual farm participation in FSA programs where no ground disturbance or change in land use occurs as a result of the proposed action or participation; and § 799.31(b)(6)(vi) Safety net programs administered by FSA). No Extraordinary Circumstances (7 CFR 799.33) exist.

For the outlined reasons, FSA has determined that the implementation of the QLA Program and the participation in the QLA Program does not constitute a major Federal action that would significantly affect the quality of the human environment, individually or cumulatively. Therefore, FSA will not prepare an environmental assessment or environmental impact statement for this regulatory action.

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affect by proposed Federal financial assistance. The objectives of the Executive order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. For reasons specified in the final rule related notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities

within this rule are excluded from the scope of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, ''Civil Justice Reform.'' This rule will not preempt State or local laws, regulations, or policies unless they represent an irreconcilable conflict with this rule. The rule will not have retroactive effect. Before any judicial action may be brought regarding the provisions of this rule, the administrative appeal provisions of 7 CFR parts 11 and 780 must be exhausted.

Executive Order 13132

This rule has been reviewed under Executive Order 13132, ''Federalism.'' The policies contained in this rule do not have any substantial direct effect on States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, except as required by law. Nor does this rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Executive Order 13175

This rule has been reviewed in accordance with the requirements of 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, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

The USDA's Office of Tribal Relations (OTR) has assessed the impact of this rule on Indian Tribes and determined that this rule may have significant Tribal implications that require ongoing adherence to Executive Order 13175. OTR notes that the programs are similar to programs that have been administered by FSA and RMA in the past; having not heard any concerns regarding the administration of these in the past, and the fact that provisions are mandated in the Disaster Relief Act, OTR recommended that consultation is not required at this time. Tribes can request consultation at any time. FSA will work with OTR to ensure meaningful consultation is provided where changes, additions, and modifications identified in this rule are not expressly mandated by law.

The Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State local, and Tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or Tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This rule contains no Federal mandates, as defined in Title II of UMRA, for State, local, and Tribal governments or the private sector. Therefore, this rule is not subject to the requirements of sections 202 and 205 of UMRA.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, FSA submitted the QLA Program information collection request to OMB for emergency approval. OMB approved the 6-month emergency information collection.

E-Government Act Compliance

FSA is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Federal Assistance Programs

The titles and numbers of the Federal Domestic Assistance Program found in the Catalog of Federal Domestic Assistance to which this rule applies are:

10.129—Wildfire and Hurricanes Indemnity Program Plus

10.133—Quality Loss Adjustment Program

List of Subjects in 7 CFR Part 760

Dairy products, Indemnity payments, Reporting and recordkeeping requirements.

For the reasons discussed above, FSA amends 7 CFR part 760 as follows:

PART 760—INDEMNITY PAYMENT PROGRAMS

■ 1. Revise the authority citation for part 760 to read as follows:

Authority: 7 U.S.C. 4501 and 1531; 16 U.S.C. 3801, note; 19 U.S.C. 2497; Title III, Pub. L. 109–234, 120 Stat. 474; Title IX, Pub. L. 110–28, 121 Stat. 211; Sec. 748, Pub. L. 111–80, 123 Stat. 2131; Title I, Pub. L. 115–123, 132 Stat. 65; Title I, Pub. L. 116–20, 133 Stat. 871; and Division B, Title VII, Pub. L. 116–94, 133 Stat. 2658.

Subpart O—Agricultural Disaster Indemnity Programs

§ 760.1500 [Amended]

■ 2. In § 760.1500(c), remove the words ''and wildfires'' and add ''wildfires, excessive moisture, and qualifying drought'' in their place.

■ 3. Amend § 760.1502 as follows:

■ a. In the definition of ''Qualifying disaster event'', in paragraph (2) of remove the word ''wildfire'' and add ''wildfire, excessive moisture, qualifying drought'' in its place; and

■ b. Add the definitions of ''Qualifying drought'' and ''U.S. Drought Monitor'' in alphabetical order.

The additions read as follows:

§ 760.1502 Definitions.

* * * * *

Qualifying drought means an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year.

* * * * *

U.S. Drought Monitor is a system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at *http://droughtmonitor.unl.edu.*

* * * * *

■ 4. In § 760.1503, add paragraph (j) to read as follows.

§ 760.1503 Eligibility.

* * * * *

(j) Members of cooperative processors are not eligible for WHIP+ assistance for sugar beet losses.

§ 760.1508 [Amended]

■ 5. Amend § 760.1508 as follows:

■ a. In paragraph (c), remove the cross reference ''paragraph (b)(1)'' and add the cross reference ''paragraph (b)'' in its place; and

■ b. In paragraph (f), remove the cross reference ''paragraph (b)(1)'' and add cross reference ''paragraph (e)'' in its place.

§ 760.1510 [Amended]

■ 6. In § 760.1510(a), remove the words ''a date that will be announced by the Deputy Administrator'' and add ''October 30, 2020'' in their place.

§ 760.1511 [Amended]

■ 7. In § 760.1511(a)(6), remove the cross reference ''paragraph (f)'' and add cross reference ''paragraph (g)'' in its place.

■ 8. Add subpart R, consisting of §§ 760.1800 through 760.1814, to read as follows:

Subpart R—Quality Loss Adjustment Program

Sec.

760.1800 Applicability.
760.1801 Administration.
760.1802 Definitions.
760.1803 Participant eligibility.
760.1804 Eligibility of affected production.
760.1805 Qualifying disaster events.
760.1806 Ineligible losses.
760.1807 Miscellaneous provisions.
760.1808 General provisions.
760.1809 Payment and adjusted gross income limitation.
760.1810 Time and method of application.
760.1811 Required documentation and verification.
760.1812 Payment calculation.
760.1813 Availability of funds and timing of payments.
760.1814 Requirement to purchase crop insurance or NAP coverage.

§ 760.1800 Applicability.

This subpart specifies the terms and conditions for the Quality Loss Adjustment (QLA) Program. The QLA Program provides disaster assistance for crop quality losses that were a consequence of hurricanes, excessive moisture, floods, qualifying drought, tornadoes, typhoons, volcanic activity, snowstorms, and wildfires occurring in calendar years 2018 and 2019.

§ 760.1801 Administration.

(a) The QLA Program is administered under the general supervision of the Administrator, Farm Service Agency (FSA), and the Deputy Administrator for Farm Programs, FSA. The QLA Program is carried out by FSA State and county committees with instructions issued by the Deputy Administrator.

(b) FSA State and county committees, and representatives and their employees, do not have authority to modify or waive any of the provisions of the regulations in this subpart or instructions issued by the Deputy Administrator.

(c) The FSA State committee will take any action required by the regulations in this subpart that the FSA county committee has not taken. The FSA State committee will also:

(1) Correct, or require an FSA county committee to correct, any action taken by the FSA county committee that is not in accordance with the regulations in this subpart; or

(2) Require an FSA county committee to withhold taking any action that is not in accordance with this subpart.

(d) No delegation to an FSA State or county committee precludes the FSA Administrator or the Deputy Administrator from determining any question arising under this subpart or from reversing or modifying any determination made by an FSA State or county committee.

(e) The Deputy Administrator has the authority to:

(1) Permit State and county committees to waive or modify a non-statutory deadline specified in this subpart; and

(2) Delegate authority to FSA State or county committees to make determinations under § 760.1812(f) and (g).

(f) Items of general applicability to program participants, including, but not limited to, application periods, application deadlines, internal operating guidelines issued to FSA State and county offices, prices, and payment factors established under this subpart, are not subject to appeal in accordance with part 780 of this chapter.

§ 760.1802 Definitions.

The following definitions apply to this subpart. The definitions in §§ 718.2 and 1400.3 of this title also apply, except where they conflict with the definitions in this section. In the event of conflict, the definitions in this section apply.

Affected production means the producer's ownership share of harvested production of an eligible crop, adjusted to standard moisture as established by the U.S. Grains Standards Act, a State regulatory agency, or industry standard, that had both:

(1) A quality loss due to a qualifying disaster event; and

(2) At least a 5 percent quality loss due to all eligible disaster events.

Average market price means the average market price determined according to § 1437.12 of this title.

Coverage level means the percentage determined by multiplying the elected yield percentage under a crop insurance policy or NAP coverage by the elected price percentage.

Crop insurance means an insurance policy reinsured by FCIC under the provisions of the Federal Crop Insurance Act, as amended. It does not include private plans of insurance.

Crop insurance indemnity means, for the purpose of this subpart, the payment to a participant for crop losses covered under crop insurance administered by RMA in accordance with the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

Crop year means:

(1) For insurable crops, the crop year as defined according to the applicable crop insurance policy; and

(2) For NAP-eligible crops, the crop year as defined in § 1437.3 of this title.

Eligible crop means a crop for which coverage was available either from FCIC under part 400 of this title, or through NAP under § 1437.4 of this title.

Eligible disaster event means a disaster event that is an eligible cause of loss specified in § 1437.10 of this title, excluding insect infestation.

FCIC means the Federal Crop Insurance Corporation, a wholly owned Government Corporation of USDA, administered by RMA.

FSA means the Farm Service Agency, an agency of USDA.

Grading factor means a factor that describes the physical condition or a feature that is evaluated to determine the quality of the production, such as broken kernels and low-test weight.

Good farming practices means the cultural practices generally recognized as compatible with agronomic and weather conditions and used for the crop to make normal progress toward maturity, as determined by FSA. These practices are:

(1) For conventional farming practices, those generally recognized by agricultural experts for the area, which could include one or more counties; or

(2) For organic farming practices, those generally recognized by the organic agricultural experts for the area or contained in the organic system plan that is in accordance with the National Organic Program specified in part 205 of this title.

Harvested means:

(1) For insurable crops, harvested as defined according to the applicable crop insurance policy;

(2) For NAP-eligible single harvest crops, that a crop has been removed from the field, either by hand or mechanically;

(3) For NAP-eligible crops with potential multiple harvests in 1 year or harvested over multiple years, that the producer has, by hand or mechanically, removed at least 1 mature crop from the field during the crop year; and

(4) For mechanically harvested NAP-eligible crops, that the crop has been

removed from the field and placed in a truck or other conveyance, except hay is considered harvested when in the bale, whether removed from the field or not.

Insurable crop means an agricultural crop (excluding livestock) for which the producer on a farm is eligible to obtain a policy or plan of insurance under the Federal Crop Insurance Act (7 U.S.C. 1501–1524).

Multiple market crop means a crop that is delivered to a single market but can have fresh and processed prices based on grading. For example, a producer may intend to sell all production of an apple crop as fresh production; however, based on grading of the crop at the market, the producer is compensated for some production at the fresh price and for some production at the processing price.

Multiple planting means the planting for harvest of the same crop in more than one planting period in a crop year on different acreage.

NAP means the Noninsured Crop Disaster Assistance Program under section 196 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7333) and part 1437 of this title.

NAP-eligible crop means an agricultural crop for which the producer on a farm is eligible to obtain NAP coverage.

NAP service fee means the amount specified in § 1437.7 of this title that the producer must pay to obtain NAP coverage.

Nutrient factor means a factor determined by a test that measures the nutrient value of a crop to be fed to livestock. Examples include, but are not limited to, relative feed value and total digestible nutrients.

Production means quantity of the crop produced, which is expressed in a specific unit of measure including, but not limited to, bushels or pounds.

QLA Program means the Quality Loss Adjustment Program.

Qualifying disaster event means a hurricane, flood, tornado, typhoon, volcanic activity, snowstorm, wildfire, excessive moisture, qualifying drought, or a related condition that occurred in the 2018 or 2019 calendar year.

Qualifying drought means an area within the county was rated by the U.S. Drought Monitor as having a D3 (extreme drought) or higher level of drought intensity during the applicable calendar year.

Quality loss means:

(1) For forage crops, a reduction in an applicable nutrient factor for the crop; and

(2) For crops other than forage, a reduction in the total dollar value of the crop due to reduction in the physical condition of the crop indicated by an applicable grading factor.

Related condition means damaging weather or an adverse natural occurrence that occurred as a direct result of a specified qualifying disaster event, such as excessive rain, high winds, flooding, mudslides, and heavy smoke, as determined by the Deputy Administrator. The term does not include insect infestation.

Reliable production record means evidence provided by the participant that is used to substantiate the amount of production reported when verifiable records are not available, including copies of receipts, ledgers of income, income statements of deposit slips, register tapes, invoices for custom harvesting, and records to verify production costs, contemporaneous measurements, truck scale tickets, and contemporaneous diaries that are determined acceptable by the FSA county committee. To determine whether the records are acceptable, the FSA county committee will consider whether they are consistent with the records of other producers of the crop in that area.

RMA means the Risk Management Agency, an agency of USDA.

Salvage value means the dollar amount or equivalent for the quantity of the commodity that cannot be marketed or sold in any recognized market for the crop.

Secondary use means the harvesting of a crop for a use other than the intended use.

Unit of measure means:

(1) For insurable crops, the FCIC-established unit of measure; and

(2) For NAP-eligible crops, the established unit of measure used for the NAP price and yield.

USDA means the U.S. Department of Agriculture.

U.S. Drought Monitor is a system for classifying drought severity according to a range of abnormally dry to exceptional drought. It is a collaborative effort between Federal and academic partners, produced on a weekly basis, to synthesize multiple indices, outlooks, and drought impacts on a map and in narrative form. This synthesis of indices is reported by the National Drought Mitigation Center at *http://droughtmonitor.unl.edu.*

Value loss crop has the meaning specified in subpart D of part 1437 of this title.

Verifiable documentation means evidence that can be verified by FSA through an independent source.

Verifiable percentage of loss is the percentage of loss determined by comparing the applicable nutrient factors for a producer's affected production of a forage crop with the average of such nutrient factors from the 3 preceding crop years, as documented on FSA–899, Historical Nutritional Value Weighted Average Worksheet.

WHIP+ means the Wildfires and Hurricanes Indemnity Program Plus under subpart O of this part.

§ 760.1803 Participant eligibility.

(a) Participants will be eligible to receive a payment under this subpart only if they incurred a loss to an eligible crop due to a qualifying disaster event, as further specified in this subpart.

(b) To be an eligible participant under this subpart, a person or legal entity must be a:

(1) Citizen of the United States;

(2) Resident alien; for purposes of this subpart, resident alien means ''lawful alien'' (see § 1400.3 of this title);

(3) Partnership consisting solely of citizens of the United States or resident aliens; or

(4) Corporation, limited liability company, or other similar organizational structure organized under State law consisting solely of citizens or resident aliens of the United States.

(c) If any person who would otherwise be eligible to receive a payment dies before the payment is received, payment may be released as specified in § 707.3 of this chapter. Similarly, if any person or legal entity who would otherwise have been eligible to apply for a payment dies or is dissolved, respectively, before the payment is applied for, payment may be released in accordance with this subpart if a timely application is filed by an authorized representative. Proof of authority to sign for the deceased producer or dissolved entity must be provided. If a participant is now a dissolved general partnership or joint venture, all members of the general partnership or joint venture at the time of dissolution or their duly authorized representatives must sign the application. Eligibility of such participant will be determined, as it is for other participants, based upon ownership share and risk in producing the crop.

(d) An ownership share is required to be eligible for a payment under this subpart. Growers growing eligible crops under contract for crop owners are not eligible for a payment under this subpart unless the grower is also determined to have an ownership share of the crop. Any verbal or written contract that precludes the grower from having an ownership share renders the

grower ineligible for payments under this subpart.

(e) A person or legal entity is not eligible to receive assistance under this subpart if FSA determines that the person or legal entity:

(1) Adopted any scheme or other device that tends to defeat the purpose of this subpart or any of the regulations applicable to this subpart;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination under any or all of the following: This subpart and parts 12, 400, 1400, and 1437 of this title.

(f) A person who is ineligible for crop insurance or NAP under § 400.458 or § 1437.16 of this title, respectively, for any year is ineligible for payments under this subpart for the same year.

(g) The provisions of § 718.11 of this chapter, providing for ineligibility for payments for offenses involving controlled substances, apply.

(h) As a condition of eligibility to receive payments under this subpart, the participant must have been in compliance with the Highly Erodible Land Conservation and Wetland Conservation provisions of part 12 of this title for the applicable crop year for which the producer is applying for benefits under this subpart, and must not otherwise be precluded from receiving payments under part 12, 400, 1400, or 1437 of this title or any law.

§ 760.1804 Eligibility of affected production.

(a) To be eligible for the QLA Program, an eligible crop's affected production must have suffered a quality loss due to a qualifying disaster event and had at least a 5 percent quality loss due to all eligible disaster events. Whether affected production of a crop had a 5 percent loss will be determined separately for crops with different crop types, intended uses, certified organic or conventional status, county, and crop year.

(b) Affected production of the following is not eligible for the QLA Program:

(1) Crops that were not grown commercially;

(2) Crops that were intended for grazing or were grazed;

(3) Crops not intended for harvest;

(4) Volunteer crops;

(5) Value loss crops;

(6) Maple sap;

(7) Honey;

(8) By-products resulting from processing or harvesting a crop, such as, but not limited to, cotton seed, peanut shells, wheat or oat straw, or corn stalks or stovers;

(9) First-year seeding for forage production;

(10) Immature fruit crops;

(11) Crops for which FCIC coverage or NAP coverage is unavailable;

(12) Multiple market crops for which the producer previously received a crop insurance indemnity or WHIP+ payment for a quality loss;

(13) Crops for which production used to calculate a crop insurance indemnity or WHIP+ payment was adjusted based on a comparison of the producer's sale price to FCIC established price;

(14) Crops that received a crop insurance indemnity, NAP payment, or WHIP+ payment based on the quantity of production that was considered unmarketable;

(15) Crops for which the producer previously received a crop insurance indemnity, NAP payment, or WHIP+ payment for which production was reported as salvage value or secondary use;

(16) Sugar beets for which a member of a cooperative processor received a payment through a cooperative agreement; and

(17) Crops that were destroyed.

(c) Only affected production from initial crop acreage will be eligible for a QLA Program payment, unless the provisions for subsequent crops in this section are met. All plantings of an annual or biennial crop are considered the same as a planting of an initial crop in tropical regions as defined in part 1437, subpart F, of this title.

(d) In cases where there is double cropped acreage, affected production of each crop may be eligible only if the specific crops are approved by the FSA State committee as eligible double cropping practices in accordance with procedures approved by the Deputy Administrator.

(e) Participants having affected production from multiple plantings may receive payments for each planting only if the planting meets the requirements of part 1437 of this title and all other provisions of this subpart are satisfied.

§ 760.1805 Qualifying disaster events.

(a) A producer is eligible for payments under this subpart only if the producer's affected production of an eligible crop suffered a crop quality loss due to a qualifying disaster event.

(b) A crop quality loss due to a qualifying disaster event must have occurred on acreage that was physically located in a county that received a:

(1) Presidential Emergency Disaster Declaration authorizing public assistance for categories C through G or individual assistance due to a qualifying disaster event occurring in the 2018 or 2019 calendar years; or

(2) Secretarial Disaster Designation for a qualifying disaster event occurring in the 2018 or 2019 calendar years.

(c) A producer with a crop quality loss on acreage not physically located in a county that was eligible under paragraph (b) of this section will be eligible for the QLA Program for losses due to qualifying disaster events only if the producer provides supporting documentation from which the FSA county committee determines that the crop quality loss on the unit was reasonably related to a qualifying disaster event as specified in this subpart. Supporting documentation may include furnishing climatological data from a reputable source or other information substantiating the claim of loss due to a qualifying disaster event.

§ 760.1806 Ineligible losses.

(a) A loss is not eligible under this subpart if any of the following apply:

(1) The cause of loss is determined by FSA to be the result of poor management decisions, poor farming practices, or drifting herbicides;

(2) The loss could have been mitigated using good farming practices, including losses due to high moisture content that could be mitigated by following best practices for drying and storing the crop;

(3) The qualifying disaster event occurred after the crop was harvested;

(4) FSA or RMA have previously disapproved a notice of loss for the crop and disaster event, unless that notice of loss was disapproved solely because it was filed after the applicable deadline; or

(5) The cause of loss was due to:

(i) Conditions or events occurring outside of the applicable growing season for the crop;

(ii) Insect infestation;

(iii) Water contained or released by any governmental, public, or private dam or reservoir project if an easement exists on the acreage affected by the containment or release of the water;

(iv) Failure of a power supply or brownout; or

(v) Failure to harvest or market the crop due to lack of a sufficient plan or resources.

(b) [Reserved]

§ 760.1807 Miscellaneous provisions.

(a) All persons with a financial interest in a legal entity receiving payments under this subpart are jointly and severally liable for any refund, including related charges, that is determined to be due to FSA for any reason.

(b) In the event that any application under this subpart resulted from

erroneous information or a miscalculation, the payment will be recalculated and any excess refunded to FSA with interest to be calculated from the date of the disbursement.

(c) Any payment to any participant under this subpart will be made without regard to questions of title under State law, and without regard to any claim or lien against the commodity, or proceeds, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings in part 3 of this chapter apply to payments made under this subpart.

(d) Any participant entitled to any payment may assign any payment(s) in accordance with regulations governing the assignment of payments in part 3 of this chapter.

(e) The regulations in parts 11 and 780 of this title apply to determinations under this subpart.

§ 760.1808 General provisions.

(a) Eligibility and payments under this subpart will be determined based on the county where the affected production was harvested.

(b) FSA county committees will make any necessary adjustments to the applicant's affected production and other information on the application form used to calculate a payment when the county committee determines:

(1) Additional documentation has been requested by FSA but has not been provided by the participant;

(2) The loss is due to an ineligible cause; or

(3) The participant has a contract providing a guaranteed payment for all or a portion of the crop.

(c) Unless otherwise specified, all eligibility provisions of part 1437 of this title also apply to tropical crops for eligibility under this subpart.

(d) FSA will use the most reliable data available at the time payments under this subpart are calculated. If additional data or information is provided or becomes available after a payment is issued, FSA will recalculate the payment amount and the producer must return any overpayment amount to FSA. In all cases, payments can only issue based on the payment formula for losses that affirmatively occurred.

(e) Production that is commingled between counties, crop years, or ineligible and eligible acres before it was a matter of record or combination of record and cannot be separated by using records or other means acceptable to FSA will be prorated to each respective year, county, or type of acreage, respectively.

§ 760.1809 Payment and adjusted gross income limitation.

(a) A person or legal entity, other than a joint venture or general partnership, is eligible to receive, directly or indirectly, payments of not more than $125,000 for each of the 2018, 2019, and 2020 crop years under this subpart.

(b) Payments made to a joint operation, including a joint venture or general partnership, cannot exceed the amount determined by multiplying the maximum payment amount specified in paragraph (a) of this section by the number of persons and legal entities, other than joint operations, that comprise the ownership of the joint operation.

(c) The direct attribution provisions in § 1400.105 of this title apply to payments under this subpart.

(d) The notification of interest provisions in § 1400.107 of this title apply to payments under this subpart.

(e) The provisions for recognizing persons added to a farming operation for payment limitation purposes as described in § 1400.104 of this title apply to payments under this subpart.

(f) The $900,000 average AGI limitation provisions in part 1400 of this title relating to limits on payments for persons or legal entities, excluding joint ventures and general partnerships, apply to each applicant for the QLA Program unless at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry-related activities. A person's or legal entity's average AGI for each of the program years 2018, 2019 or 2020, is determined by using the average of the adjusted gross incomes for the 3 taxable years preceding the most immediately preceding taxable year. If the person's or legal entity's average AGI is below $900,000 or at least 75 percent of the person or legal entity's average AGI is derived from farming, ranching, or forestry-related activities, the person or legal entity, is eligible to receive payments under this subpart.

§ 760.1810 Time and method of application.

(a) A completed FSA–898, Quality Loss Adjustment (QLA) Program Application, must be submitted in person, by mail, email, or facsimile to any FSA county office by the close of business on March 5, 2020.

(b) An application submitted in accordance with paragraph (a) of this section is not considered valid and complete for issuance of payment under this subpart unless FSA determines all the applicable eligibility provisions have been satisfied and the producer has submitted all of following by March 19, 2020:

(1) Documentation required by § 760.1811;

(2) FSA–578, Report of Acreage, for all acreage for any crop for which payments under this subpart are requested;

(3) FSA–895, Crop Insurance and/or NAP Coverage Agreement; and

(4) For forage crops, FSA–899, Historical Nutritional Value Weighted Average Worksheet, if verifiable documentation of historical nutrient factors is available.

(c) In addition to the forms listed in paragraph (b) of this section, applicants must also submit all the following eligibility forms within 60 days from the date of signing the QLA Program application if not already on file with FSA:

(1) AD–1026, Highly Erodible Land Conservation (HELC) and Wetland Conservation Certification;

(2) CCC–902 Automated, Farm Operating Plan for Payment Eligibility 2009 and Subsequent Program Years;

(3) CCC–941 Average Adjusted Gross Income (AGI) Certification and Consent to Disclosure of Tax Information; and

(4) CCC–942 Certification of Income from Farming, Ranching and Forestry Operations, if applicable.

(d) Failure to submit all required forms by the applicable deadlines in paragraphs (b) and (c) of this section may result in no payment or a reduced payment.

(e) Application approval and payment by FSA does not relieve a participant from having to submit any form required, but not filed, according to this section.

(f) Once signed by a producer, the application is considered to contain information and certifications of and pertaining to the producer regardless of who entered the information on the application.

(g) The producer applying for payment under this subpart certifies the accuracy and truthfulness of the information provided in the application as well as any documentation filed with or in support of the application. All information is subject to verification or spot check by FSA at any time, either before or after payment is issued. Refusal to allow FSA or any agency of the USDA to verify any information provided will result in the participant's forfeiting eligibility for payment under this subpart. FSA may at any time, including before, during, or after processing and paying an application, require the producer to submit any additional information necessary to implement or determine any eligibility

provision of this subpart. Furnishing information specified in this subpart is voluntary; however, FSA may choose not to act on the application or approve payment if the required information is not provided. Providing a false certification will result in ineligibility and can also be punishable by imprisonment, fines, and other penalties.

§ 760.1811 Required documentation and verification.

(a) If requested by FSA, an applicant must provide documentation that establishes the applicant's ownership share and value at risk in the crop.

(b) The applicant must provide acceptable documentation that is dated and contains all information required to substantiate the applicant's certification to the satisfaction of the FSA county committee. Verifiable documentation is required to substantiate the total dollar value loss and associated affected production, grading factors, and nutritional factors. FSA may verify the records with records on file at the warehouse, gin, or other entity that received or may have received the reported production. Reliable production records are required to substantiate the reported amount of affected production for applications not based on the total dollar value loss.

(c) To be considered acceptable, verifiable documentation for grain crops that were sold may come from any time between harvest and sale of the affected production, unless the FSA county committee determines the record is not representative of the condition within 30 days of harvest. For all other crops, the verifiable documentation must come from tests or analysis completed within 30 days of harvest, unless the FSA county committee determines that the record is representative of the condition of the affected production at time of harvest. Examples of acceptable records for purposes of this paragraph (c) include:

(1) Warehouse grading sheets;

(2) Settlement sheets;

(3) Sales receipts showing grade and price or disposition to secondary market due to quality; and

(4) Laboratory test results.

(d) For forage crops, producers must submit verifiable documentation showing the nutrient factors for the affected production. Producers must also submit verifiable documentation of the historical nutrient factors for the 3 preceding crop years if available. The nutrient factors that must be documented for a crop will determined by the FSA county committee based on the standard practice for the crop in that county.

(e) For all crops other than forage crops, producers must submit verifiable documentation of the total dollar value loss due to quality, if available, and verifiable documentation of grading factors due to quality.

(f) The participant is responsible for:

(1) Retaining, providing, and summarizing, at time of application and whenever required by FSA, the best available verifiable production records for the crop;

(2) Providing the information in a manner that can be easily understood by the FSA county committee; and

(3) Providing supporting documentation about the disaster event if the FSA county committee has reason to question the disaster event.

(e) Participants must provide all records for any production of a crop that is grown with an arrangement, agreement, or contract for guaranteed payment.

(f) Participants are required to retain documentation in support of their application for 3 years after the date of approval.

(g) Participants receiving QLA Program payments or any other person who furnishes such information to USDA must permit authorized representatives of USDA or the Government Accountability Office, during regular business hours, to enter the agricultural operation and to inspect, examine, and make copies of books, records, or other items for the purpose of confirming the accuracy of the information provided by the participant.

§ 760.1812 Payment calculation.

(a) Payments will be calculated separately for crops based on the crop type, intended use, certified organic or conventional status, county, and crop year.

(b) For forage crops with verifiable documentation of nutrient factors for the affected production and for the 3 preceding crop years, the payment will be equal to the producer's total affected production multiplied by the producer's verifiable percentage of loss, multiplied by the average market price, multiplied by 70 percent.

(c) For forage crops with verifiable documentation of nutrient factors for the affected production but not for the 3 preceding crop years, the payment will be equal to the producer's total affected production multiplied by the county average percentage of loss in paragraph (f) of this section, multiplied by the average market price, multiplied by 70 percent, multiplied by 50 percent.

(d) For crops other than forage with verifiable documentation of the total dollar value loss due to quality, the payment will be equal to the producer's total dollar value loss on the affected production, multiplied by 70 percent.

(e) For crops other than forage without verifiable documentation of the total dollar value loss but with verifiable documentation of grading factors, the payment will be equal to the producer's affected production multiplied by the county average loss per unit of measure in paragraph (g) of this section, multiplied by 70 percent, multiplied by 50 percent.

(f) The county average percentage of loss is the average percentage of loss from producers eligible for payment under paragraph (b) of this section if at least 5 producers in a county are eligible for payment for a crop under paragraph (b) of this section. If less than 5 producers in a county are eligible for payment for a crop under paragraph (b) of this section, the Deputy Administrator will:

(1) Determine a county average percentage of loss based on the best available data, including, but not limited to, evidence of losses in contiguous counties; or

(2) If a county average percentage of loss cannot be determined due to insufficient data, not issue payments to applicants under paragraph (c) of this section.

(g) The county average loss per unit of measure is based on the weighted average sales price from producers eligible for payment under paragraph (d) of this section if at least 5 producers in a county are eligible for payment for a crop under paragraph (d) of this section. If less than 5 producers are eligible for payment in a county under paragraph (d) of this section, the Deputy Administrator will:

(1) Determine a county average loss per unit of measure based on the best available data, including, but not limited to, evidence of losses in contiguous counties; or

(2) If a county average loss per unit of measure cannot be determined due to insufficient data, not issue payments to applicants under paragraph (e) of this section.

§ 760.1813 Availability of funds and timing of payments.

(a) Payments will be issued after the application period has ended and all applications have been reviewed by FSA.

(b) In the event that, within the limits of the funding made available by the Secretary, approval of eligible applications would result in payments

in excess of the amount available, FSA will prorate payments by a national factor to reduce the payments to an amount that is less than available funds as determined by the Secretary.

(c) Applications and claims that are unpaid or prorated for any reason will not be carried forward for payment under other funds for later years or otherwise, but will be considered, as to any unpaid amount, void and nonpayable.

§ 760.1814 Requirement to purchase crop insurance or NAP coverage.

(a) For the first 2 consecutive crop years for which crop insurance or NAP coverage is available after the enrollment period for the QLA Program ends, a participant who receives payment under this subpart for a crop loss in a county must obtain:

(1) For an insurable crop, crop insurance with at least a 60 percent coverage level for that crop in that county; or

(2) For a NAP-eligible crop, NAP coverage with a coverage level of 60 percent.

(b) Participants who exceed the average adjusted gross income limitation for NAP payment eligibility [1] for the applicable crop year may meet the purchase requirement specified in paragraph (a)(2) of this section by purchasing Whole-Farm Revenue Protection crop insurance coverage, if eligible, or paying the NAP service fee and premium even though the participant will not be eligible to receive a NAP payment due to the average adjusted gross income limit.

(c) The final crop year to purchase crop insurance or NAP coverage to meet the requirements of paragraph (a) of this section is the 2023 crop year.

(d) A participant who obtained crop insurance or NAP coverage for the crop in accordance with the requirements for WHIP+ in § 760.1517 is considered to have met the requirement to purchase crop insurance or NAP coverage for the QLA Program.

(e) If a producer fails to obtain crop insurance or NAP coverage as required in this section, the producer must reimburse FSA for the full amount of QLA Program payment plus interest. A producer will only be considered to have obtained NAP coverage for the purposes of this section if the participant submitted a NAP application for coverage and paid the requisite NAP service fee and any applicable premium by the applicable deadline and completed all program requirements required under the coverage agreement, including filing an acreage report.

Richard Fordyce,

Administrator, Farm Service Agency.

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[1] See §§ 1400.500(a) and 1400.1(a)(4) of this title.

DEPARTMENT OF ENERGY

10 CFR Part 1061

RIN 1990–AA50

Procedures for the Issuance of Guidance Documents

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE) publishes this final rule to establish procedures for the issuance of DOE guidance documents in accordance with Executive Order 13891. In this final rule, DOE establishes internal agency requirements for the contents of guidance documents, and procedures for providing notice of, and soliciting public comment on, certain guidance documents. This final rule also establishes procedures for the public to petition DOE to modify or withdraw guidance documents.

DATES: The effective date of this rule is February 5, 2021.

ADDRESSES: The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *https://www.regulations.gov*. All documents in the docket are listed in the *https://www.regulations.gov* index. However, not all documents listed in the index, such as those containing information that is exempt from public disclosure by law, may be publicly available. A link to the docket web page can be found at *https://www.regulations.gov/document?D=DOE-HQ-2020-0033-0001*. The docket web page explains how to access all documents, including public comments, in the docket.

FOR FURTHER INFORMATION CONTACT: Mr. Matthew Ring, U.S. Department of Energy, Office of the General Counsel, Forrestal Building, GC–33, 1000 Independence Avenue SW, Washington, DC 20585, (202) 586–2555, Email: *Guidance@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of Final Rule

In this final rule, DOE incorporates into the Code of Federal Regulations a new 10 CFR part 1061, which implements the requirements of Executive Order 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents.'' (84 FR 55235 (Oct. 15, 2019)) Among other things, Executive Order 13891 requires agencies to provide more transparency for their guidance documents by creating a searchable online database for current guidance documents,[1] and by establishing procedures to allow the public to comment on significant guidance documents and to petition the agency to withdraw or modify guidance documents.[2] Moreover, the Executive Order requires agencies to clearly state in their guidance documents that such guidance does not have the force and effect of law and is not legally binding, except as authorized by law or as incorporated into a contract. (84 FR 55235, 55237)

This final rule applies to all DOE guidance documents, as defined by Executive Order 13891, including the exceptions listed in section 2 of the Executive Order. This final rule also lists specific types of documents and communications that fall within the broader exceptions listed in the Executive Order (*e.g.,* speeches and presentations given by DOE officials, legal positions taken in litigation or enforcement actions). (See also OMB M–20–02, Guidance Implementing Executive Order 13891, Titled ''Promoting the Rule of Law Through Improved Agency Guidance Documents'' (Oct. 31, 2019), available at *https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf*). This final rule also adopts the same definition of ''significant guidance document'' as section 2 of Executive Order 13891.

In accordance with Executive Order 13891, this final rule requires that all DOE guidance documents clearly state that they do not have the force and effect of law and are not legally binding on the public, and that they are only intended to provide clarity to the public

[1] DOE's online database may be found at *energy.gov/guidance*.

[2] Executive Order 13891 defines ''significant guidance document'' as ''a guidance document that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.'' (84 FR 55235, 55236)

regarding existing statutory and regulatory requirements. Moreover, this final rule requires that DOE guidance documents be written clearly and refrain from using mandatory language, such as the terms ''shall'' or ''must.'' If a guidance document purports to describe, approve, or recommend specific conduct that is beyond what is required by existing statute or legislative rule, this final rule requires that the document include a clear and prominent statement that the guidance document will not be used as an independent basis for enforcement, that conformity with the guidance document is strictly voluntary, and that nonconformity will not affect the rights and obligations of regulated parties.

This final rule also requires that all DOE guidance documents be reviewed and cleared by the Department's Office of the General Counsel. Additionally, this final rule requires that significant guidance documents be signed by the Secretary or a component agency head appointed by the President. This will ensure that the requirements and intent of Executive Order 13891 are met, and that guidance documents are issued in accordance with relevant laws and regulations.

This final rule also codifies procedures for providing notice in the **Federal Register** concerning significant guidance documents, soliciting public comments on such guidance documents, and responding to such comments. DOE notes that the agency generally provides notice and solicits comments on significant guidance documents. Therefore, this final rule codifies agency procedures that are already in use for significant guidance documents. This final rule also provides procedures for the public to petition the agency to modify or withdraw guidance documents. DOE notes that the procedures in this final rule for petitions to modify or withdraw guidance documents are similar to the procedures that DOE uses for petitions for rulemaking.

II. Summary of Comments and DOE Responses

On July 1, 2020, DOE published a notice of proposed rulemaking (NOPR) in which DOE proposed new part 1061 to implement the requirements of Executive Order 13891. (85 FR 39495) In the NOPR, DOE also granted in part, and denied in part, a petition for rulemaking submitted by the New Civil Liberties Alliance (NCLA) asking DOE to initiate a rulemaking to prohibit any DOE component from issuing, relying on, or defending improper agency guidance.[3] DOE received four comments on the NOPR, which are summarized below along with DOE's responses. Based on comments, DOE is making changes between the proposed rule and this final rule, as described in DOE's responses below.

Comments of NCLA

NCLA's comments[4] responded specifically to a portion of NCLA's petition for rulemaking that DOE declined to include in the NOPR: Procedures addressing finality and judicial review of agency guidance. NCLA stated that DOE should further clarify part 1061 to express the availability of judicial review after final disposition of a petition for the withdrawal or modification of guidance documents under the procedures of § 1061.4. (NCLA at 3) NCLA disagreed with DOE's statement in the NOPR that ''courts have the authority, and are best positioned, to determine what agency actions are reviewable by a court under the APA or other relevant laws and regulations'' and that the provisions concerning finality or judicial review sought by NCLA would not be as useful to regulated parties as the provisions DOE proposed in the NOPR, because the provisions in the proposed rule ''should eliminate, or lessen, the perceived need for judicial review in a significant range of circumstances by further confirming that guidance documents do not bind regulated parties.'' (NCLA at 3; see also 85 FR 39497) NCLA stated that the judiciary has historically lacked the ability to review improper agency guidance because, in part, the APA typically permits review only of final agency action, and the failure to achieve finality under the APA has resulted in courts being unable to consider the coercive effects of guidance documents. NCLA further stated that when an agency's guidance review process falls short, clear procedures identifying when an agency action is final and what review is available allow an interested party to seek meaningful redress from the courts. (NCLA at 3)

NCLA further stated that, as proposed, § 1061.4 contemplates the finality of DOE's action on a petition and suggests that judicial review under the APA may be available, but it does not provide a specific recourse for a petitioner who disagrees with the agency's disposition of a petition. NCLA concluded that § 1061.4 should include an explicit provision stating that if a person exhausts his or her administrative remedies in accordance with paragraph (g) of § 1061.4, then the disposition of the petition submitted in accordance with § 1061.4 shall constitute final agency action under the APA and shall be subject to review under the judicial review provisions of the APA. (NCLA at 4)

DOE Response

In response, DOE emphasizes that the final rule requires DOE guidance documents to explicitly state that they are non-binding and do not have the force and effect of law, and prohibits DOE from relying on guidance documents as an independent basis for enforcement. Enforcement actions must be based on the underlying statutory or regulatory requirements. The requirements of this final rule make clear that no binding legal obligations or consequences flow from DOE guidance documents, and that compliance with a guidance document is voluntary. With respect to petitions for modification or withdrawal of DOE guidance documents, DOE declines to make the changes sought by NCLA. This final rule makes clear that a petitioner must avail himself or herself of the procedures in § 1061.4. After those procedures have been exhausted and the petitioner receives a final disposition of the petition, DOE's consideration of the petition is complete, and DOE will take no further action on the petition. As in the proposed rule, DOE notes that courts are responsible for determining whether judicial review is available under the APA for a particular agency action, including DOE's disposition of a petition under § 1061.4. Courts are in the best position to determine if an agency action is final and ripe for review, and whether legal consequences actually flow from said action, and therefore, DOE declines to include a provision stating when judicial review of a guidance document or a petition to modify or withdraw guidance document would be available. In addition, DOE notes that this final rule should eliminate, or lessen, the perceived need for judicial review in a significant range of circumstances by further confirming that guidance documents do not bind regulated parties. Accordingly, DOE declines to incorporate NCLA's suggested changes into this final rule.

[3] See 84 FR 50791 (Sept. 26, 2019). NCLA's petition, the notice soliciting comment, and comments received on the petition may be found on *http://www.regulations.gov* under docket number DOE–HQ–2020–0002, document number 2019–20540.

[4] NCLA's comments may be found on *http://www.regulations.gov* under docket number DOE–HQ–2020–0002 with the Comment ID DOE–HQ–2020–0033–0004.

Comments of MHARR

The Manufactured Housing Association for Regulatory Reform (MHARR) provided comments [5] in support of NCLA's petition for rulemaking and DOE's proposed rule, except to the extent that the proposed rule omitted procedural and substantive protections set forth in NCLA's petition for rulemaking, particularly procedures to ensure that DOE comply with the Congressional Review Act (CRA). (5 U.S.C. 801–808) MHARR stated that it supports the adoption of all elements of NCLA's petition, including specific CRA compliance procedures. (MHARR at 2) MHARR stated that it has observed agencies, including DOE, abuse the guidance document process to impose *de facto* regulatory mandates and associated burdens. MHARR continued that such guidance documents impose significant cost burdens on regulated parties, including MHARR members, without affording interested parties opportunity to comment or to challenge such guidance in court. (MHARR at 3) MHARR further stated that, as set forth in Executive Order 13891, the imposition of new obligations through guidance documents is against statutory law, as well as the Constitution, and therefore, the proposed regulatory language offered in NCLA's petition for rulemaking should be included in this final rule. Additionally, MHARR stated that, in particular, the CRA compliance provisions offered in NCLA's petition should be included in the final rule because the CRA encompasses guidance documents, and MHARR disagreed with DOE's assertion in the NOPR that DOE's internal procedure adequately govern DOE's compliance with the CRA because DOE and other agencies have undertaken covered actions on an ongoing basis without full compliance with the CRA and its substantive requirements. (MHARR at 3)

DOE Response

Consistent with MHARR's comments, the final rule establishes procedures to ensure that the agency's process for the issuance and modification of guidance documents is transparent and accessible to the public, including by allowing public comment on significant guidance documents. The final rule also assures regulated parties that such guidance is not legally binding, and does not affect the rights and obligations of regulated parties. The final rule implements, and is consistent with, the requirements of Executive Order 13891. With respect to MHARR's comments on the proposed CRA compliance provisions in NCLA's petition, DOE declines to include such provisions in the final rule. As DOE stated in the NOPR, current DOE and Executive Branch procedures ensure compliance with the CRA. MHARR stated that DOE has issued actions covered by the CRA without fully complying with the CRA; however, MHARR did not provide any specific examples of such non-compliant actions. Moreover, the CRA compliance procedures in NCLA's petition mirror those that are already required of Executive Branch agencies by OMB M–19–14, Guidance on Compliance with the Congressional Review Act (Apr. 11, 2019), which NCLA cited in its petition. (See 84 FR 5079, 50797 (Sept. 26, 2019)) Accordingly, the CRA compliance procedures proffered by NCLA, and supported by MHARR, are already in place in Executive Branch policy. Additionally, this final rule requires DOE to consult with, and receive a determination from, OIRA on the significance of DOE guidance documents. Therefore, OIRA will have the opportunity to determine independently whether a guidance document is a ''major'' rule for purposes of the CRA, consistent with 5 U.S.C. 804(2), or otherwise must be submitted under the CRA's procedures.

Comments of AHRI

The Air-Conditioning, Heating, and Refrigeration Institute (AHRI) [6] submitted comments in support of DOE's plan to issue procedures on the issuance of guidance documents in accordance with Executive Order 13891. AHRI stated that its experience working with DOE's Office of Energy Efficiency and Renewable Energy (EERE) has consistently demonstrated alignment with the spirit of Executive Order 13891, that AHRI has found DOE's guidance documents to be useful and helpful, and that DOE guidance has, on occasion, been particularly useful in quickly resolving questions that arise in the implementation of regulations. (AHRI at 1) AHRI encouraged DOE to establish procedures that enable efficient solutions to short-term challenges. AHRI further stated that it appreciates EERE's efforts to make all guidance documents readily accessible on its website, and that the establishment of a single web portal on DOE's website makes it even easier now for the public to locate DOE's guidance documents. (AHRI at 1)

DOE Response

Consistent with the AHRI's comments, the final rule establishes procedures consistent with Executive Order 13891 to ensure that the agency's process for the issuance and modification of guidance documents is transparent and accessible to the public, including through DOE's guidance web portal. The procedures in the final rule ensure that DOE guidance documents are readily accessible to the public online. With respect to AHRI's comments encouraging DOE to establish procedures that enable efficient solutions to short-term challenges, DOE believes that the procedures in the final rule are sufficient to meet such challenges. DOE (acting in conjunction with the Administrator of OMB's Office of Information and Regulatory Affairs pursuant to section 4(a)(iii) of Executive Order 13891) may dispense with the notice and comment procedures of the final rule in exigent circumstances or emergencies. DOE may likewise do so when DOE finds for good cause (consistent with section 4(a)(iii)(A) of Executive Order 13891) that notice and public comment for a significant guidance document are impracticable, unnecessary, or contrary to the public interest. Moreover, non-significant guidance documents need not be subject to public notice and comment. Accordingly, DOE made no changes to the final rule based on AHRI's comments, because the procedures in the final rule allow DOE sufficient flexibility to efficiently address short-term or urgent challenges.

Comments of Goodman

Goodman Manufacturing Company, L.P. (Goodman) [7] submitted comments in support of DOE's proposal to establish procedures for the issuance of DOE guidance documents in accordance with Executive Order 13891. In its comments, Goodman proposed some revisions to the provisions in the NOPR, so that the prescribed provisions in the proposed new 10 CFR part 1061 do not unduly impact well-established existing guidance documents that the HVAC industry has relied upon for several years. Goodman stated that it was concerned that the rescission of such existing guidance documents would cause uncertainty among regulated HVAC manufacturers. (Goodman at 2)

[5] MHARR's comments may be found on *http://www.regulations.gov* under docket number DOE–HQ–2020–0002 with the Comment ID DOE–HQ–2020–0033–0002.

[6] AHRI's comments may be found on *http://www.regulations.gov* under docket number DOE–HQ–2020–0002 with the Comment ID DOE–HQ–2020–0033–0005.

[7] AHRI's comments may be found on *http://www.regulations.gov* under docket number DOE–HQ–2020–0002 with the Comment ID DOE–HQ–2020–0033–0006.

Goodman stated that, as currently proposed, § 1061.3(g) may rescind existing guidance documents that do not comply with the procedures in § 1061.3(a), and that such rescission would last unless and until DOE subjects such guidance documents to these procedures. Goodman stated that it is concerned that such immediate action could lead to a gap in the availability of guidance to stakeholders for an unknown period of time, and that it is not clear to stakeholders which of the existing guidance documents are ''posted on DOE's website portal as described in paragraph (a) [of § 1061.3],'' and that this lack of clarity would cause greater uncertainty, specifically for the HVAC industry. (Goodman at 2)

As an alternative, Goodman proposed revising paragraph (g) in § 1061.3 to state that guidance documents not posted to DOE's web page portal are rescinded effective one year after final rule publication or whenever DOE subjects such guidance documents to the procedures of this section, whichever comes first. Goodman stated that this alternative is particularly essential to the HVAC industry regarding the uniform test methods for measuring the energy consumption of central air conditioners and heat pumps because of the difference in the applicable effective dates for Appendices M and M1 to Subpart B of 10 CFR part 430. (Goodman at 2) Goodman stated that, due to the difference in these effective dates, it is imperative that DOE maintain the existing guidance document for the usage of an amended test procedure for testing, rating, and certifying products prior to the compliance date for new standards (''2014 Early Compliance Guidance''), and that otherwise Appendix M1 will compel manufacturers to make representations in accordance with Appendix M1 on or after the effective date of Appendix M1, rather than prior to that date, as allowed under the 2014 Early Compliance Guidance. (Goodman at 2) Goodman stated that the 2014 Early Compliance Guidance is particularly essential for products subject to regional standards because it allows manufacturers to introduce products into commerce well in advance of the 2023 effective date as long as those products are tested, rated, and certified in accordance with Appendix M1 and the 2023 energy conservation standards, thereby providing remaining market actors in the traditional distribution chain an option to procure such products in time for the 2023 installation effective date. (Goodman at 2–3) Goodman requested that, at a minimum, DOE indicate on its website portal which guidance documents are in compliance and which guidance are not in compliance with § 1061.3(a). Goodman also stated that its concerns about existing guidance documents apply to guidance other than 2014 Early Compliance Guidance, along with a list of examples of such guidance documents. (Goodman at 3)

Goodman also proposed minor editorial revisions for the final rule. Specifically, Goodman stated that because the proposed definition of ''Guidance document'' in paragraph (16) of § 1061.2 already eliminates documents ''directed solely at DOE personnel or to other Federal agencies that is not intended to have substantial future effect on the behavior of regulated parties,'' the inclusion of this language in § 1061.3(a)(3) is duplicative and can be removed. Goodman also proposed replacing the word ''will'' in §§ 1061.3(f), 1061.3(g), 1061.4(d) and 1061.4(e) with the word ''shall.'' (Goodman at 3)

DOE Response

In response to Goodman, DOE makes clear that the specific guidance referenced in the comment has not been rescinded. DOE declines to make the changes to § 1061.3(g) proposed by Goodman; however, DOE has made a change to § 1061.3(g) to clarify that documents not made available through DOE's website portal as described in paragraph (f) of § 1061.3 are deemed rescinded under § 1061.3(g). This change replaces the text of § 1061.3(g) from the proposed rule that stated guidance documents ''not posted to DOE's website portal as described in paragraph (a) of [§ 1061.3]'' would be deemed rescinded. DOE believes that the final rule makes clear that existing documents currently available through the guidance web portal, such as the 2014 Early Compliance Guidance, are in effect. Executive Order 13891 required that agencies make all effective guidance documents available through each agency's guidance web portal, and that otherwise the guidance document would be deemed rescinded. However, agencies could have reinstated rescinded guidance documents without being subject to the procedures of Executive Order 13891 by making them available through their guidance web portal by June 27, 2020. Accordingly, any DOE guidance document, as defined in part 1061, that was not available through the DOE guidance web portal as of June 27, 2020, is deemed rescinded. DOE will not cite, use, or rely on any guidance document that has been rescinded, except to establish historical facts. However, all guidance documents made available through DOE's website portal prior to June 27, 2020, and that are currently available through DOE's website portal, have not been rescinded and are currently effective and may be relied upon. Under the final rule, only new or revised guidance documents, or rescinded guidance documents that DOE seeks to reinstate, must go through the procedures in § 1061.3. Guidance documents made available through DOE's website portal prior to June 27, 2020, and that are currently available through DOE's website portal, are currently in effect and are not required to go through the procedures in § 1061.3.

DOE agrees with Goodman's remaining editorial comments and has removed the reference to documents directed at DOE personnel in § 1061.3(a)(3), and has replaced the term ''will'' with ''shall'' in §§ 1061.3(f), 1061.3(g), 1061.4(d) and 1061.4(e).

Regulatory Analysis

A. Review Under Executive Order 12866, ''Regulatory Planning and Review''

This final rule is a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review.'' (58 FR 51735 (Oct. 4, 1993)) As a result, this action was reviewed by the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB). DOE does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a final rule of agency procedure and practice. The final rule describes DOE's internal procedures for the promulgation and processing of guidance documents, to ensure that guidance documents only clarify existing statutory and regulatory obligations and do not impose any new obligations. DOE adopts these internal procedures as part of its implementation of Executive Order 13891, and does not anticipate incurring significant additional resource costs in doing so. Moreover, it is anticipated that the public will benefit from the resulting increase in efficiency and transparency in the issuance of guidance documents, and more opportunities to comment on guidance documents.

B. Review Under Executive Orders 13771

On January 30, 2017, the President issued Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' (See 82 FR 9339

(Feb. 3, 2017)) This final rule is not an Executive Order 13771 regulatory action because it results in costs that are de minimis.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of a regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking,* 67 FR 53461, (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. (68 FR 7990) The Department has made its procedures and policies available on the Office of the General Counsel's website: *http://energy.gov/gc/office-general-counsel.*

The final rule codifies internal agency procedures regarding DOE's issuance of guidance documents. Additionally, as noted previously, guidance documents do not have the force and effect of law and are not legally binding on regulated entities. This final rule establishes procedures to ensure that DOE guidance only clarifies existing statutory and regulatory obligations, rather than imposing any new obligations. DOE therefore does not anticipate any significant economic impacts from today's final rule. For these reasons, DOE certifies that this rulemaking will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE did not prepare a regulatory flexibility act analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

D. Review Under the Paperwork Reduction Act of 1995

The final rule imposes no new information or record keeping requirements. Accordingly, Office of Management and Budget (OMB) clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

E. Review Under the National Environmental Policy Act of 1969

DOE has determined that the final rule is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6 of Appendix A to subpart D, 10 CFR part 1021. That Categorical Exclusion applies to actions that are strictly procedural, such as rulemaking establishing the administration of grants. The final rule codifies internal agency procedures for issuing guidance documents. The action does not have direct environmental impacts. No extraordinary circumstances are present that would warrant further review. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

F. Review Under Executive Order 13132, ''Federalism''

Executive Order 13132, ''Federalism,'' 64 FR 43255, (Aug. 10, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. (65 FR 13735) DOE examined this final rule and determined that it will not preempt State law and will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of Government. No further action is required by Executive Order 13132.

G. Executive Order 13175 ''Consultation and Coordination With Indian Tribal Governments''

Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' 65 FR 67249 (Nov. 9, 2000), applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175. Because this final rule does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

H. Review Under Executive Order 12988, ''Civil Justice Reform''

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct, rather than a general standard and promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies its preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct, while promoting simplification and burden reduction; (4) specifies its retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met, or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

I. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting

costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed ''significant intergovernmental mandate'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *http://energy.gov/gc/office-general-counsel*). This final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year by State, local, and tribal governments, in the aggregate, or by the private sector, so these requirements under UMRA do not apply.

J. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This final rule does not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

K. Review Under Executive Order 12630, ''Governmental Actions and Interference With Constitutionally Protected Property Rights''

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (Mar. 18, 1988), that this final rule does not result in any takings which might require compensation under the Fifth Amendment to the United States Constitution.

L. Review Under the Information Quality Act

The Information Quality Act (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

M. Review Under Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use''

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) Is a significant regulatory action under Executive Order 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. The final rule codifies internal agency procedures; it is not likely to have a significant adverse effect on the supply, distribution, or use of energy; and the Administrator of OIRA has not designated it as a significant energy action. Accordingly, the requirements of Executive Order 13211 do not apply.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

List of Subjects in 10 CFR Part 1061

Administrative practice and procedure.

Signing Authority

This document of the Department of Energy was signed on December 11, 2020, by William S. Cooper, III, General Counsel, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 15, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

■ For the reasons stated in the preamble, DOE adds part 1061 to Chapter X of Title 10 of the Code of Federal Regulations as follows:

PART 1061—PROCEDURES FOR THE ISSUANCE OF GUIDANCE DOCUMENTS

Sec.
1061.1 Purpose.
1061.2 Definitions.
1061.3 Procedures for issuing guidance documents.
1061.4 Petitions for withdrawal or modification of guidance documents.

Authority: 42 U.S.C. 7254; 42 U.S.C. 7101 *et seq.;* E.O. 13891, 84 FR 55235.

§ 1061.1 Purpose.

This part establishes DOE procedures for the issuance and review of new or revised guidance documents, and procedures for the public to petition for the withdrawal or removal of DOE guidance documents.

§ 1061.2 Definitions.

For purposes of this part, the following terms, phrases and words are defined as follows:

Administrator means the Administrator of the Office of Information and Regulatory Affairs within the Office of Management and Budget.

DOE means the U.S. Department of Energy.

Guidance document means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include:

(1) Rules promulgated pursuant to notice and comment under the Administrative Procedure Act, 5 U.S.C. 553, or similar statutory provisions;

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

(3) Rules of agency organization, procedure, or practice;

(4) Decisions of agency adjudications under 5 U.S.C. 554, 42 U.S.C. 6303(d)(3)(A), or similar statutory provisions;

(5) Internal executive branch legal advice or legal opinions addressed to executive branch officials;

(6) Agency statements of specific, rather than general, applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions, notices regarding particular locations or facilities, and correspondence with individual persons or entities, including notices of violation and warning letters;

(7) Briefs and other positions taken in litigation, enforcement actions, and financial assistance or contract bid protests, appeals or any other contract or financial assistance litigation;

(8) 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, but not limited to, speeches, presentations, editorials, media interviews, press materials, congressional testimony, and congressional correspondence;

(9) Guidance pertaining to military or foreign affairs functions;

(10) Guidance or policies pertaining to financial assistance formation, funding opportunity announcements, awards and administration of financial assistance;

(11) Guidance or policies pertaining to contract formation, solicitations, awards and administration of contracts;

(12) Guidance or policies pertaining to the administration or oversight of capital asset projects or projects treated as capital asset projects by the Department;

(13) Guidance pertaining to execution of the Department's small business programs and achievement, including compliance with the Small Business Regulatory Enforcement Fairness Act;

(14) Grant solicitations and awards;

(15) Contract solicitations and awards;

(16) Internal agency policies or guidance directed solely at DOE personnel or to other Federal agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(17) Guidance pertaining to the use, operation, or control of a government facility or property; or

(18) Policies or guidance when the release or disclosure of the document is legally prohibited.

Significant guidance document means a guidance document that may reasonably be anticipated to:

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

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

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

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

§ 1061.3 Procedures for issuing guidance documents.

(a) *Contents of Guidance Documents.* All new or revised DOE guidance documents:

(1) Must comply with all relevant statutes and regulations;

(2) Must include a clear and prominent statement declaring that:

(i) 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;

(ii) The document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies, except as authorized by law or as incorporated into a contract; and

(iii) DOE will not rely upon the document as an independent basis for an enforcement action or other administrative penalty.

(3) Must avoid using mandatory language such as ''shall,'' ''must,'' ''required,'' or ''requirement,'' unless the language is describing an established statutory or regulatory requirement, or is directed solely to DOE personnel and is not intended to have a substantial future effect on the behavior of regulated parties;

(4) Must be written in plain and understandable language; and

(5) Must include the following attributes: The term ''guidance''; a title; identification of the issuing agency or office; identification of activities to which and the persons to whom the document applies; the date of issuance; the relation to previous guidance (if applicable); a citation to the statutory provision(s), regulation(s), or both to which the document applies; and a short summary of the subject matter.

(b) *Review and Clearance by Counsel.* All new or revised DOE guidance documents must be reviewed by the Office of the General Counsel prior to issuance to:

(1) Ensure compliance with this part and Executive Order 13891;

(2) Obtain a determination from the Administrator as to whether the guidance document is significant, as defined in this part; and

(3) If the guidance document is determined to be significant, coordinate with the Office of Information and Regulatory Affairs within the Office of Management and Budget as prescribed in paragraph (c) of this section.

(c) *Procedures for Significant Guidance Documents.* For any guidance document deemed to be a significant guidance document by the Administrator, DOE shall:

(1) Publish notice of the guidance document in the **Federal Register** and on DOE's guidance website, and provide a public notice and comment period of not less than 30 days prior to the issuance of the final significant guidance document;

(2) Provide publicly available responses to major and relevant concerns raised in comments;

(3) Obtain signature of the significant guidance document by the Secretary of Energy or DOE component head appointed by the President prior to issuance of the final significant guidance document;

(4) In accordance with the procedures of Executive Order 12866, obtain review of the significant guidance document by the Administrator prior to issuance of the final significant guidance document;

(5) Comply with applicable requirements of Executive Orders 12866, 13563, 13609, 13771, and 13777. and any revisions thereto or superseding Executive Orders.

(d) *Exception to notice and comment procedures.* DOE may dispense with the requirements of paragraphs (c)(1) and (2) of this section where DOE finds for good cause that notice and public comment for a significant guidance document are impracticable, unnecessary, or contrary to the public interest. DOE shall incorporate such finding and a brief statement of the reasons for such finding into the significant guidance document.

(e) *Other Exceptions.* The procedural requirements of paragraph (c) of this section shall not apply, in whole or in part, when:

(1) DOE and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from the relevant requirement or requirements; or

(2) The significant guidance document is of a kind for which DOE and the Administrator have developed a categorical exception from the relevant requirement or requirements, as approved by the Administrator.

(f) *Electronic Availability of Guidance.* DOE shall:

(1) Ensure that all guidance documents, as defined in this part, are available to the public on the DOE

website through a single web page portal; and

(2) State clearly and prominently on its web page portal that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract.

(g) *Rescinded Guidance Documents.* All guidance documents, as defined in this Part, that are not made available through DOE's website portal as described in paragraph (f) of this section shall be deemed rescinded, unless and until DOE subjects such guidance documents to the procedures of this section. Except for the purposes of establishing historical facts, DOE shall not cite, use, or rely upon rescinded guidance documents unless and until DOE subjects such guidance documents to the procedures of this section.

§ 1061.4 Petitions for withdrawal or modification of guidance documents.

(a) *Filing a petition.* Any person may petition DOE to withdraw or modify a guidance document. The petition must be addressed to the Office of the General Counsel, Attention: Petition for Modification or Withdrawal of Guidance Document, and either:

(1) Sent by mail addressed to: Forrestal Building, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585;

(2) Sent by email to *Guidance@hq.doe.gov*; or

(3) Hand delivered to DOE at 1000 Independence Avenue SW, Washington, DC 20585.

(b) *Content of petition.* For each petition filed under this section, the petitioner must:

(1) Specify the petitioner's:

(i) Name, or if the petitioner is an organization, the name of the organization and the name and authority of the individual who signed the petition on behalf of the organizational or corporate petitioner;

(ii) Telephone number;

(iii) Mailing address; and

(iv) Email address (if available).

(2) Identify the guidance document to be withdrawn or modified; and

(3) Be signed by the petitioner or authorized representative.

(c) *Additional information.* To assist DOE in responding appropriately to the petition, a petitioner should also:

(1) Present any specific problems or issues that the petitioner believes are associated with the guidance document, including any specific circumstances in which the guidance document is incorrect, incomplete, obsolete, or inadequate;

(2) Present any proposed solution to either modify or withdraw the guidance document, including a discussion of how the petitioner's proposed solution resolves the issues identified under paragraph (c)(1) of this section;

(3) In the case of a petition for modification of a guidance document, specify any modifications to the text of the document that petitioner seeks;

(4) Cite, enclose, or reference technical, scientific, or other data or information supporting the petitioner's assertions under paragraphs (c)(1) and (2) of this section.

(d) *Public comment.* DOE shall publish a petition for modification or withdrawal of a guidance document and supporting documentation in the **Federal Register**, and provide opportunity for public comment. DOE may dispense with the notice and comment procedures in this paragraph where DOE finds for good cause that notice and public comment are impracticable, unnecessary, or contrary to the public interest, or where exigency, safety, health, or other compelling cause warrants an exemption from the notice and comment procedures in this paragraph. DOE shall incorporate such finding and a brief statement of the reasons for such finding into its decision on the petition.

(e) *Confidential business information.* In accordance with the provisions set forth in 10 CFR 1004.11, any request for confidential treatment of any information contained in a petition for modifying or withdrawing a guidance document, or in supporting documentation, must be accompanied by a copy of the petition or supporting documentation from which the information claimed to be confidential has been deleted. DOE shall publish in the **Federal Register** the petition and supporting documents from which confidential information, as determined by DOE, has been deleted in accordance with 10 CFR 1004.11.

(f) *Disposition of petition.* DOE shall determine the appropriate disposition of a petition after consideration of the petition and any supporting documents received, as well as any public comment received on the petition, within 90 days of DOE's publication in the **Federal Register** of such petition, to the maximum extent practicable.

(g) *Exhaustion of administrative remedies.* Before any DOE action under this part is final, a person must exhaust his or her administrative remedies. To exhaust administrative remedies under this part, a person must:

(1) Avail himself or herself of the procedures in this section; and

(2) Receive a final disposition from DOE in accordance with paragraph (f) of this section.

[FR Doc. 2020–27875 Filed 1–5–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2020–1168; Project Identifier AD–2020–01568–E; Amendment 39–21379; AD 2021–01–03]

RIN 2120–AA64

Airworthiness Directives; International Aero Engines AG Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain International Aero Engines AG (IAE) V2500–A1, V2522–A5, V2524–A5, V2525–D5, V2527–A5, V2527E–A5, V2527M–A5, V2528–D5, V2530–A5, V2531–E5, and V2533–A5 model turbofan engines. This AD was prompted by a root cause analysis of an event involving an uncontained failure of a high-pressure turbine (HPT) 1st-stage disk that resulted in high-energy debris penetrating the engine cowling. This AD requires removing certain HPT 1st-stage and HPT 2nd-stage disks from service. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective January 21, 2021.

The FAA must receive comments on this AD by February 22, 2021.

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

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

Examining the AD Docket

You may examine the AD docket at *https://www.regulations.gov* by

searching for and locating Docket No. FAA–2020–1168; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The street address for the Docket Operations is listed above.

FOR FURTHER INFORMATION CONTACT:

Nicholas Paine, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7116; fax: (781) 238–7199; email: *nicholas.j.paine@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

On March 18, 2020, an Airbus Model A321–231 airplane, powered by IAE V2533–A5 model turbofan engines, experienced an uncontained HPT 1st-stage disk failure that resulted in high-energy debris penetrating the engine cowling. Based on a preliminary analysis of this event, on March 21, 2020, the FAA issued Emergency AD 2020–07–51, which requires the removal from service of certain HPT 1st-stage disks installed on IAE V2522–A5, V2524–A5, V2525–D5, V2527–A5, V2527E–A5, V2527M–A5, V2528–D5, V2530–A5, and V2533–A5 model turbofan engines.

Since the FAA issued AD 2020–07–51, the manufacturer conducted a root cause analysis and identified a different population of HPT 1st-stage and HPT 2nd-stage disks that are affected by the unsafe condition and require removal from service. This condition, if not addressed, could result in failure of the HPT, uncontained HPT failure, damage to the engine, damage to the airplane, and loss of the airplane. The FAA is issuing this AD to address the unsafe condition on these products.

FAA's Determination

The FAA is issuing this AD because the agency has determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

AD Requirements

This AD requires the removal from service of certain HPT 1st-stage and HPT 2nd-stage disks installed on IAE V2500–A1, V2522–A5, V2524–A5, V2525–D5, V2527–A5, V2527E–A5, V2527M–A5, V2528–D5, V2530–A5, V2531–E5, and V2533–A5 model turbofan engines.

Interim Action

The design approval holder is currently developing a modification to address the unsafe condition identified in this AD. Once this modification is developed, the FAA might consider additional rulemaking.

Justification for Immediate Adoption and Determination of the Effective Date

Section 553(b)(3)(B) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) authorizes agencies to dispense with notice and comment procedures for rules when the agency, for ''good cause,'' finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under this section, an agency, upon finding good cause, may issue a final rule without providing notice and seeking comment prior to issuance. Further, section 553(d) of the APA authorizes agencies to make rules effective in less than thirty days, upon a finding of good cause.

An unsafe condition exists that requires the immediate adoption of this AD without providing an opportunity for public comments prior to adoption. The FAA has found that the risk to the flying public justifies foregoing notice and comment prior to adoption of this rule. On March 18, 2020, an Airbus Model A321–231 airplane, powered by IAE V2533–A5 model turbofan engines, experienced an uncontained HPT 1st-stage disk failure that resulted in an aborted takeoff. The uncontained failure of the HPT 1st-stage disk resulted in high-energy debris penetrating the engine cowling. The FAA published Emergency AD (EAD) 2020–07–51 on March 21, 2020 (followed by publication in the **Federal Register** on April 13, 2020, as a Final Rule, Request for Comments (85 FR 20402)), to remove from service HPT 1st-stage disks identified as having the highest risk of failure. Based on the root cause analysis performed since that event, the manufacturer has identified a different population of affected HPT 1st-stage and HPT 2nd-stage disks that are affected by the same unsafe condition and require removal from service. These HPT disks have the highest risk of failure and require removal within 50 flight cycles or 30 days after the effective date of this AD, whichever comes first, to prevent additional HPT disk failures and maintain an acceptable level of safety. This unsafe condition may result in loss of the airplane.

The FAA considers removal of certain HPT 1st-stage and HPT 2nd-stage disks to be an urgent safety issue. Accordingly, notice and opportunity for prior public comment are impracticable and contrary to the public interest pursuant to 5 U.S.C. 553(b)(3)(B). In addition, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment effective in less than 30 days, for the same reasons the FAA found good cause to forego notice and comment.

Comments Invited

The FAA invites you to send any written data, views, or arguments about this final rule. Send your comments to an address listed under **ADDRESSES**. Include the docket number FAA–2020–1168 and Project Identifier AD–2020–01568–E at the beginning of your comments. The most helpful comments reference a specific portion of the final rule, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this final rule because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR 11.35, the FAA will post all comments received, without change, to *https://www.regulations.gov,* including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this final rule.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this AD contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this AD, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this AD. Submissions containing CBI should be sent to Nicholas Paine, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Regulatory Flexibility Act

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

Costs of Compliance

The FAA estimates that this AD affects 4 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Remove HPT 1st-stage or HPT 2nd-stage disk from service.	92 work-hours × $85 per hour = $7,820.	$300,000	$307,820	$1,231,280

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

(2) Will not affect intrastate aviation in Alaska.

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2021–01–03 International Aero Engines AG: Amendment 39–21379; Docket No. FAA–2020–1168; Project Identifier AD–2020–01568–E.

(a) Effective Date

This airworthiness directive (AD) is effective January 21, 2021.

(b) Affected ADs

None.

(c) Applicability

This AD applies to International Aero Engines AG (IAE) V2500–A1, V2522–A5, V2524–A5, V2525–D5, V2527–A5, V2527E–A5, V2527M–A5, V2528–D5, V2530–A5, V2531–E5, and V2533–A5 model turbofan engines with an installed:

(1) High-pressure turbine (HPT) 1st-stage disk, part number (P/N) 2A5001, with a serial number (S/N) listed in Figure 1 to paragraph (c) of this AD; or

(2) HPT 2nd-stage disk, P/N 2A4802 or 2A1202, with an S/N listed in Figure 2 to paragraph (c) of this AD.

Figure 1 to Paragraph (c)—HPT 1st-Stage Disks, P/N 2A5001

HPT 1st-Stage Disk S/N
PKLBMR8122
PKLBN95688
PKLBPD1563
PKLBR09920
PKLBR16496
PKLBR19225
PKLBR25636
PKLBR28076
PKLBR34562
PKLBR52354
PKLBR69530
PKLBR82479
PKLBRJ9427
PKLBRN5510
PKLBRT5081
PKLBRU7299
PKLBRW8547
PKLBRW9395
PKLBSJ7141
PKLBSM8377

Figure 2 to Paragraph (c)—HPT 2nd-Stage Disks, P/N 2A4802 or 2A1202

HPT 2nd-Stage Disk S/N
PKLBJ09996
PKLBJ13601
PKLBJ80883
PKLBKL8627
PKLBLJ9333
PKLBP87124
PKLBPY9696
PKLBSL8699

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by an analysis performed by the manufacturer of an event involving an uncontained failure of an HPT 1st-stage disk that resulted in high-energy debris penetrating the engine cowling. The FAA is issuing this AD to prevent failure of the HPT 1st-stage and HPT 2nd-stage disks. The unsafe condition, if not addressed, could result in uncontained HPT disk failure, damage to the engine, damage to the airplane, and loss of the airplane.

(f) Compliance

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

(g) Required Actions

(1) For IAE model turbofan engines with an HPT 1st-stage disk, P/N 2A5001, with a S/N listed in Figure 1 to paragraph (c) of this AD, within 50 flight cycles or 30 days after the effective date of this AD, whichever comes first, remove the HPT 1st-stage disk from service.

(2) For IAE model turbofan engines with an HPT 2nd-stage disk, P/N 2A4802 or 2A1202, with a S/N listed in Figure 2 to paragraph (c) of this AD, within 50 flight cycles or 30 days after the effective date of this AD, whichever comes first, remove the HPT 2nd-stage disk from service.

(h) Installation Prohibition

After the effective date of this AD, do not install onto any engine an HPT 1st-stage or HPT 2nd-stage disk with a P/N and S/N listed in paragraph (c) of this AD.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD,

if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in Related Information. You may email your request to *ANE-AD-AMOC@faa.gov*.

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

(j) Related Information

For more information about this AD, contact Nicholas Paine, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7116; fax: (781) 238–7199; email: *nicholas.j.paine@faa.gov*.

(k) Material Incorporated by Reference

None.

Issued on December 28, 2020.

Lance T. Gant,

Director, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–00053 Filed 1–5–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 201215–0342]

RIN 0694–AH89

Technical Amendments to the Export Administration Regulations: Export Control Classification Number 0Y521 Series Supplement—Extension of Software Specially Designed To Automate the Analysis of Geospatial Imagery Classification

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule; technical amendment.

SUMMARY: On January 6, 2020, the Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) to add Software Specially Designed to Automate the Analysis of Geospatial Imagery to the 0Y521 Temporary Export Control Classification Numbers (ECCN) Series as 0D521. In this action BIS extends that status for a year pursuant to the 0Y521 series extension procedures.

DATES: This rule is effective January 6, 2021.

FOR FURTHER INFORMATION CONTACT: Aaron Amundson, Director, Information Technology Division, Office of National Security and Technology Transfer Controls, at email *Aaron.Amundson@bis.doc.gov* or by phone at (202) 482–5299.

SUPPLEMENTARY INFORMATION:

Background

On January 6, 2020, the Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR) with an interim final rule to add Software Specially Designed to Automate the Analysis of Geospatial Imagery to the 0Y521 Temporary Export Control Classification Numbers (ECCN) Series as 0D521. More specifically, the software was described as Geospatial imagery ''software'' ''specially designed'' for training a Deep Convolutional Neural Network to automate the analysis of geospatial imagery and point clouds. *See* 85 FR 459.

BIS established the ECCN 0Y521 series in a final rule published April 13, 2012 (72 FR 22191) (hereinafter ''April 13 rule'') to identify items that warrant control on the Commerce Control List (CCL) but are not yet identified in an existing ECCN. Items in the 0Y521 series of ECCNs are added upon a determination by the Department of Commerce, with the concurrence of the Departments of Defense and State, and other agencies as appropriate, that the items warrant control for export because the items may provide a significant military or intelligence advantage to the United States or because foreign policy reasons justify control. The ECCN 0Y521 series is a temporary holding classification.

Under the procedures established in the April 13 rule and codified at § 742.6(a)(8)(iii) of the EAR, items classified under ECCN 0Y521 remain so classified for one year from the date they are listed in supplement no. 5 to part 774 of the EAR, unless the items are re-classified under a different ECCN or the 0Y521 classification is extended.

BIS may extend an item's ECCN 0Y521 classification for two one-year periods, provided that the U.S. Government has submitted a proposal to the relevant multilateral regime(s) (*e.g.,* the Wassenaar Arrangement) to obtain multilateral controls over the item, with the understanding that multilateral controls are preferable when practical. Further extension beyond three years may occur only if the Under Secretary for Industry and Security makes a determination that such extension is in the national security or foreign policy interest of the United States. Any extension or re-extension of control of an ECCN 0Y521 item, including the determination by the Under Secretary, shall be published in the **Federal Register**.

In this action, BIS extends the status of an item classified under a 0Y521 ECCN for a year consistent with procedures that allow such an extension. Specifically, in this case the U.S. Government submitted a proposal for multilateral control of the 0D521 software specially designed to automate the analysis of geospatial imagery, as described in the January 6, 2020 interim final rule, to the relevant multilateral regime (the Wassenaar Arrangement) in a timely manner, within the first year of the item's 0D521 classification. However, due to the pandemic, the regime did not convene and therefore did not consider acceptance of the proposal. An extension of time is appropriate in order for the U.S. Government to continue its effort at the Wassenaar Arrangement in 2021.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852) that provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This interim final rule has been designated to be not significant for purposes of Executive Order 12866. The requirements of Executive Order 13771 do not apply because the rule is not significant.

2. Notwithstanding any other provision of law, no person is required to respond to, nor is subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid OMB control number. This rule does not involve any collection of information.

3. This rule does not contain policies associated with Federalism as that term is defined under Executive Order 13132.

4. Pursuant to section 1762 of ECRA (see 50 U.S.C. 4821), this action is exempt from the Administrative Procedure Act requirements (under 5 U.S.C. 553) for notice of proposed rulemaking, opportunity for public participation, and delay in effective date. This rule only updates Supplement No. 5 to Part 774 to the EAR by extending the date of the period of validity of 0D521 software in Supplement No. 5 to Part 774 for one year. This revision is merely technical and in accordance with established 0Y521 ECCN series procedure and purpose, which was proposed to the public and subject of comment. This rule clarifies information, which serves to avoid confusing readers about the 0D521 item's status. It does not alter any right, obligation or prohibition that applies to any person under the EAR.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, part 774 of the Export Administration Regulations (15 CFR parts 730 through 774) is amended as follows:

PART 774—THE COMMERCE CONTROL LIST

■ 1. The authority citation for part 774 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 8720; 10 U.S.C. 8730(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.;* 22 U.S.C. 6004; 42 U.S.C. 2139a; 15 U.S.C. 1824; 50 U.S.C. 4305; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783.

Supplement No. 5 to Part 774 [Amended]

■ 2. In Supplement No. 5 to part 774, amend the table, under the heading ''0D521. Software'' entry No 1, by revising the date in the third column to read: ''January 6, 2022''.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2020–28776 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2000–N–0011]

Uniform Compliance Date for Food Labeling Regulations

AGENCY: Food and Drug Administration, Department of Helath and Human Services (HHS).

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or we) is establishing January 1, 2024, as the uniform compliance date for food labeling regulations that are published on or after January 1, 2021, and on or before December 31, 2022. We periodically announce uniform compliance dates for new food labeling requirements to minimize the economic impact of labeling changes.

DATES: This rule is effective January 6, 2021. Submit either electronic or written comments on the final rule by March 8, 2021.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2000–N–0011 for ''Uniform Compliance Date for Food Labeling Regulations.'' Received comments, those filed in a timely manner, will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' We will review this copy, including the claimed confidential information, in our consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments, and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://*

www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Carrol Bascus, Center for Food Safety and Applied Nutrition (HFS–24), Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–3835.

SUPPLEMENTARY INFORMATION: We periodically issue regulations requiring changes in the labeling of food. If the compliance dates of these labeling changes were not coordinated, the cumulative economic impact on the food industry of having to respond separately to each change would be substantial. Therefore, we periodically have announced uniform compliance dates for new food labeling requirements (see *e.g.,* the **Federal Register** of October 19, 1984 (49 FR 41019); December 24, 1996 (61 FR 67710); December 27, 1996 (61 FR 68145); December 23, 1998 (63 FR 71015); November 20, 2000 (65 FR 69666); December 31, 2002 (67 FR 79851); December 21, 2006 (71 FR 76599); December 8, 2008 (73 FR 74349); December 15, 2010 (75 FR 78155); November 28, 2012 (77 FR 70885); December 10, 2014 (79 FR 73201); November 25, 2016 (81 FR 85156); and December 20, 2018 (83 FR 65294)). Use of a uniform compliance date provides for an orderly and economical industry adjustment to new labeling requirements by allowing sufficient lead time to plan for the use of existing label inventories and the development of new labeling materials.

We have determined under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

We have examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, Executive Order 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 13771 requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.'' We believe that this final rule is not a significant regulatory action as defined by Executive Order 12866.

The establishment of a uniform compliance date does not in itself lead to costs or benefits. We will assess the costs and benefits of the uniform compliance date in the regulatory impact analyses of the labeling rules that take effect at that date.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final rule does not impose compliance costs on small entities, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $156 million, using the most current (2019) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an expenditure in any year that meets or exceeds this amount.

We have analyzed this final rule in accordance with the principles set forth in Executive Order 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we have concluded that the rule does not contain policies that have federalism implications as defined in the Executive Order and, consequently, a federalism summary impact statement is not required.

This action is not intended to change existing requirements for compliance dates contained in final rules published before January 1, 2021. Therefore, all final rules published by FDA in the **Federal Register** before January 1, 2021, will still go into effect on the date stated in the respective final rule. We generally encourage industry to comply with new labeling regulations as quickly as feasible, however. Thus, when industry members voluntarily change their labels, it is appropriate that they incorporate any new requirements that have been published as final regulations up to that time.

In rulemaking that began with publication of a proposed rule on April 15, 1996 (61 FR 16422), and ended with a final rule on December 24, 1996 (61 FR 67710) (together ''the 1996 rulemaking''), we provided notice and an opportunity for comment on the practice of establishing uniform compliance dates by issuance of a final rule announcing the date. We received no comments objecting to this practice during the 1996 rulemaking, nor have we received comments objecting to this practice since we published a uniform compliance date final rule on December 20, 2018. Therefore, we find good cause to dispense with issuance of a proposed rule inviting comment on the practice of establishing the uniform compliance date because such prior notice and comment are unnecessary. Interested parties will have an opportunity to comment on the compliance date for each individual food labeling regulation as part of the rulemaking process for that regulation. Consequently, FDA finds any further advance notice and opportunity for comment unnecessary for establishment of the uniform compliance date. Nonetheless, under 21 CFR 10.40(e)(1), we are providing an opportunity for comment on whether the uniform compliance date established by this final rule should be modified or revoked.

In addition, we find good cause for this final rule to become effective on the date of publication of this action. A delayed effective date is unnecessary in this case because the establishment of a uniform compliance date does not impose any new regulatory requirements on affected parties. Instead, this final rule provides affected parties with notice of our policy to identify January 1, 2024, as the compliance date for final food labeling regulations that require changes in the labeling of food products and that publish on or after January 1, 2021, and on or before December 31, 2022, unless

special circumstances justify a different compliance date. Thus, affected parties do not need time to prepare before the rule takes effect. Therefore, we find good cause for this final rule to become effective on the date of publication of this action.

The new uniform compliance date will apply only to final FDA food labeling regulations that require changes in the labeling of food products and that publish on or after January 1, 2021, and on or before December 31, 2022. Those regulations will specifically identify January 1, 2024, as their compliance date. All food products subject to the January 1, 2024, compliance date must comply with the appropriate regulations when initially introduced into interstate commerce on or after January 1, 2024. If any food labeling regulation involves special circumstances that justify a compliance date other than January 1, 2024, we will determine for that regulation an appropriate compliance date, which will be specified when the final regulation is published.

Dated: December 29, 2020.

Stephen M. Hahn,

Commissioner of Food and Drugs.

Dated: December 30, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–29273 Filed 12–31–20; 4:15 pm]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9937]

RIN 1545–BP46

Rollover Rules for Qualified Plan Loan Offset Amounts

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document sets forth final regulations relating to amendments made to section 402(c) of the Internal Revenue Code (Code) by section 13613 of the Tax Cuts and Jobs Act (TCJA). Section 13613 of TCJA provides an extended rollover period for a qualified plan loan offset, which is a type of plan loan offset. These regulations affect participants, beneficiaries, sponsors, and administrators of qualified employer plans.

DATES:

Effective Date: These regulations are effective on January 6, 2021.

Applicability Date: For date of applicability, see § 1.402(c)–3(b)(2).

FOR FURTHER INFORMATION CONTACT: Naomi Lehr at (202) 317–4102, Vernon Carter at (202) 317–6799, or Pamela Kinard at (202) 317–6000 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document amends 26 CFR part 1, by adding § 1.402(c)–3 to the Income Tax Regulations to reflect changes to section 402(c) of the Code, as amended by section 13613 of TCJA (Pub. L. 115–97 (131 Stat. 2054)).

1. Plan Loans, Eligible Rollover Distributions, and Plan Loan Offset Amounts

Section 72(p)(1) of the Code provides that if, during any taxable year, a participant or beneficiary receives (directly or indirectly) any amount as a loan from a qualified employer plan (as defined in section 72(p)(4)(A)),[1] that amount shall be treated as having been received by the individual as a distribution from the plan. For certain plan loans, section 72(p)(2) provides an exception to the general treatment of loans as distributions under section 72(p)(1).

For the exception under section 72(p)(2) to apply so that a plan loan is not treated as a distribution under section 72(p)(1) for the taxable year in which the loan is received, the loan generally must satisfy three requirements:

(1) The loan, by its terms, must satisfy the limits on loan amounts, as described in section 72(p)(2)(A);

(2) The loan, by its terms, generally must be repayable within 5 years, as described in section 72(p)(2)(B); and

(3) The loan must require substantially level amortization over the term of the loan, as described in section 72(p)(2)(C).

Section 401(a)(31) requires that a plan qualified under section 401(a) provide for the direct transfer of eligible rollover distributions. A similar rule applies to section 403(a) annuity plans, section 403(b) tax-sheltered annuities, and section 457 eligible governmental plans. See generally sections 403(a)(1), 403(b)(10), and 457(d)(1)(C).

Sections 402(c)(3) and 408(d)(3) provide that any amount distributed from a qualified plan or individual retirement account or annuity (IRA) will be excluded from income if it is transferred to an eligible retirement plan no later than the 60th day following the day the distribution is received. A similar rule applies to section 403(a) annuity plans, section 403(b) tax-sheltered annuities, and section 457 eligible governmental plans. See generally sections 403(a)(4)(B), 403(b)(8)(B), and 457(e)(16)(B).

Sections 402(c)(3)(B) and 408(d)(3)(I) provide that the Secretary may waive the 60-day rollover requirement ''where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement.'' See generally Rev. Proc. 2020–46, 2020–45 I.R.B. 995, which sets forth a self-certification procedure that taxpayers may use in certain circumstances to claim a waiver of the 60-day deadline for completing a rollover under section 402(c)(3)(B) or 408(d)(3)(I), and Rev. Proc. 2020–4, 2020–1 I.R.B. 148, which sets forth procedures that taxpayers may use to request a waiver of the 60-day rollover deadline by submitting a request for a private letter ruling.[2]

Section 1.402(c)–2, Q&A–3(a), provides that, unless specifically excluded, an eligible rollover distribution means any distribution to an employee (or to a spousal distributee described in § 1.402(c)–2, Q&A–12(a)) of all or any portion of the balance to the credit of the employee in a qualified plan. Section 1.402(c)–2, Q&A–3(b), provides that certain distributions (for example, required minimum distributions under section 401(a)(9)) are not eligible rollover distributions.

Section 1.402(c)–2, Q&A–9(a), provides that a distribution of a plan loan offset amount (as defined in § 1.402(c)–2, Q&A–9(b)) is an eligible rollover distribution if it satisfies § 1.402(c)–2, Q&A–3. Thus, an amount not exceeding the plan loan offset amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan within the 60-day period described in section 402(c)(3), unless the plan loan offset amount fails to be an eligible rollover distribution for another reason.

Section 1.402(c)–2, Q&A–9(b), provides that a distribution of a plan loan offset amount is a distribution that occurs when, under the plan terms governing the loan, the employee's

[1] Under section 72(p)(4), a qualified employer plan means a qualified plan, a section 403(a) annuity plan, a section 403(b) plan, and any governmental plan.

[2] Note that the 60-day rollover deadline can also be extended to provide temporary relief during a disaster or an emergency response. For example, in response to the COVID–19 pandemic, Notice 2020–23, 2020–18 I.R.B. 742, extended the 60-day rollover deadline to July 15, 2020, for distributions made between April 1, 2020, and July 14, 2020.

accrued benefit is reduced (offset) in order to repay the loan. This may occur when, for example, the terms governing a plan loan require that, in the event of an employee's termination of employment or request for a distribution, the loan is to be repaid immediately or treated as in default. A plan loan offset may also occur when, under the terms of the plan loan, the loan is canceled, accelerated, or treated as if it is in default (for example, if the plan treats a loan as in default upon an employee's termination of employment or within a specified period thereafter). See also § 1.72(p)–1, Q&A–13(a)(2). Because a plan loan offset is an actual distribution for purposes of the Code, not a deemed distribution under section 72(p), a plan loan offset cannot occur prior to a distributable event. See generally § 1.72(p)–1, Q&A–13(b).

2. Qualified Plan Loan Offset Amounts

Section 13613 of TCJA amended section 402(c)(3) of the Code to provide an extended rollover deadline for qualified plan loan offset (QPLO) amounts (as defined in section 402(c)(3)(C)(ii)).[3] Any portion of a QPLO amount (up to the entire QPLO amount) may be rolled over to an eligible retirement plan by the individual's tax filing due date (including extensions) for the taxable year in which the offset occurs.

A QPLO amount is defined in section 402(c)(3)(C)(ii) as a plan loan offset amount that is treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of:

(1) The termination of the qualified employer plan, or

(2) The failure to meet the repayment terms of the loan from such plan because of the severance from employment of the employee.

In addition, section 402(c)(3)(C)(iv) provides that the extended rollover period will not apply ''to any plan loan offset amount unless such plan loan offset amount relates to a loan to which section 72(p)(1) does not apply by reason of section 72(p)(2).''

Section 301.9100–2(b) of the regulations provides rules for automatic six-month extensions to make regulatory or statutory elections. Under this rule, a taxpayer will receive an automatic extension of 6 months from the due date of a return, excluding extensions, to make elections that otherwise must be made by the due date of the return plus extensions, provided that:

(1) The taxpayer's return was timely filed for the year the election should have been made; and

(2) The taxpayer takes appropriate corrective action within the six-month period.

Section 301.9100–2(b) further provides that paragraph (b) does not apply to regulatory or statutory elections that must be made by the due date of the return excluding extensions.

Notice of Proposed Rulemaking

1. In General

On August 20, 2020, the Department of the Treasury (Treasury Department) and the IRS published a notice of proposed rulemaking (REG–116475–19) in the **Federal Register** (85 FR 51369) setting forth rules in new § 1.402(c)–3 for qualified plan loan offsets (QPLO proposed regulations). As described in the background of the preamble to the QPLO proposed regulations, the Treasury Department and IRS anticipate providing separate guidance with respect to Division O of the Further Consolidated Appropriations Act of 2020, Public Law 116–94 (133 Stat. 2534), titled ''Setting Every Community Up for Retirement Enhancement Act of 2019'' (SECURE Act). As part of that guidance, the Treasury Department and IRS anticipate amending § 1.402(c)–2 to reflect changes made by section 114 of the SECURE Act (relating to changes to section 401(a)(9) of the Code to the required beginning date applicable to section 401(a) plans and other eligible retirement plans described in section 402(c)(8)) and to add new level designations for each paragraph in the questions and answers to satisfy **Federal Register** requirements. It is anticipated that § 1.402(c)–3, which includes both the new QPLO rules and already existing plan loan offset rules in Q&A–9 of § 1.402(c)–2, will be combined with § 1.402(c)–2 in connection with that project (including replacing Q&A–9 of § 1.402(c)–2 with paragraph (a) of § 1.402(c)–3).

As an initial matter, the QPLO proposed regulations confirm that a QPLO is a type of plan loan offset; accordingly, most of the general rules relating to plan loan offset amounts apply to QPLO amounts. For example, the rule that a plan loan offset amount is an eligible rollover distribution applies to a QPLO amount. In addition, the rules in § 1.401(a)(31)–1, Q&A–16 (guidance concerning the offering of a direct rollover of a plan loan offset amount), and § 31.3405(c)–1, Q&A–11 (guidance concerning special withholding rules with respect to plan loan offset amounts), applicable to plan loan offset amounts in general, apply to QPLO amounts. The QPLO proposed regulations provide examples to illustrate the interaction of the special rules for QPLOs with the general rules for plan loan offsets.

2. Rollover Period for Plan Loan Offset Amounts, Including QPLO Amounts

Section 1.402(c)–3(a)(2)(ii)(A) of the QPLO proposed regulations provides that a distribution of a plan loan offset amount that is an eligible rollover distribution and *not* a QPLO amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan (as defined in section 402(c)(8)(B)) within the 60-day period set forth in section 402(c)(3)(A). While a plan loan offset generally is subject to this 60-day rollover period, there are special rules for the waiver of the 60-day rollover deadline.

Section 1.402(c)–3(a)(2)(ii)(B) of the QPLO proposed regulations provides that a distribution of a plan loan offset amount that is an eligible rollover distribution and a QPLO amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan through the period ending on the individual's tax filing due date (including extensions) for the taxable year in which the offset is treated as distributed from a qualified employer plan. Thus, a taxpayer with an eligible rollover distribution that is a QPLO amount may roll over any portion of the distribution to an eligible retirement plan, including another qualified retirement plan (if that plan permits) or an IRA, by the taxpayer's deadline for filing income taxes for the year of the distribution, including extensions.[4]

[3] In addition to TCJA, other statutory provisions may extend the period to roll over a plan loan offset. For example, section 2202(a) of the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, 134 Stat. 281 (2020) (CARES Act), permits an individual to receive from an eligible retirement plan up to $100,000 for a coronavirus-related distribution (which may include a plan loan offset that otherwise meets the requirements to be a coronavirus-related distribution). A qualified individual with a coronavirus-related distribution (which may be included in gross income ratably over the 3-year period beginning with the taxable year of the distribution) may recontribute up to the amount of the distribution to an applicable eligible retirement plan in which the individual is a beneficiary and to which a rollover can be made. For further information relating to the interaction of section 2202 of the CARES Act and plan loan offsets, see Notice 2020–50, 2020–28 I.R.B. 35.

[4] For a detailed discussion of the application of § 301.9100–2(b) (which provides rules for automatic six-month extensions to make regulatory or statutory elections) to the extended rollover period for QPLO amounts, see the preamble discussion in the Explanation of Provisions section of the QPLO proposed regulations, under the heading, *Rollover Period for Plan Loan Offset Amounts, Including QPLO Amounts.*

3. Definitions of Plan Loan Offset Amount, QPLO Amount, and Qualified Employer Plan

Section 1.402(c)–3(a)(2)(iii)(A) of the QPLO proposed regulations provides that a plan loan offset amount is the amount by which, under plan terms governing a plan loan, an employee's accrued benefit is reduced (offset) in order to repay the loan (including the enforcement of the plan's security interest in the employee's accrued benefit). A distribution of a plan loan offset amount is an actual distribution, not a deemed distribution under section 72(p).

Section 1.402(c)–3(a)(2)(iii)(B) of the QPLO proposed regulations defines a QPLO amount as a plan loan offset amount that satisfies two requirements. First, the plan loan offset amount must be treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of the termination of the qualified employer plan, or the failure to meet the repayment terms of the loan from such plan because of the severance from employment of the employee. Second, the plan loan offset amount must relate to a plan loan that met the requirements of section 72(p)(2) immediately prior to the termination of the qualified employer plan or the severance from employment of the employee, as applicable.

Section 1.402(c)–3(a)(2)(iii)(C) of the QPLO proposed regulations define a qualified employer plan, for purposes of the QPLO amount definition, as a qualified employer plan as defined in section 72(p)(4).

4. Special Rules for QPLO Determinations

Section 1.402(c)–3(a)(2)(iv) of the QPLO proposed regulations provides several special rules for purposes of determining whether a plan loan offset amount is a QPLO amount. First, the QPLO proposed regulations provide that whether an employee has a severance from employment with the employer that maintains the qualified employer plan is determined in the same manner as under § 1.401(k)–1(d)(2). Thus, an employee has a severance from employment when the employee ceases to be an employee of the employer maintaining the plan.

Second, the QPLO proposed regulations provide that a plan loan offset amount is treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of the failure to meet the plan loan repayment terms because of severance from employment if the plan loan offset:

(1) Relates to a failure to meet the repayment terms of the plan loan, and

(2) Occurs within the period beginning on the date of the employee's severance from employment and ending on the first anniversary of that date.

Whether a plan loan offset amount is a QPLO amount is relevant to plan administrators because those administrators are responsible for reporting whether a distribution is a plan loan offset amount or a QPLO amount on Form 1099–R, *Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.,* and furnishing that form to the taxpayer.[5] In the QPLO proposed regulations, the Treasury Department and the IRS indicated that the proposed 12-month rule would assist plan administrators in identifying QPLO amounts by providing a bright-line rule for determining whether a plan loan offset amount following a severance from employment satisfies the first requirement in § 1.402(c)–3(a)(2)(iii)(B) to be a QPLO amount.

The QPLO proposed regulations proposed to apply the subsequent final regulations to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after the date of publication of a Treasury decision adopting the proposed rules as final regulations. The preamble to the QPLO proposed regulations also stated that taxpayers (including a filer of a Form 1099–R) may rely on the proposed regulations with respect to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after August 20, 2020, and before the date the regulations are published as final regulations in the **Federal Register**.

The Treasury Department and the IRS received one written comment relating to the QPLO proposed regulations. No request for a public hearing was made, and no public hearing was held. After consideration of the comment, this Treasury decision adopts the QPLO proposed regulations with one important modification relating to the applicability date.

[5] The Instructions to the 2020 Form 1099–R provide that if an employee's accrued benefit is offset to repay a loan (a plan loan offset amount), the administrator should report the distribution as an actual distribution and not use Code L (for deemed distributions) in box 7. For a QPLO amount, the Instructions to the 2020 Form 1099–R provide that the administrator should enter Code M (for QPLO amounts) in box 7.

Summary of Comments and Explanation of Revisions

The commenter stated that the bright-line 12-month rule in the QPLO proposed regulations is a helpful approach in determining whether a plan loan offset amount is a QPLO amount, but expressed concern that recordkeepers may not currently have procedures to track a terminated employee's date of severance or the one-year anniversary of that date. To address this concern, the commenter recommended that the Treasury Department and the IRS (i) consider an alternative bright-line rule under which a plan loan offset amount is treated as satisfying the requirement in § 1.402(c)–3(a)(2)(iv)(B) if the plan loan offset occurs by the end of the year following the calendar year in which the employee has a severance from employment, and (ii) delay by one year the effective date of the final regulations (or, alternatively, provide for a one-year period of time during which a person responsible for reporting a QPLO amount on Form 1099–R will not be viewed as improperly reporting it, provided that a reasonable, good faith effort is made to determine if a plan loan offset is a QPLO).

With respect to the first recommendation, the Treasury Department and the IRS have considered the alternative bright-line rule suggested by the commenter, but have retained in the final regulations the 12-month rule in § 1.402(c)–3(a)(2)(iv)(B) of the QPLO proposed regulations. Although the 12-month rule is a bright-line rule that may assist plan administrators and recordkeepers in satisfying their reporting obligations, it is also an interpretation of a statutory requirement that should apply to all taxpayers in the same manner. The alternative rule recommended by the commenter could result in significantly different treatment of participants based solely on when during a calendar year each participant severs from employment. For example, Taxpayer A, who severs from employment on December 31, 2020, could experience a plan loan offset during a 366-day period following the severance and be treated as having a QPLO (and thus be eligible for the extended rollover rule), whereas Taxpayer B, who severs from employment one day later, on January 1, 2021, could experience a plan loan offset during a 729-day period and receive the same treatment.

With respect to the commenter's second recommendation to delay the effective date of the final regulations, the Treasury Department and the IRS

agree that additional time to implement § 1.402(c)–3 is appropriate. Accordingly, the applicability date in these final regulations is revised from the QPLO proposed regulations, which had proposed to apply the regulations to plan loan offset amounts treated as distributed on or after the date of publication of final regulations. Under the revised applicability date, the final regulations will apply to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after January 1, 2021. Thus, for example, the rules in § 1.402(c)–3 will first apply to 2021 Form 1099–Rs required to be filed and furnished in 2022 (more than one year after the date of publication of the final regulations). This delayed applicability date will give plan administrators and recordkeepers additional time to program systems and otherwise establish procedures for obtaining the exact date of severance from employment of a plan participant and tracking the one-year anniversary of that date.

The applicability date in these final regulations is also revised to provide that taxpayers (including a filer of a Form 1099–R) may apply these regulations with respect to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after August 20, 2020, which is the date of the publication of the QPLO proposed regulations.

Applicability Date

These regulations apply to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after January 1, 2021. Thus, for example, the rules in § 1.402(c)–3 will first apply to 2021 Form 1099–Rs required to be filed and furnished in 2022. However, taxpayers (including a filer of a Form 1099–R) may apply these regulations with respect to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after August 20, 2020.

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance published in the Internal Revenue Bulletin, please visit the IRS website at *https://www.irs.gov.*

Special Analyses

These regulations are 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.

In addition, it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6). This certification is based on the fact that the regulations reflect the statutory changes to section 402(c) made by section 13613 of TCJA. The regulations reflect the extended rollover period for QPLO amounts, as amended by TCJA. Specifically, the regulations reflect the statute in a manner that (i) is consistent with the statutory language, (ii) provides certain clarifications, and (iii) eases and facilitates plan administration. Although the regulations might affect a substantial number of individuals, the economic impact of the regulations is not expected to be significant. The regulations do not impose any new compliance burdens on taxpayers and are not expected to result in any economically meaningful changes in behavior.

Pursuant to section 7805(f), the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business, and no comments were received.

Drafting Information

The principal authors of these regulations are Naomi Lehr and Pamela R Kinard of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes), although other persons in the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

■ 2. Section 1.402(c)–3 is added to read as follows:

§ 1.402(c)–3 Eligible rollover distributions; Qualified plan loan offsets.

(a)(1) *Q–1.* What special rollover rules apply to a plan loan offset amount (including a qualified plan loan offset amount)?

(2) *A–1*—(i) *In general*—(A) *Eligible rollover distribution.* A distribution of a plan loan offset amount, as defined in paragraph (a)(2)(iii)(A) of this section (including a qualified plan loan offset amount, a type of plan loan offset amount defined in paragraph (a)(2)(iii)(B) of this section), is an eligible rollover distribution if it satisfies § 1.402(c)–2, Q&A–3 and 4.

(B) *Other rules relating to plan loan offset amounts.* See § 1.401(a)(31)–1, Q&A–16, for guidance concerning the offering of a direct rollover of a plan loan offset amount. See also § 31.3405(c)–1, Q&A–11, of this chapter for guidance concerning special withholding rules with respect to plan loan offset amounts.

(ii) *Rollover period for a plan loan offset amount*—(A) *Plan loan offset amount that is not a qualified plan loan offset amount.* A distribution of a plan loan offset amount that is an eligible rollover distribution and not a qualified plan loan offset amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan (as defined in § 1.402(c)–2, Q&A–2) within the 60-day period set forth in section 402(c)(3)(A).

(B) *Plan loan offset amount that is a qualified plan loan offset amount.* A distribution of a plan loan offset amount that is an eligible rollover distribution and that is a qualified plan loan offset amount may be rolled over by the employee (or spousal distributee) to an eligible retirement plan within the period set forth in section 402(c)(3)(C), which is the individual's tax filing due date (including extensions) for the taxable year in which the offset is treated as distributed from a qualified employer plan.

(iii) *Definitions*—(A) *Plan loan offset amount.* For purposes of section 402(c), a plan loan offset amount is the amount by which, under the plan terms governing a plan loan, an employee's accrued benefit is reduced (offset) in order to repay the loan (including the enforcement of the plan's security interest in an employee's accrued benefit). A distribution of a plan loan offset amount can occur in a variety of circumstances, for example, when the terms governing a plan loan require that, in the event of the employee's termination of employment or request for a distribution, the loan be repaid immediately or treated as in default. A distribution of a plan loan offset amount also occurs when, under the terms governing the plan loan, the loan is cancelled, accelerated, or treated as if it were in default (for example, when the plan treats a loan as in default upon an employee's termination of employment

or within a specified period thereafter). A distribution of a plan loan offset amount is an actual distribution, not a deemed distribution under section 72(p).

(B) *Qualified plan loan offset amount.* For purposes of section 402(c), a qualified plan loan offset amount is a plan loan offset amount that satisfies the following requirements:

(*1*) The plan loan offset amount is treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of the termination of the qualified employer plan, or the failure to meet the repayment terms of the loan because of the severance from employment of the employee; and

(*2*) The plan loan offset amount relates to a plan loan that met the requirements of section 72(p)(2) immediately prior to the termination of the qualified employer plan or the severance from employment of the employee, as applicable.

(C) *Qualified employer plan.* For purposes of section 402(c) and this section, a qualified employer plan is a qualified employer plan as defined in section 72(p)(4).

(iv) *Special rules for qualified plan loan offset amounts*—(A) *Definition of severance from employment.* For purposes of paragraph (a)(2)(iii)(B)(*1*) of this section, whether an employee has a severance from employment with the employer that maintains the qualified employer plan is determined in the same manner as under § 1.401(k)–1(d)(2). Thus, an employee has a severance from employment when the employee ceases to be an employee of the employer maintaining the plan.

(B) *Offset because of severance from employment.* A plan loan offset amount is treated as distributed from a qualified employer plan to an employee or beneficiary solely by reason of the failure to meet the repayment terms of a plan loan because of severance from employment of the employee if the plan loan offset:

(*1*) Relates to a failure to meet the repayment terms of the plan loan; and

(*2*) Occurs within the period beginning on the date of the employee's severance from employment and ending on the first anniversary of that date.

(v) *Examples.* The following examples illustrate the rules with respect to plan loan offset amounts, including qualified plan loan offset amounts, in this paragraph (a) and in §§ 1.401(a)(31)–1, Q&A–16, and 31.3405(c)–1, Q&A–11, of this chapter. For purposes of the examples in this paragraph (a)(2)(v), each reference to a plan refers to a qualified employer plan as described in section 72(p)(4).

(A) *Example 1.* (*1*) In 2020, Employee A has an account balance of $10,000 in Plan Y, of which $3,000 is invested in a plan loan to Employee A that is secured by Employee A's account balance in Plan Y. Employee A has made no after-tax employee contributions to Plan Y. The plan loan meets the requirements of section 72(p)(2). Plan Y does not provide any direct rollover option with respect to plan loans. Employee A severs from employment on June 15, 2020. After severance from employment, Plan Y accelerates the plan loan and provides Employee A 90 days to repay the remaining balance of the plan loan. Employee A, who is under the age set forth in section 401(a)(9)(C)(i)(II), does not repay the loan within the 90 days and instead elects a direct rollover of Employee A's entire account balance in Plan Y. On September 18, 2020 (within the 12-month period beginning on the date that Employee A severed from employment), Employee A's outstanding loan is offset against the account balance.

(*2*) In order to satisfy section 401(a)(31), Plan Y must make a direct rollover by paying $7,000 directly to the eligible retirement plan chosen by Employee A. When Employee A's account balance was offset by the amount of the $3,000 unpaid loan balance, Employee A received a plan loan offset amount (equivalent to $3,000) that is an eligible rollover distribution. However, under § 1.401(a)(31)–1, Q&A–16, Plan Y satisfies section 401(a)(31), even though a direct rollover option was not provided with respect to the $3,000 plan loan offset amount.

(*3*) No withholding is required under section 3405(c) on account of the distribution of the $3,000 plan loan offset amount because no cash or other property (other than the plan loan offset amount) is received by Employee A from which to satisfy the withholding.

(*4*) The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (a)(2)(iii)(B) of this section. Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset amount to an eligible retirement plan within the period that ends on the employee's tax filing due date (including extensions) for the taxable year in which the offset occurs.

(B) *Example 2.* (*1*) The facts are the same as in paragraph (a)(2)(v)(A) of this section (*Example 1*), except that, rather than accelerating the plan loan, Plan Y permits Employee A to continue making loan installment payments after severance from employment. Employee A continues making loan installment payments until January 1, 2021, at which time Employee A does not make the loan installment payment due on January 1, 2021. In accordance with § 1.72(p)–1, Q&A–10, Plan Y allows a cure period that continues until the last day of the calendar quarter following the quarter in which the required installment payment was due. Employee A does not make a plan loan installment payment during the cure period. Plan Y offsets the unpaid $3,000 loan balance against Employee A's account balance on July 1, 2021 (which is after the 12-month period beginning on the date that Employee A severed from employment).

(*2*) The conclusion is the same as in paragraph (a)(2)(v)(A) of this section (*Example 1*), except that the $3,000 plan loan offset amount is not a qualified plan loan offset amount (because the offset did not occur within the 12-month period beginning on the date that Employee A severed from employment). Accordingly, Employee A may roll over up to the $3,000 plan loan offset amount to an eligible retirement plan within the 60-day period provided in section 402(c)(3)(A) (rather than within the period that ends on Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs).

(C) *Example 3.* (*1*) The facts are the same as in paragraph (a)(2)(v)(A) of this section (*Example 1*), except that the terms governing the plan loan to Employee A provide that, upon severance from employment, Employee A's account balance is automatically offset by the amount of any unpaid loan balance to repay the loan. Employee A severs from employment but does not request a distribution from Plan Y. Nevertheless, pursuant to the terms governing the plan loan, Employee A's account balance is automatically offset on June 15, 2020, by the amount of the $3,000 unpaid loan balance.

(*2*) The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (a)(2)(iii)(B) of this section. Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset amount to an eligible retirement plan within the period that ends on Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs.

(D) *Example 4.* (*1*) The facts are the same as in paragraph (a)(2)(v)(A) of this section (*Example 1*), except that Employee A elects to receive a cash distribution of the account balance that remains after the $3,000 plan loan offset

amount, instead of electing a direct rollover of the remaining account balance.

(*2*) The amount of the distribution received by Employee A is $10,000 ($3,000 relating to the plan loan offset and $7,000 relating to the cash distribution). Because the amount of the $3,000 plan loan offset amount attributable to the loan is included in determining the amount of the eligible rollover distribution to which withholding applies, withholding in the amount of $2,000 (20 percent of $10,000) is required under section 3405(c). The $2,000 is required to be withheld from the $7,000 to be distributed to Employee A in cash, so that Employee A actually receives a cash amount of $5,000.

(*3*) The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (a)(2)(iii)(B) of this section. Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset to an eligible retirement plan within the period that ends on the Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs. In addition, Employee A may roll over up to $7,000 (the portion of the distribution that is not related to the offset) within the 60-day period provided in section 402(c)(3).

(E) *Example 5.* (*1*) The facts are the same as in paragraph (a)(2)(v)(D) of this section (*Example 4*), except that the $7,000 distribution to Employee A after the offset consists solely of employer securities within the meaning of section 402(e)(4)(E).

(*2*) No withholding is required under section 3405(c) because the distribution consists solely of the $3,000 plan loan offset amount and the $7,000 distribution of employer securities. This is the result because the total amount required to be withheld does not exceed the sum of the cash and the fair market value of other property distributed, excluding plan loan offset amounts and employer securities.

(*3*) Employee A may roll over up to the $7,000 of employer securities to an eligible retirement plan within the 60-day period provided in section 402(c)(3). The $3,000 plan loan offset amount is a qualified plan loan offset amount within the meaning of paragraph (a)(2)(iii)(B) of this section. Accordingly, Employee A may roll over up to the $3,000 qualified plan loan offset amount to an eligible retirement plan within the period that ends on Employee A's tax filing due date (including extensions) for the taxable year in which the offset occurs.

(F) *Example 6.* (*1*) Employee B, who is age 40, has an account balance in Plan Z. Plan Z provides for no after-tax employee contributions. In 2022, Employee B receives a loan from Plan Z, the terms of which satisfy section 72(p)(2), and which is secured by elective contributions subject to the distribution restrictions in section 401(k)(2)(B).

(*2*) Employee B fails to make an installment payment due on April 1, 2023, or any other monthly payments thereafter. In accordance with § 1.72(p)–1, Q&A–10, Plan Z allows a cure period that continues until the last day of the calendar quarter following the quarter in which the required installment payment was due (September 30, 2023). Employee B does not make a plan loan installment payment during the cure period. On September 30, 2023, pursuant to section 72(p)(1), Employee B is taxed on a deemed distribution equal to the amount of the unpaid loan balance. Pursuant to § 1.402(c)–2, Q&A–4(d), the deemed distribution is not an eligible rollover distribution.

(*3*) Because Employee B has not severed from employment or experienced any other event that permits the distribution under section 401(k)(2)(B) of the elective contributions that secure the loan, Plan Z is prohibited from executing on the loan. Accordingly, Employee B's account balance is not offset by the amount of the unpaid loan balance at the time of the deemed distribution. Thus, there is no distribution of an offset amount that is an eligible rollover distribution on September 30, 2023.

(G) *Example 7.* (*1*) The facts are the same as in in paragraph (a)(2)(v)(F) of this section (*Example 6*), except that Employee B has a severance from employment on November 1, 2023. On that date, Employee B's unpaid loan balance is offset against the account balance on distribution.

(*2*) The plan loan offset amount is not a qualified plan loan offset amount. Although the offset occurred within 12 months after Employee B severed from employment, the plan loan does not meet the requirement in paragraph (a)(2)(iii)(B) of this section (that the plan loan meet the requirements of section 72(p)(2) immediately prior to Employee B's severance from employment). Instead, the loan was taxable on September 30, 2023 (prior to Employee B's severance from employment on November 1, 2023), because of the failure to meet the level amortization requirement in section 72(p)(2)(C). Accordingly, Employee B may roll over the plan loan offset amount to an eligible retirement plan within the 60-day period provided in section 402(c)(3)(A) (rather than within the period that ends on Employee B's tax filing due date (including extensions) for the taxable year in which the offset occurs).

(b)(1) *Q–2.* When are the rules in this section applicable to plan loan offset amounts, including qualified plan loan offset amounts?

(2) *A–2.* The rules provided in paragraph (a) of this section are applicable to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after January 1, 2021. However, taxpayers (including a filer of a Form 1099–R) may choose to apply the regulations in this section with respect to plan loan offset amounts, including qualified plan loan offset amounts, treated as distributed on or after August 20, 2020.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: December 1, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2020–27151 Filed 1–5–21; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 30

[EPA–HQ–OA–2018–0259; FRL–10019–07–ORD]

RIN 2080–AA14

Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action establishes how the Environmental Protection Agency (EPA) will consider the availability of dose-response data underlying pivotal science used in its significant regulatory actions and influential scientific information. When promulgating significant regulatory actions or developing influential scientific information for which the conclusions are driven by the quantitative relationship between the amount of dose or exposure to a pollutant, contaminant, or substance and an effect, the EPA will give greater consideration to studies where the underlying dose-

response data are available in a manner sufficient for independent validation. This action also requires the EPA to identify and make publicly available the science that serves as the basis for informing a significant regulatory action at the proposed or draft stage to the extent practicable; reinforces the applicability of peer review requirements for pivotal science; and provides criteria for the Administrator to exempt certain studies from the requirements of this rulemaking.

DATES: This final rule is effective on January 6, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OA–2018–0259. All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information (CBI) information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form in the EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal Holidays). Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Bennett Thompson, Office of Science Advisor, Policy and Engagement (8104R), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 564–1071; email address: *osp_staff@epa.gov.*

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I. General Information

A. Does this action apply to me?

This final rule does not regulate any entity outside the EPA. Rather, the requirements modify the EPA's internal procedures regarding the transparency of pivotal science underlying significant regulatory actions [1] and influential scientific information. However, the Agency recognizes that any entity interested in the EPA's regulations may be interested in this final rule. For example, this final rule may be of interest to entities that conduct research or another scientific activity that is likely to be relevant to the EPA's regulatory activity or development of influential scientific information. This rule has no retrospective effect on either final significant regulatory actions or influential scientific information.

B. What action is the Agency taking?

The EPA is issuing this final rule to help strengthen the transparency of the dose-response data underlying certain EPA actions and to set the overarching structure and principles for transparency of pivotal science in significant regulatory actions and influential scientific information. This rule has a much narrower scope than the 2018 proposed rule (Ref. 5) and the 2020 supplemental notice of proposed rulemaking (Ref. 7). The rule describes how the EPA will determine the consideration to afford pivotal science of the EPA's significant regulatory actions and influential scientific information for which the conclusions are driven by the quantitative relationship between the amount of dose or exposure to a pollutant, contaminant, or substance and an effect based on the availability of the underlying dose-response data and other applicable factors. This rule builds upon prior EPA actions in response to Government-wide data access and sharing policies.

First, the EPA is requiring that, when promulgating significant regulatory actions or developing influential scientific information, the Agency will determine which studies constitute pivotal science and give greater consideration to those studies determined to be pivotal science for which the underlying dose-response data are available in a manner sufficient for independent validation.

Second, the EPA is establishing provisions for how the requirements of this part will apply. This rule sets the overarching structure and principles for transparency of pivotal science in significant regulatory actions and influential scientific information. The final rule provides that if implementing the rule results in any conflict between this rule and the environmental statutes that the EPA administers, and their implementing regulations, this rule will yield and the statutes and regulations will be controlling.

Third, this rule requires that the EPA shall clearly identify all science that serves as the basis for informing a significant regulatory action. The EPA shall make all such science that serves as the basis for informing a significant

[1] Consistent with OMB guidance, this rule would not apply to the following regulatory actions: Individual party adjudications, enforcement activities, site-specific actions, or permit proceedings.

regulatory action publicly available to the extent practicable using standards for protecting identifiable information.

Fourth, the EPA is establishing requirements for the independent peer review of pivotal science.

Fifth, the EPA is finalizing a provision that provides criteria for the Administrator to consider when granting case-by-case exemptions to the requirements of this rule.

The EPA is also defining the following terms for the purposes of this rule: ''data,'' ''dose-response data,'' ''independent validation,'' ''influential scientific information,'' ''pivotal science,'' ''publicly available,'' ''reanalyze,'' ''science that serves as the basis for informing a significant regulatory action,'' and ''significant regulatory actions.''

Finally, the EPA intends to issue implementation guidelines that will help execute this final rule consistently across programs. This may include the process for designating key studies as pivotal science, documenting the availability of dose-response data, and requesting an Administrator's exemption.

C. What is the Agency's authority for taking this action?

The EPA is authorized to issue this rule under its authority to promulgate housekeeping regulations governing its internal affairs (hereinafter, ''housekeeping authority''). This final rule describes how the EPA will determine the consideration to afford pivotal science of the EPA's final significant regulatory actions and influential scientific information based on the availability of the underlying dose-response data and other applicable factors. This rule exclusively pertains to the internal practices of the EPA and does not regulate the conduct or determine the rights or obligations of any entity outside the Federal Government.

The Federal Housekeeping Statute (5 U.S.C. 301) provides that ''[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.'' As the Supreme Court discussed in *Chrysler Corp.* v. *Brown,* the intended purpose of section 301 was to grant early Executive departments the authority ''to govern internal departmental affairs.'' [2] As the Supreme Court further explained, section 301 authorizes ''what the [Administrative Procedure Act] terms 'rules of agency organization, procedure or practice' as opposed to substantive rules.'' [3]

While the EPA is not one of the ''Executive departments'' referred to in 5 U.S.C. 101, the EPA gained housekeeping authority equivalent to that granted to Executive departments in section 301 through the Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (July 9, 1970), which created the EPA. The Reorganization Plan established the Administrator as ''head of the agency,'' transferred functions and authorities of various agencies and Executive departments to the EPA, and gave the EPA the authority to promulgate regulations to carry out the transferred functions.

Section 2(a)(1)–(8) of the Reorganization Plan transferred to the EPA functions previously vested in several agencies and Executive departments including the Departments of the Interior and Agriculture. Section 2(a)(9) also transferred so much of the functions of the transferor officers and agencies ''as is incidental to or necessary for the performance by or under the Administrator of the functions transferred'' and provided that ''[t]he transfers to the Administrator made by this section shall be deemed to include the transfer of [ ] authority, provided by law, to prescribe regulations relating primarily to the transferred functions.'' The Federal Housekeeping Statute was existing law at the time the Reorganization Plan was enacted. Further, the Reorganization Plan does not limit the authority to promulgate regulations only to the transferred functions, but rather it transfers all authority that ''relate[s]'' to the transferred functions. Housekeeping authority is ancillary to the transferred functions because it allows the EPA to establish standard, internal procedures that are necessary to carry out and support those functions. Accordingly, the concomitant Federal housekeeping authority to issue procedural rules was transferred to the EPA.

The Office of Legal Counsel has opined that the Reorganization Plan ''convey[s] to the [EPA] Administrator all of the housekeeping authority available to other department heads under section 301'' and demonstrates that ''Congress has vested the Administrator with the authority to run EPA, to exercise its functions, and to issue regulations incidental to the performance of those functions.'' [4]

Courts have recognized the EPA as an agency with Federal housekeeping authority. The U.S. Court of Appeals for the Second Circuit, in *EPA* v. *General Elec. Co.,* 197 F.3d 592, 595 (2nd Cir. 1999), found that ''the Federal Housekeeping Statute, 5 U.S.C. 301, authorizes government agencies such as the EPA to adopt regulations regarding 'the custody, use, and preservation of [agency] records, papers, and property.' '' The U.S. Court of Appeals for the Fourth Circuit, in *Boron Oil Co.* v. *Downie,* 873 F.2d 67, 69 (4th Cir. 1989), held that the district court had exceeded its jurisdiction when it had compelled testimony contrary to duly promulgated EPA regulations, which the EPA argued were authorized by section 301. The Second and Fourth Circuits did not directly address whether the EPA was an ''Executive department,'' but rather recognized that the EPA has the authority to issue regulations governing its internal affairs and assumed that authority comes from section 301. Indeed, if the EPA did not possess housekeeping authority, the EPA would not be able to efficiently carry out its daily functions, which would in turn compromise the EPA's ability to exercise its duties as a Federal regulatory agency.

On April 30, 2018, the EPA published the Strengthening Transparency in Regulatory Science Proposed Rulemaking (''2018 proposed rule,'' Ref. 5). The 2018 proposed rule cites as authority several environmental statutes that the EPA administers: The Clean Air Act (CAA); the Clean Water Act (CWA); the Safe Drinking Water Act (SDWA); the Resource Conservation and Recovery Act (RCRA); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Emergency Planning and Community Right-To-Know Act (EPCRA); and the Toxic Substances Control Act (TSCA). Subsequently, on May 25, 2018, the EPA published a document extending the comment period and announced a public hearing on the 2018 proposed rule to be held on July 18, 2018 (Ref. 6). That document identified 5 U.S.C. 301 as a source of authority in addition to those statutes cited in the 2018 proposed rule.

On March 18, 2020, in the **Federal Register** at 85 FR 15396, the EPA

[2] *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 309 (1979).

[3] *Id.* at 310.

[4] Authority of EPA to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property, 32 O.L.C. 79, 2008 WL 4422366 at *4 (May 28, 2008) (''OLC Opinion'').

published the Strengthening Transparency in Regulatory Science Supplemental Notice of Proposed Rulemaking (''2020 SNPRM,'' Ref. 7), in which the EPA clarified some of the citations in the 2018 proposed rule (Ref. 5). However, because this is purely a procedural rule, the EPA is not relying on any substantive environmental statutes as authority.

This action is a procedural rule within the scope of the EPA's housekeeping authority. As the Supreme Court explained in *Chrysler Corp.,* rules of internal agency management are considered procedural rules as opposed to substantive rules under the APA.[5] Even if there could be downstream practical effects on the voluntary behavior of outside parties and on outside parties' interactions with the EPA, such impacts do not render this procedural rule substantive. (See *American Hosp. Ass'n* v. *Bowen,* 834 F.2d 1037, 1051 (D.C. Cir. 1987)—''[A]gency rules that impose 'derivative,' 'incidental,' or 'mechanical' burdens upon regulated individuals are considered procedural, rather than substantive.''). As the Supreme Court explained in *Chrysler Corp.,* ''the central distinction among agency regulations found in the APA is that between 'substantive rules' on the one hand and 'interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice on the other.' ''[6] The Supreme Court further clarified that unlike procedural rules, substantive rules have legal force and effect on individual rights and obligations, and noted that whether a rule affects individual rights and obligations is an ''important touchstone'' for distinguishing substantive rules from other types of rules.[7] This final rule does not regulate the rights and obligations of any party outside of the EPA let alone have legal force and effect on them. Any incidental impacts on voluntary behavior outside of the EPA do not render this a substantive rule.

Some public commenters asserted that the EPA lacks the authority under the substantive environmental statutes that it administers to promulgate this rule. However, the EPA is relying exclusively on its housekeeping authority to promulgate this purely procedural rule. In this final procedural rule, the EPA does not interpret or apply provisions of a particular statute or statutes that it administers. The EPA will undertake such efforts in forthcoming actions, which will be either statute-specific science transparency regulations or programmatic regulations implementing this procedural rule. Some of these subsequent actions will be substantive rules issued under the associated environmental statutes and will be subject to judicial review. In this action, the EPA is finalizing a rule of internal agency procedures, including how the Agency will consider the availability of dose-response data underlying pivotal science used in its significant regulatory actions and influential scientific information for independent validation.

Some public commenters nonetheless took the position that this rule is substantive because it will affect the Agency's interactions with regulated parties. First, and as discussed above, this final rule does not regulate any party outside of the EPA but rather exclusively governs the EPA's internal process for determining the consideration to afford pivotal science with respect to certain actions. This rule does not require any researcher or other outside entity to provide data or models to the EPA. Nor does the rule categorically exclude studies—even studies where the underlying dose-response data are not available for independent validation—and therefore any incidental impact on researchers who are developing science and deciding whether to make the underlying dose-response data available is negligible. Instead, it governs internal agency procedures for determining the consideration to afford various studies according to factors that include data availability. In doing so, the final rule provides greater transparency on the consideration the EPA will give pivotal science where the underlying dose-response data are or are not available for independent validation.

Certain commenters stated that the final rule is substantive because they asserted it imposes burdens on scientists who endeavor to have their research considered by the EPA when it makes regulatory decisions or develops influential scientific information. The EPA notes, however, that procedural rules do not alter the rights or interests of parties but they ''may alter the manner in which the parties present themselves or their viewpoints to the agency,'' without thereby becoming substantive rules (*James A. Hurson Assocs.* v. *Glickman,* 229 F.3d 277, 280 (D.C. Cir. 2000)). If researchers want to increase the likelihood that their studies receive greater consideration by the EPA, they may take steps to ensure that the underlying dose-response data are available to the greatest extent possible. But any such response to this final rule would be purely voluntary. It is not required by this rule.

Some commenters also argued that this rule is not procedural because they asserted it conflicts with the substantive environmental statutes administered by the EPA. However, this final rule does not interpret or apply the provisions of any environmental statutes; such efforts will occur in the subsequent actions under the relevant statutes described above. As this rule makes clear, if implementing this procedural rule would result in conflicts with existing environmental statutes, and their implementing regulations, this rule will yield to the EPA statutes and regulations.

This is a rulemaking of agency organization, procedure, or practice. This procedural rule would not regulate any person or entity outside the EPA and would not affect the rights or obligations of outside parties. As a rule of Agency procedure, this rule is exempt from the notice-and-comment and delayed effective-date requirements set forth in the Administrative Procedure Act. See 5 U.S.C. 553(a)(2), (b)(A), (d). Nonetheless, the Agency voluntarily sought public comment on the proposed rule because it believed that the information and opinions supplied by the public would inform the Agency's views. *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 524 (1978) (''Agencies are free to grant additional procedural rights in the exercise of their discretion.'') In addition, even assuming arguendo that the delayed effective-date requirement of the Act applied to this action, the EPA has determined that there would be good cause, consistent with 5 U.S.C. 553(d)(3), for making this final rule effective immediately because immediate implementation of the rule, with its goals of ensuring transparency and consistency in how the agency considers dose-response data underlying pivotal science to be used in significant regulatory decisions and influential scientific information, is crucial for ensuring confidence in EPA decision-making. Because this is a procedural rule that only applies internally to ensure that the EPA consistently considers data availability, the rationale for delayed effectiveness to allow reasonable time for non-EPA regulated entities to adjust their behavior before and prepare for the effective date of the new requirements does not apply. See *Omnipoint Corp.* v. *Fed. Commc'n Comm'n,* 78 F.3d 620, 630 (D.C. Cir. 1996); see also *United States* v. *Gavrilovic,* 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). For these reasons, the Agency

[5] *Chrysler Corp.,* 441 U.S. 281 at 301–02.

[6] *Id.* at 301 (quoting 5 U.S.C. 553(b), (d)).

[7] *Id.* at 302.

finds that good cause exists under APA section 553(d)(3) to make this rule effective immediately upon publication.

II. Background

A. Summary of 2018 Proposed Rule

In the 2018 proposed rule (Ref. 5), the EPA proposed adding 40 CFR part 30, which would direct the EPA to ensure that the pivotal regulatory science underlying its actions is publicly available in a manner sufficient for independent validation. The EPA proposed to take this action under the authority of the statutes it administers, including provisions providing general authority to promulgate regulations necessary to carry out the Agency's functions under these statutes and provisions specifically addressing the Agency's conduct of and reliance on scientific activity to inform those functions.

In the 2018 proposed rule, the EPA defined ''dose-response data and models,'' ''pivotal regulatory science,'' ''regulatory decisions,'' ''regulatory science,'' and ''research data'' (proposed 40 CFR 30.2).

Many of the provisions in proposed 40 CFR part 30 applied to dose-response models and data, regardless of the source of funding or identity of the party who developed the model or generated the data. Specifically, the EPA proposed that the Agency would ensure that dose-response data and models underlying pivotal regulatory science were publicly available in a manner sufficient for independent validation, including releasing information necessary for the public to ''understand, assess, and replicate findings'' (proposed 40 CFR 30.5). The public release of such information would be consistent with law; protect privacy, confidentiality, and confidential business information (CBI); and be sensitive to national security interests.

In addition to proposing requirements for ensuring that dose-response data and models were publicly available in a manner sufficient for independent validation, the EPA proposed additional requirements pertaining to the use of dose-response data and models underlying pivotal regulatory science. Proposed 40 CFR 30.6 would have required the EPA to: Describe and document any assumptions and methods used; clearly explain the scientific basis for each model assumption used and present analyses showing the sensitivity of the modeled results to alternative assumptions; evaluate the appropriateness of using default assumptions (*e.g.,* assumptions of a linear, no-threshold dose-response) on a case-by-case basis; and when available, give explicit consideration to high-quality studies that explore: A broad class of parametric dose-response or concentration-response models, a robust set of potential confounding variables, nonparametric models that incorporate fewer assumptions, the use of various threshold models across the dose or exposure range, and models that investigate factors that might account for spatial heterogeneity.

The 2018 proposed rule also included requirements that pertained more broadly to the use of studies in Agency actions and pivotal regulatory science. Proposed 40 CFR 30.4 would have required the EPA to clearly identify all studies relied upon when taking any final Agency action and make all such studies available to the public to the extent practicable. Proposed 40 CFR 30.7 would have required the EPA to conduct independent peer review of all pivotal regulatory science used to justify regulatory decisions. As part of the peer review, the EPA would have been required to ask peer reviewers to articulate the strengths and weaknesses of the Agency's justification for the assumptions applied and the implications of those assumptions for the results.

Finally, the 2018 proposed rule would have allowed for the EPA Administrator to grant exemptions to the requirements of the rule when the Administrator determined that compliance would be impracticable because it was not feasible to either (1) ensure that all dose-response data and models underlying pivotal regulatory science were publicly available in a manner sufficient for independent validation, in a fashion consistent with law; protective of privacy, confidentiality, and CBI; and sensitive to national security interests; or (2) conduct independent peer review on all pivotal regulatory science used to justify regulatory decisions for reasons outlined in Section IX of the OMB Bulletin for Peer Review (Ref. 8).

The EPA solicited comment on the 2018 proposed rule generally and on specific provisions in the proposal, including the legal authority for the proposed rule, the scope of the proposal, public access to dose-response data and models, and how the proposed rule should be implemented.

B. Summary of 2020 Supplemental Notice of Proposed Rulemaking

The 2020 SNPRM (Ref. 7) included clarifications, modifications, and additions to certain provisions in the 2018 proposed rule. The 2020 SNPRM also revised the authority cited in proposed 40 CFR part 30; revised proposed 40 CFR 30.2, 30.3, 30.5, 30.6, 30.7, and 30.9; and deleted proposed 40 CFR 30.10.

Through the 2020 SNPRM, the EPA modified proposed 40 CFR part 30 to expand the scope of the 2018 proposed rule, clarified the intent of the 2018 proposed rule, and solicited public comment on two proposed approaches for how the Agency would consider data and model availability when evaluating studies. The 2020 SNPRM modified the scope of the 2018 proposed rule in two ways: (1) Expanded ''dose-response data and models'' to ''data and models,'' and (2) expanded the applicability of the proposed requirements to influential scientific information, which was defined in the 2020 SNPRM as the ''scientific information the Agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions,'' consistent with the definition of ''influential scientific information'' provided in the OMB Final Information Quality Bulletin for Peer Review (Ref. 8). As a result of the 2020 SNPRM, the provisions in proposed 40 CFR part 30 would have applied to data and models, regardless of the source of funding or identity of the party who developed the model or generated the data, underlying pivotal science or pivotal regulatory science. The EPA modified proposed 40 CFR 30.2, 30.3, 30.6, and 30.9 to reflect this change in scope of the proposed rulemaking.

With the expanded scope, the EPA proposed that data and models underlying pivotal regulatory science and pivotal science be available in a manner sufficient for independent validation. To clarify its intent, in the 2020 SNPRM the EPA modified and added proposed definitions for key terminology, including ''data,'' ''model,'' ''publicly available,'' and ''independent validation.'' Specifically, the EPA clarified that ''independent validation'' of data and models, as proposed, meant the ''reanalysis of study data by subject matter experts who have not contributed to the development of the study to demonstrate that the same analytic results reported in the study are capable of being substantially reproduced'' (2020 SNPRM proposed 40 CFR 30.2). In the 2020 SNPRM, the EPA also proposed definitions for ''reanalyze'' and ''capable of being substantially reproduced'' to further clarify the intent of the rulemaking.

In proposed 40 CFR 30.5, the EPA solicited public comment on two approaches for how the Agency would consider data and model availability

when evaluating studies underlying pivotal regulatory science and pivotal science. Under the first approach, the Agency would have only used pivotal regulatory science or pivotal science where the underlying data and models were either publicly available for independent validation or, in the case of restricted data and models (*e.g.,* those that include CBI, proprietary data, or personally identifiable information (PII) that cannot be sufficiently de-identified to protect the data subjects), available through restricted access in a manner sufficient for independent validation. Under the second approach, the EPA would have, other things equal, given greater consideration to studies where the underlying data and models were either publicly available in a manner sufficient for independent validation or, in the case of restricted data and models, available through restricted access in a manner sufficient for independent validation. Proposed 40 CFR 30.9 would have allowed the EPA Administrator to grant an exemption to the requirements in proposed 40 CFR part 30 if the Administrator determined that compliance was impracticable because technological barriers rendered sharing of the data or models infeasible; the development of the data or model was completed or updated before the effective date of this final rule; or by making the data and models publicly available, it would have conflicted with laws governing privacy, confidentiality, CBI, or national security interests.

Finally, the EPA clarified in the 2020 SNPRM that it is authorized to promulgate this rulemaking under its housekeeping authority and revised the authority cited in proposed 40 CFR part 30 accordingly. The Agency solicited public comment on whether to use its housekeeping authority independently or in conjunction with the environmental statutory provisions cited as authority in the 2018 proposed rule, which were further clarified in the 2020 SNPRM.

III. Description of Final Rule and Responses to Significant Comments

A. Purpose and Effect of the Action

1. *Purpose.* The EPA is committed to its mission of protecting human health and the environment through sound policy decisions that are informed by robust scientific and technical research. Because of the potential impact of the EPA's significant regulatory actions and influential scientific information on American lives and livelihoods, the American people deserve environmental decisions and policies that are based on the best scientific information. Only through continuous improvement to its procedures, especially those focused on transparency, can the EPA fully demonstrate that commitment.

The purpose of this action is to increase transparency by codifying internal procedural requirements for how the EPA will consider the availability of the underlying dose-response data that it relies upon to promulgate significant regulatory actions and develop influential scientific information. These requirements build upon open data initiatives in the Federal Government and scientific community and advance the EPA's mission and commitment to the public by prioritizing transparency of the underlying dose-response data in pivotal science for the most impactful of EPA's assessments and regulatory actions. Where underlying dose-response data in pivotal science are available, subject matter experts could independently reanalyze the data to affirm original research conclusions, check for errors, test alternative assumptions, and better understand and evaluate the implications of the uncertainty used in the original analysis. Such independent reanalyses will subsequently enable the EPA to make stronger, data-driven decisions in future rulemakings or in revisions to existing rules or influential scientific information. This could occur through standard cyclical reviews (*e.g.,* revisions to national ambient air quality standards, risk and technology reviews, national primary drinking water regulations), ad hoc revisions, or revisions through the information quality guidelines or other petition processes. Implementation of this rule will more effectively share pivotal science for external consideration and increase the opportunity for independent validation of pivotal science by subject matter experts. As data are better understood through independent reanalysis, the public will, if they so choose, be able to more effectively comment, engage, and hold the EPA accountable during the development of future significant regulatory actions and influential scientific information.

The transparency provisions in this final rule are intended to build upon existing Federal Government efforts and provide incremental progress toward the Agency's goal of greater transparency. The EPA and the Federal Government have long encouraged open data initiatives, as the principle of transparency in regulatory decision-making and the other operations of government agencies is a fundamental behavior of good government that is inherently valuable to the public. For example, in 2002 the Office of Management and Budget (OMB) released its *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies,* which includes discussion of the importance of the reproducibility of analyses underlying influential information (Ref. 3). The EPA's 2016 *Plan to Increase Access to Results of EPA-Funded Scientific Research* noted that ''transparency is a core EPA value'' and that increased availability of research data would accelerate scientific breakthroughs that support the Agency's mission and policymaking efforts (Ref. 9). The EPA's *Open Government Plan 5.0* (Ref. 10) also details the EPA's progress in implementing the tenets of the numerous data transparency initiatives in the Federal Government prior to 2018, including the Office of Management and Budget (OMB) M–10–06 (Ref. 11), the Office of Science and Technology Policy Memorandum of February 22, 2013 (Ref. 12), and OMB M–13–13 (Ref. 4). In 2019, Congress passed the Foundations for Evidence-Based Policymaking Act of 2018 (or OPEN Government Data Act, Public Law 115–435) into law, which included requirements for Federal agencies to prioritize making their data available to the public, and OMB has released additional guidance for implementing the act (Refs. 13, 14).

The scientific community has also embraced greater data transparency, as evidenced by data sharing and availability requirements for many high-impact journals (Ref. 15) and the emergence of organizations, such as the Center for Open Science, and international initiatives like Findable, Accessible, Interoperable, and Reusable (FAIR) data principles; Facilitate Open Science Training in European Research (FOSTER); and Guidelines for Transparency and Openness Promotion (TOP) in Journal Policies and Practices that incentivize greater transparency in research (Refs. 16, 17).

The EPA supports these efforts and is pursuing an incremental approach to maximizing transparency in the science that it relies upon to ensure that implementation is done in a thoughtful and deliberate way that focuses on the EPA's most impactful actions, minimizes unintended consequences, and informs future transparency requirements. As further described in Section II.B of this preamble, the EPA is focusing on the underlying dose-response data for this rulemaking because of the influence these data have on particularly impactful decisions at

the Agency. Risk assessments and regulations that target emissions and risk reduction of one or more pollutants, contaminants, or substances are integral to the Agency's mission and the underlying dose-response data that inform the quantitative value used to evaluate and mitigate potential risk are critical to understanding the assessment or regulatory action. In addition, the data underlying the dose-response assessment are more distinct than the broad range of data informing an entire risk assessment. Therefore, the EPA is concentrating its current efforts to increase transparency on a well-defined step in the quantitative assessment of risk supporting specific Agency actions. This final rule provides an important step in furthering the progress already being made toward maximizing transparency and will provide important insight for developing future statute-specific requirements.

Most public commenters on the purpose of the 2018 proposed rule and the 2020 SNPRM supported the concept of greater transparency, but questioned the ''problem'' the EPA was trying to fix. Other commenters indicated that it was not clear how greater data availability would fix these perceived problems, given what they asserted were limited detail in the proposed rule. Some public commenters and members of the EPA's Science Advisory Board (SAB) also suggested that issues related to transparency are or may be fixed with existing guidance, mechanisms, and other requirements. Other commenters questioned the motivation for the rulemaking, asserting that the rulemaking was the result of political interests, rather than scientific need; that it was biased to benefit industry; or that it was a deliberate attempt to suppress human health and climate studies. Some commenters contended that there was little evidence of a widespread reanalysis issue in science or, in particular, studies that would inform environmental policy. Other commenters contended that the rulemaking was at odds with the Agency's mission and would result in decreased environmental and human health protections. Some commenters asserted that the rule would lead to increased litigation and limit the public's trust in the EPA. Other commenters contended that the rule was inconsistent with practices in other Federal agencies and may adversely impact other Federal and state agencies that rely on EPA assessments.

Commenters supporting the rulemaking generally asserted that the greater transparency provided in the proposal and SNPRM was necessary and important for developing sound and scientifically robust regulations. Some commenters stated that transparency is a principle of good government. Some commenters noted specific benefits to greater transparency, including more effective public scrutiny and scientific debate, less political rhetoric, and clearer, more efficient regulations. Some commenters provided specific examples of EPA regulations or risk assessments that have relied on incorrect data or would have been improved with greater transparency. Other commenters contended that greater transparency was consistent or complementary with research and publishing policies, Federal Government policies, and the scientific method, while other commenters asserted that the rule would be an important improvement to transparency at the EPA.

The EPA continues to believe that codifying internal procedures aimed at prioritizing transparency in significant regulatory actions and influential scientific information into regulation will improve the opportunity for the public to access the EPA's scientific analyses and resulting regulatory actions in a way that is beneficial to the scientific process, the Agency's mission, and the public's health and safety. This rule is designed to build upon OMB M–19–15 (Ref. 18), which highlights the need to characterize the sensitivity of an agency's conclusions to analytic assumptions, as well as other Federal guidance documents that require greater data transparency (Ref. 18). The EPA's attention to data transparency is also responsive to the broader interest in greater data and model transparency observed in the numerous transparency initiatives in the scientific community and Federal Government, as well as the criticism the EPA has received from members of the public, scientific community, and Congress on the transparency of the scientific basis for EPA's decisions in previous influential scientific information assessments and regulatory actions (Refs. 19, 20, 21, 22, 23). The EPA's continued progress toward maximizing transparency is vital to building and maintaining trust with the public and credibility in the Agency's decisions.

The EPA disagrees with the contention that this rule is politically motivated, as transparency assumes no political ideology, nor is this rule likely to result in decreased human health or environmental protections, as the benefits of greater data transparency and the significance of reanalyzing and validating study results are well-documented in scientific literature. McNutt (2014) noted, ''reproducibility, rigor, transparency, and independent verification are cornerstones of the scientific method'' (Ref. 24). The National Academies of Sciences, Engineering, and Medicine (NAS) workshop on Reproducibility and Replicability in Science also noted that ''certainly, reproducibility and replicability play an important role in achieving rigor and transparency'' (Ref. 16).[8] Munafò et al. (2017) state, ''the credibility of scientific claims is rooted in the evidence supporting them, which includes the methodology applied, the data acquired, and the process of methodology implementation, data analysis and outcome interpretation. Claims become credible by the community reviewing, critiquing, extending and reproducing the supporting evidence. However, without transparency, claims only achieve credibility based on trust in the confidence or authority of the originator. Transparency is superior to trust'' (Ref. 25). The 2019 NAS workshop on Reproducibility and Replicability in Science also concluded, ''the scientific enterprise depends on the ability of the scientific community to scrutinize scientific claims and to gain confidence over time in results and inferences that have stood up to repeated testing'' (Ref. 16). Importantly, the workshop also concluded that researchers, funding institutions, and journals could make advancements to improve reproducibility, rigor, and transparency (Ref. 16).

The EPA agrees that data transparency is vital for individuals who have not contributed to the study to be able to verify the quality and strength of published studies and agrees with commenters that the opportunity to independently validate the pivotal science that the EPA relies upon is important in furthering scientific understanding and the Agency's mission. A presenter in a 2016 NAS workshop on Principles and Obstacles for Sharing Data from Environmental Health Research stated more directly that ''for environmental policy making to be legitimate, the scientific reasoning behind a given decision—including the data supporting it—must be transparent'' (NAS Workshop Report, Ref. 26). When data are widely available, researchers can validate

[8] The NAS workshop on Reproducibility and Replicability in Science defines ''reproducibility'' to mean the extent to which a researcher can obtain consistent computational results using the same input data, computational steps, methods, code, and conditions of analysis. The use of ''reproducibility'' by the NAS is consistent with the intent of the use of ''independent validation'' in this rule.

research results and help identify and correct unintended errors, as well as reanalyze the data for new and different purposes, examine novel questions, provide new scientific insights, and improve model development. In its April 24, 2020, letter to EPA Administrator Wheeler (Ref. 27), the EPA's SAB noted that it

> ''recognizes the importance of this rule and its purpose, establishing transparency of the influential scientific information used for significant regulations and enhancing public access to scientific data and analytical methods to help ensure scientific integrity, consistency and robust analysis. Strengthening transparency by improving access to data can lead to an increase in the quantity and the quality of evidence that informs important regulatory and policy decisions. The scientific community is moving toward adopting the precept of sharing accurate data and information to increase credibility, high-quality outcomes and public confidence in science. The SAB supports the adoption of this precept.'' [9]

The EPA also agrees with commenters that the scientific community and government agencies are making great strides in data transparency; however, improvements can still be made over existing policies and mechanisms. Many scientific publications, for example, require authors to make a data availability or data access statement, which discloses where and under what conditions the underlying study data are available. Yet the EPA cannot solely rely on data availability statements made in published research because initiatives toward greater data sharing and transparency amongst scientific journals and international organizations are still being implemented, are inconsistently enforced, and the true accessibility of data in a public repository is still limited (Refs. 28, 29, 30, 31, 32, 33). For example, Christensen et al. (2019) evaluated 1,072 peer-reviewed articles and ''found that rates of data availability for empirical articles published after journals adopted data-sharing policies differ widely between journals, from 0 percent to 83 percent, with a mean of 35 percent'' (Ref. 32). Stodden et al. (2018) noted they were only able to retrieve the dataset and code for 44 percent of the 204 computational studies published in *Science* in the 16 months after the publisher instituted its data availability requirements (Ref. 34). Therefore, the rule requirements for the EPA's independent evaluation of the availability of data are necessary and critical to prioritizing data transparency in the pivotal science underlying its significant regulatory actions and influential scientific information.

Finally, focusing the final rule requirements on the underlying dose-response data is intended to address public comments concerning clarity of the rule, potential unintended consequences, and the potential for far-reaching impacts. The requirements provide a workable framework for evaluating pivotal science in the context of the availability of its underlying dose-response data, while balancing important technical considerations in order to ensure the Agency maintains a strong scientific basis for its decision-making. The incremental progress made possible by this rule provides an important step towards prioritizing transparency in particularly impactful EPA rules and assessments and will inform future statute-specific rulemakings.

2. Effect of this rule on the studies the EPA uses to support significant regulatory actions and influential scientific information. The EPA received significant comment on the effect of the 2018 proposed rule and 2020 SNPRM on the studies the Agency would be able to consider and use to support significant regulatory actions and influential scientific information. Many commenters asserted that the EPA's action, if finalized, would limit the scientific studies the EPA could use because the EPA would exclude from consideration any studies where the underlying data and models could not be made publicly available or available in a manner sufficient for independent validation.

As discussed in Section III.B of this preamble, based on a consideration of the public comments on the 2018 proposed rule and the 2020 SNPRM, the EPA is finalizing internal procedural requirements for how the Agency will consider the availability of underlying dose-response data of pivotal science when promulgating a significant regulatory action or developing influential scientific information that relies on dose-response data. The EPA is also further clarifying how the Agency will determine the consideration to afford to pivotal science in either significant regulatory actions or influential scientific information.

Consistent with existing Agency practice (Ref. 35), the EPA will review and evaluate all relevant scientific studies when developing significant regulatory actions and influential scientific information. The EPA will continue to use the following, established factors to assess the quality of studies used to develop significant regulatory actions and influential scientific information (Refs. 36, 37):

- Soundness—The extent to which the scientific and technical procedures, measures, methods or models employed to generate the information are reasonable for, and consistent with, the intended application.
- Applicability and Utility—The extent to which the information is relevant for the Agency's intended use.
- Clarity and Completeness—The degree of clarity and completeness with which the data, assumptions, methods, quality assurance, sponsoring organizations and analyses employed to generate the information are documented.
- Uncertainty and Variability—The extent to which the variability and uncertainty (quantitative and qualitative) in the information or in the procedures, measures, methods or models are evaluated and characterized.
- Evaluation and Review—The extent of independent verification, validation and peer review of the information or of the procedures, measures, methods or models.

When evaluating potential links between exposure to a pollutant, contaminant, or substance and effects and the nature of the dose-response relationship, the EPA will follow best practices and rely on the highest quality, most relevant studies in determining the potential for hazard due to exposure to a pollutant, contaminant, or substance. Where there is convincing and well-substantiated evidence (consistent with Agency guidelines on hazard identification and dose-response assessment) to support a relationship between exposure and effect, the EPA will identify a subset of those studies for use in characterizing the quantitative relationship between the amount of dose or exposure to a pollutant, contaminant, or substance and an effect. This will be based on the exposure situation being addressed, the quality of the studies, the reporting adequacy, and the relevance of the endpoints. From that subset, the specific dose-response studies or analyses that drive the requirements, quantitative analyses, or both will be identified as pivotal science (see Section III.E of this preamble).

Once the EPA has identified pivotal science—for either significant regulatory actions or influential scientific information—the EPA will then evaluate if the underlying dose-response data are available in a manner sufficient for independent validation. The EPA will give greater consideration to pivotal science for which the underlying dose-response data are either publicly available in a manner sufficient for

[9] The SAB also provided several constructive comments and recommendations, which have been considered in the development of this final rule.

independent validation or, in the case of PII, CBI, or proprietary data, available through restricted access that affords privacy in a manner sufficient for independent validation.

The EPA acknowledges, and agrees with commenters, that there may be pivotal science for which the underlying dose-response data are not publicly available due to technological feasibility or cannot be made available in a secure environment that still allows for independent analysis. For example, dose-response data underlying older pivotal science may no longer be available or may not exist in a currently usable format. In these cases, the EPA may still use the pivotal science after either giving it lesser consideration or receiving an exemption from the requirements of this rule from the Administrator (see Section III.G of this preamble). See Section III.E of this preamble for a description of the factors the EPA will consider when determining the consideration to afford to pivotal science when the underlying dose-response data are not available for independent validation.

The EPA expects to identify pivotal science, and the consideration afforded to pivotal science, in proposed significant regulatory actions and external review drafts of influential scientific information, which will allow the subject matter experts, if they so choose, to independently validate the pivotal science and provide comment to the EPA. The EPA believes that this approach will allow the public to more effectively comment, engage, and hold the EPA accountable during the future development of specific significant regulatory actions and influential scientific information.

3. Effect of this rule on human health and environmental protection. Many commenters contended that the 2018 proposed rule and the 2020 SNPRM would prevent the EPA from meeting its statutory obligations and performing its mission of protecting human health and the environment. Some commenters asserted that, by excluding studies based on data availability, the EPA would develop regulatory decisions that are: (1) Not based on high-quality studies or the best available science; and (2) potentially biased towards regulated parties. As a result, these commenters argued that human health and environmental protections would decrease. Several commenters contended that decreased human health and environmental protections would disproportionately affect communities of color, indigenous communities, and low-income communities because these communities are more likely to live or work near sources of pollution.

The EPA considered these comments when finalizing this rule, and the EPA does not agree that its approach will lead to systematic bias towards certain types of stakeholder goals. As described above, the EPA is not categorically excluding any studies from consideration when promulgating significant regulatory actions or developing influential scientific information. Rather, the Agency will continue to evaluate the quality of all relevant studies, consistent with the intended use of the information. The EPA will also continue to rely on the highest quality, most relevant studies available in determining the potential for hazard due to exposure to a pollutant, contaminant, or substance.

When characterizing the quantitative relationship between the amount of dose or exposure to a pollutant, contaminant, or substance and an effect, the EPA will identify pivotal science and give greater consideration to pivotal science for which the underlying dose-response data are available in a manner sufficient for independent validation. Including this review of dose-response data availability for pivotal science is critical to the EPA's progress toward increased transparency and providing increased opportunity for scientific reanalysis and review by independent third parties. This approach will result in significant regulatory actions and influential scientific information that are based on high quality studies that maximize transparency, leading to human health and environmental protections consistent with the statutes the EPA administers.

In response to the 2018 proposed rule, the EPA received comments on perceived conflicts between the requirements included in the 2018 proposed rule and statutory requirements that direct EPA to consider certain data and information when developing Agency actions. For example, some commenters contended that the requirements in the 2018 proposed rule conflicted with the FIFRA pesticide registration requirements and associated implementing regulations, which require registrants to submit data and information to the EPA to enable the Agency to make its unreasonable adverse effects determinations. These commenters argued that, under the 2018 proposed rule, the EPA would not be able to consider these data, which are often claimed as CBI, when evaluating the pesticide registrations because the data could not be made publicly available. In response to this comment and other similar comments, the EPA clarified in the 2020 SNPRM the relationship between this rulemaking, the environmental statutes and their implementing regulations by adding language to proposed 40 CFR 30.3 stating that statutory requirements and corresponding implementing regulations would control in the event of any conflicts.

With this final rule, the EPA is maintaining language from the 2020 SNPRM in 40 CFR 30.3 stating that statutory requirements and corresponding implementing regulations will control in the event of any conflict, and clarifying in this preamble that the requirements in this final rule set the overarching structure and principles for transparency in significant regulatory actions and influential scientific information. The EPA plans to promulgate either statute-specific transparency regulations or programmatic actions implementing this procedural rule, as appropriate, to clarify how the Agency will implement the provisions from this final rule for specific programs authorized under the statutes the EPA administers.

B. Dose-Response Data

The 2018 proposed rule focused on dose-response data and models, although not consistently. For example, some parts of the proposed regulatory text appear to limit applicability of certain provisions to only dose-response models. In others, the proposed requirements would apply more broadly. Commenters noted this variability. As a result, in the 2020 SNPRM, the EPA proposed a consistent, broader applicability to data and models.

The EPA received significant comment on this proposed expansion of the applicability of the rulemaking to data and models. While some commenters supported this expansion, other commenters contended that the applicability to dose-response data and models was already very broad, and that the broader applicability would significantly limit the information that the EPA could consider in a broad ranges of assessments (*e.g.,* bioaccumulation data, data on environmental releases, exposure estimates used by the EPA across the environmental statutes that it administers). Some commenters contended that the EPA did not provide sufficient rationale to support this expansion.

Based on the comments on the 2018 proposed rule and the 2020 SNPRM, taking into account the number of studies that would be subject to the rule, the EPA determined that the Agency

should pursue an incremental approach to maximizing transparency in the science that it relies upon by focusing the final rule requirements on dose-response data and, in particular, only those studies that are integral to characterizing dose-response relationships (*e.g.,* identifying candidate PODs). The EPA considered commenters' assertions that the scope of the 2018 proposed rule would be so broad as to make implementation infeasible. The 2018 proposed definition of ''dose-response data and models'' would apply to dose-response data [and models] ''used to characterize the quantitative relationship between the amount of dose or exposure to a pollutant, contaminant, or substance and the magnitude of a predicted health or environmental impact.'' This relationship of the dose-response data to the magnitude of a predicted health or environmental impact would require the consideration of an array of studies beyond those that characterize dose-response relationships, including, for example, studies that inform the dose-response modeling (*e.g.,* benchmark response selection); studies that identify data for toxicokinetic adjustments that inform calculation of a human-equivalent point of departure (POD); and studies that inform the selection of uncertainty factors. The number of studies that are used to establish the relationship between dose-response data and models and the magnitude of a predicted health or environmental impact can potentially be very large. This may make implementing the rule, as proposed, more challenging for at least some significant regulatory actions and influential scientific information. While transparency in EPA decision-making is the purpose of this action, the EPA prefers an incremental approach. Rather than having this final rule apply to all the studies that support the assessment of the relationship of a dose or exposure of a pollutant, contaminant, or substance to the magnitude of a predicted health or environmental impact, the EPA is balancing transparency and feasibility by focusing on those studies that describe the quantitative relationship between the dose or exposure of a pollutant, contaminant, or substance and an effect. Specifically, the scope of dose-response data in this final rule is those studies consisting of the data integral to characterizing dose-response relationships. In some instances, this group will consist of a handful of studies. In other instances, where there are multiple toxicity endpoints, there may be more studies that are crucial to characterizing dose-response relationships. In some other cases, there may be a large number of studies that are used to characterize a dose-response relationship (*e.g.,* where the dose-response is based on a meta-regression of epidemiology studies). However, not all of these studies would be considered pivotal science (see Section III.C.6 of this preamble for the definition of ''pivotal science'').

Based on comments and other considerations, the EPA is concentrating its efforts in the final rule to increase transparency on dose-response data, as the dose-response data are discrete and the dose-response assessment is a well-defined and impactful step in the quantitative assessment of risk. This final rule provides an important step in furthering progress toward maximizing transparency and will provide insight for future statute-specific requirements. Consistent with this targeted focus, the EPA is replacing the proposed definition of ''dose-response data and models'' at 40 CFR 30.2 with a definition of ''dose-response data'' (see Section III.C of this preamble).

C. Definitions

The 2018 proposed rule included proposed definitions for ''dose-response data and models,'' ''pivotal regulatory science,'' ''regulatory decisions,'' ''regulatory science,'' and ''research data.'' Some commenters stated that several of the proposed definitions were unclear, including some that seemed to overlap (*e.g.,* ''pivotal regulatory science'' and ''regulatory science''). Some commenters also stated that certain terms used in the proposed regulatory requirements were not clear and should be defined.

In response to these comments on the 2018 proposed rule, the EPA proposed in the 2020 SNPRM definitions for ''capable of being substantially reproduced,'' ''data,'' ''independent evaluation,'' ''models,'' ''publicly available,'' and ''reanalyze.'' In the 2020 SNPRM, the EPA also proposed a definition of ''influential scientific information'' to comport with the proposed expansion of the applicability of the rulemaking to influential scientific information.

Based on a consideration of the public comments on both the 2018 proposed rule and the 2020 SNPRM, the EPA is finalizing the definitions at 40 CFR 30.2 as follows.

1. *Capable of being substantially reproduced, independent validation, and reanalyze.* In the 2018 proposed rule, the EPA used the term ''replicate'' in the proposed regulatory text at 40 CFR 30.5 but did not define it at 40 CFR 30.2. Proposed 40 CFR 30.5 read, in pertinent part, ''[i]nformation is considered 'publicly available in a manner sufficient for independent validation' when it includes the information necessary for the public to understand, assess, and replicate findings . . . .'' Some commenters contended that the EPA was not clear about what it meant by the term ''replicate'' and interpreted the term ''replicate'' in several different ways. For example, some commenters asserted that the EPA used the term ''replicate'' but actually meant ''reanalyze.'' The EPA finds that these comments have merit and is clarifying that the intent of the term in the proposed regulatory text at 40 CFR 30.5 was ''reanalyze'' rather than ''replicate.'' In the 2020 SNPRM, the EPA proposed using the term ''reanalyze'' instead of ''replicate'' and proposed at 40 CFR 30.2 a definition for ''reanalyze.'' Given that proposed 40 CFR 30.5 also included the term ''independent validation'' and that this term directly relates to ''replicate,'' the EPA also proposed a definition at 40 CFR 30.2 for this term. The proposed definition of ''independent validation'' included the term ''capable of being substantially reproduced.'' The EPA also defined this term because it was an important component of the definition of ''independent validation.''

While commenters generally supported the inclusion of the proposed definitions for ''capable of being substantially reproduced,'' ''independent validation,'' and ''reanalyze,'' some commenters addressed aspects of the proposed definitions and suggested modifications. One commenter suggested replacing the term ''validation'' with ''verification'' because they asserted the term ''validation'' has specific meanings in the context of assay development and in the context of model development. The EPA understands that the term validation is used differently in some scientific disciplines than the EPA has defined it. However, for the purposes of this rule, the EPA has defined validation in terms of independent reanalysis.

Another commenter contended that the proposed definition of ''independent validation'' was inconsistent with the remainder of the proposal because it restricts the concept of ''independent validation'' to ''subject matter experts who have not contributed to the development of the study,'' rather than the public as was the stated intent of the rule. Because this rule is about scientific data, the EPA finds it unlikely that without the necessary expertise, one could reasonably reanalyze the dose-response data underlying pivotal

science. This final rule does not preclude the public from engaging subject matter experts to determine whether a study can be independently validated. Also, the definition cannot be considered solely in isolation. The regulatory text in which the term is used informs the extent of the availability of dose-response data underlying studies. Specifically, 40 CFR 30.5 requires, in part, that the dose-response data underlying studies that the EPA will consider as pivotal science be available in a manner sufficient for independent validation. Scientific information is considered available in a manner sufficient for independent validation when it includes the information necessary to understand, assess, and reanalyze findings. The efficacy of the reanalysis will depend on the expertise of the person conducting the reanalysis.

One commenter noted that the term ''reproduced'' in the proposed definition of ''capable of being substantially reproduced'' and the use of ''capable of being substantially reproduced'' in the proposed definition of ''independent validation,'' were inconsistent with the description of reproduce in the 2020 SNPRM preamble and the NAS Workshop Report (Ref. 26). The commenter contended that this adds confusion. Another commenter asserted that there is insufficient guidance or standards for what the term ''substantially'' means or who will make the determination (*e.g.,* scientific staff with oversight of an EPA scientific advisory panel). Another commenter stated that there were inconsistencies with the proposed definitions for the terms ''capable of being substantially reproduced'' and ''reanalyze.'' Commenters asserted that the former proposed definition specifies the use of ''identical methods,'' whereas the latter proposed definition specifies the use of the ''same or different'' methods.

The EPA finds that these comments have merit. The EPA is modifying the definition of ''independent validation'' in the final rule by replacing ''capable of being substantially reproduced'' with ''produced.'' The EPA will not finalize the proposed 40 CFR 30.2 definition of ''capable of being substantially reproduced'' because the term is not used in the final rule's definition of ''independent validation'' or elsewhere in 40 CFR 30. As a result, ''substantially'' will not need to be defined or described in the final rule. The EPA is also modifying the definition of ''reanalyze'' to specify the use of the same methods because as proposed it specified the use of the ''same or different'' methods. This change was made so that the definition would be consistent with the final rule's definition of ''independent validation.''

2. *Data and models.* In the 2020 SNPRM, the EPA proposed a definition of ''data'' in response to comments on the 2018 proposed rule, contending that a definition for this term was needed to clarify the applicability of the rulemaking. Commenters requested that the EPA clarify which stage of data would need to be available to allow for independent validation. The stage of data that the EPA identified in the proposed 40 CFR 30.2 definition of ''data'' is based on the discussion of the different stages of data in the NAS Workshop Report (Ref. 26). The 2020 SNPRM adapted the description of the stage of data from the NAS Workshop Report (Ref. 26) that was data at the appropriate level of detail to allow for independent validation via reanalysis.

Several commenters asserted that the proposed definition of ''data'' was so broad that it could include potentially any information. One commenter contended that as published scientific results are often the final steps in a process involving several processing and analysis steps, the proposed definition of ''data'' definition did not identify what intermediate step of data processing would be subject to this rule. The commenter noted that determining which of the multiple data processing and analysis steps that should be used would differ from study to study. Another commenter suggested that the EPA should identify the actual final dataset used in statistical analysis as the appropriate stage of data to be made available.

As the EPA described in the 2020 SNPRM, there are different stages of data. The EPA presented the different stages described in the NAS Workshop Report (Ref. 26), ''There are raw data, which come straight from the survey or the experiment. There are cleaned-up data, which consist of the raw data modified to remove obvious errors.'' (These are the data that are ready to be analyzed to extract relevant information.) ''There are processed data, which are data that have been computed and analyzed to extract relevant information. There is the final clean data set that is provided with a publication.'' Since the purpose of 40 CFR 30.5 is to determine the consideration to afford to studies based on, among other factors, the availability of the underlying dose-response data that would support independent validation via reanalysis of the data underlying pivotal science, the appropriate stage of data would not be the processed data (data that have been computed and analyzed to extract relevant information) or the final clean data set that is provided with a publication. At these two stages of data, the analysis has already been conducted, and the results have already been determined. In order to determine if these results are valid, data that had not already been computed and analyzed are needed.

In this final rule, the EPA is not identifying a specific step in a multi-step analysis as the stage of data that would be sufficient for independent validation through reanalysis because this would be overly prescriptive and not informative. As noted by commenters, the step at which the final clean data set will be generated will vary from study to study. The level of detail required would be that needed for a separate party to reanalyze the study. The appropriate step is where the data are ready to be analyzed to extract relevant information.

One commenter requested that the EPA introduce and define a new term, ''validated data,'' which are the data with the proper level of quality assurance. While the EPA routinely conducts quality assurance to ensure that data are acceptable for use, the EPA does not see the need to create a separate definition. The focus of this rulemaking is the independent validation of the results of studies underlying pivotal science, not the quality assurance of the data itself.

Some commenters contended that the EPA should define ''data'' as the raw data in which obvious errors have not been removed. Other commenters stated that raw data in which obvious errors have not been removed would result in skewed analyses for third parties not familiar with the data collection process. Given concerns about potentially skewed analyses, the final definition of ''data'' maintains the stage of data in which obvious errors have been removed.

Some commenters also requested that the EPA define ''model'' to clarify the applicability of the rulemaking. In the 2020 SNPRM, the EPA proposed a definition of ''model'' at 40 CFR 30.2, but the Agency is not finalizing the definition of ''model'' because this regulation applies only to dose-response data (see Section III.B of this preamble).

3. *Dose-response data.* In the 2018 proposed rule, the EPA proposed a definition of ''dose-response data and models.'' The EPA did not receive significant comment on the definition of ''dose-response data and models'' itself. However, as discussed in Section III.B of this preamble, this final rule applies to dose-response data, and thus the EPA is not finalizing a definition for ''dose-

response data and models.'' Rather, consistent with the applicability of this final rule, the EPA is finalizing a definition of ''dose-response data'' that is specific to the relationship between a dose or exposure and an effect.

4. *Influential scientific information.* In the 2020 SNPRM, the EPA proposed expanding the scope of the 2018 proposed rule to include influential scientific information and proposed to define ''influential scientific information'' as ''scientific information the Agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions,'' consistent with the definition of ''influential scientific information'' provided in the OMB Final Information Quality Bulletin for Peer Review (Ref. 8).

The EPA received public comments in support of and against the Agency's proposed 40 CFR 30.2 definition of ''influential scientific information.'' Some commenters believed that the proposed definition was too broad to be useful and, as a result, would apply to all scientific documents produced by the EPA. Other commenters believed that the proposed definition was too narrow and would not adequately capture the types of information that may be considered influential.

The EPA finds that these comments have merit, in part. The definition of ''influential scientific information'' at proposed 40 CFR 30.2 in the 2020 SNPRM is the same definition as in the OMB Final Information Quality Bulletin for Peer Review (Ref. 8). The EPA proposed to adopt this definition because it intended the scope to be consistent with how that term has been interpreted and applied in the context of peer review.[10] Given that the definition is both established and has been routinely applied by the EPA, the EPA disagrees with the suggestion that the term is inherently too narrow or too broad. Rather than modify the proposed 40 CFR 30.2 definition of ''influential scientific information,'' the EPA is modifying 40 CFR 30.3 in the final rule to clarify the Agency's intent that the requirements in 40 CFR 30.3 apply to influential scientific information, unless the influential scientific information is exempted from peer review requirements as described in Section IX of the OMB Final Information Quality Bulletin for Peer Review (Ref. 8). Consistent with this approach, the EPA is finalizing the definition of ''influential scientific information'' as proposed in the 2020 SNPRM.

5. *Pivotal science.* In the 2020 SNPRM, the EPA introduced the term ''pivotal science,'' defined in proposed 40 CFR 30.2 as ''the specific scientific studies or analyses that underly [sic] influential scientific information.'' This term was proposed as a parallel to ''pivotal regulatory science,'' defined in 40 CFR 30.2 of the 2018 proposed rule as ''the specific scientific studies or analyses that drive the requirements and/or quantitative analysis of EPA significant regulatory decisions.''

The EPA received comment on the use of ''regulatory'' in ''pivotal regulatory science.'' Some commenters contended that there is no such thing as science that is regulatory; rather, there is science used to support regulation. Some commenters also noted that the terms ''pivotal science'' and ''pivotal regulatory science'' have similar scopes.

The EPA acknowledges that no scientific study is inherently regulatory; rather, the EPA uses science to inform its significant regulatory actions. In order to increase the clarity of this final rule, to take into account the similarities between the two definitions, and to more accurately describe the science that the EPA uses, the EPA is removing the term ''pivotal regulatory science'' and combining the definitions of ''pivotal science'' and ''pivotal regulatory science'' under the single term ''pivotal science'' in 40 CFR 30.2. The EPA is responding to comments on both terms together.

Some commenters noted that the scope of studies that could be considered ''pivotal science'' was unclear but appeared broad. Some commenters argued that since properly conducted science reviews the entire body of scientific evidence, nearly any study evaluated could be considered ''pivotal science.'' The EPA's SAB suggested that the Agency clarify whether ''pivotal science'' refers to all the hazard characterization and dose-response models that the EPA evaluates and captures in its analysis (Ref. 27). Other commenters asserted that if the EPA interprets ''pivotal science'' broadly to include all studies involved in the development of significant regulatory actions or influential scientific information, implementing this rule would be infeasible.

As discussed in Section III.B of this preamble, the EPA finds merit in comments that the proposed definition for ''pivotal science'' appeared too broad to feasibly implement in this rule. Because of the EPA's commitment to basing its decisions on sound science, the EPA may review several hundred or thousands of scientific studies in the development of significant regulatory actions or influential scientific information. As such, the EPA agrees that determining data availability for all the studies EPA considers in significant regulatory actions and influential scientific information may be infeasible at this time. Future statute-specific rulemakings may be more expansive as the EPA continues to make incremental progress toward maximizing transparency.

Further, although this rulemaking does not require reanalysis of a study's underlying data, the EPA finds that limiting the scope of ''pivotal science'' will still provide meaningful and impactful opportunity for reanalysis. Lewandowsky et al. (2020) evaluated the cost-effectiveness of reanalysis studies under various scenarios and concluded that reanalysis studies are most cost-effective when they are focused on studies of the greatest interest to the scientific community (in this study, the number of citations was a surrogate for interest) (Ref. 38). This finding is consistent with results in other studies that found and encouraged narrowing the focus of attempted reanalysis studies to those studies of greater significance (Refs. 37, 39, 40, 41).

In this final rule, rather than considering all studies that support the assessment of the relationship of a dose or exposure of a pollutant, contaminant, or substance to the magnitude of a predicted health or environmental impact as ''pivotal science,'' the EPA is balancing transparency and feasibility by focusing on those studies that inform the quantitative relationship between the dose or exposure of a pollutant, contaminant, or substance and an effect. Thus, ''pivotal science'' includes only those studies that are integral to characterizing dose-response relationships (*e.g.,* identifying candidate PODs). These are the studies that drive the requirements or quantitative analyses of EPA significant regulatory actions or influential scientific information. Although this rule takes an incremental approach and therefore does not include studies informing the dose-response modeling (*e.g.,* benchmark response selection), studies identifying data for toxicokinetic adjustments, or studies informing the selection of uncertainty factors do not drive the requirements or quantitative analyses of EPA significant regulatory actions or influential scientific

[10] For example, see the Environmental Protection Agency Annual Report on Peer Review Fiscal Year 2017 (October 1, 2016–September 30, 2017) that the Agency submitted to OMB, *https://cfpub.epa.gov/si/EPA%20FY%202017%20Annual%20Peer%20Review%20Report.pdf.* Each annual report identifies influential scientific information and highly influential scientific assessments.

information. Future statute-specific rulemakings may interpret ''pivotal science'' more broadly.

This clarified definition of ''pivotal science'' in the final rule is also responsive to the SAB's comments that pivotal science should be more focused (Ref. 27). Consistent with the intent of this rulemaking, the EPA intends to clearly identify the studies considered pivotal in the documentation at the proposed rule stage for significant regulatory actions and when influential scientific information is disseminated for peer review.

Some commenters also expressed confusion regarding how ''pivotal science'' relates to ''best available science.'' One commenter recommended that if this rulemaking is intended to alter the EPA's definition and use of the best available science, the EPA should issue further guidance for public comment. To be clear, this rulemaking is not intended to modify the Agency's interpretations of ''best available science.'' The EPA will continue to consider all peer-reviewed science, consistent with existing study quality assessment factors and corresponding statutory mandates. The EPA will then identify and consider ''pivotal science in accordance with the provisions of this rule,'' unless the implementation of the rule conflicts with statutory requirements and associated implementing regulations.

6. *Publicly available.* In the 2018 proposed rule, the EPA used the term ''publicly available,'' but did not propose a definition at 40 CFR 30.2 or describe it in the preamble to the 2018 proposed rule. Some commenters on the 2018 proposed rule asked the EPA to explain what it meant by the term. In the 2020 SNPRM, the EPA proposed a definition for ''publicly available'' at 40 CFR 30.2.

One commenter stated that the proposed definition was vague because it did not make clear whether the study data itself would proactively be made available to members of the public by data holders in government sources, media sources, or other online sources. The definition is not intended to describe the mechanism for making the information available (*i.e.,* whether the information is made available proactively or is made available upon request). Rather, the definition describes whether, given the nature of the information, it can be, must be, or is already generally available (*i.e.,* where the information can be made lawfully available from government records, is required to be made available by government law or regulation, or is information that is widely available to the general public).

Another commenter requested that the EPA consider data and models to be publicly available when they are available through restricted access when the data includes CBI, proprietary data, or PII that cannot be sufficiently de-identified to protect the data subjects. The EPA disagrees with the commenter. The plain meaning of ''publicly available'' does not include availability through restricted access to data that includes CBI or PII because there are laws that preclude the disclosure of CBI or PII to those not authorized for its access. Thus, the general public cannot access the un-sanitized CBI data or non-anonymized PII data in a manner that will allow for independent validation through reanalysis. If the public cannot access such data, it is not publicly available.

Several commenters contended that the proposed definition of ''publicly available'' would introduce a bias favoring industry data submitted to the EPA. They asserted that industry-generated studies submitted to the EPA pursuant to FIFRA would be considered publicly available because they could be obtained by the public in response to a Freedom of Information Act (FOIA) request. However, this does not mean that these are immediately or easily available to the public. Some commenters cited the EPA's *Freedom of Information Act Annual Report Fiscal Year 2019* (2020), which lists a median response time for ''expedited processing'' of FOIA requests by the EPA as 493 days (Ref. 42). The EPA finds that such comments have merit and is modifying the definition in the final rule to add the following at the end of the definition: '''''the public must be able to access the information on the date of publication of the proposed rule for the significant regulatory action or dissemination of the draft influential scientific information for public review and comment.''

7. *Research data.* Proposed 40 CFR 30.2 in the 2018 proposed rule included a definition of ''research data.'' In the 2020 SNPRM, the EPA deleted the proposed definition of ''research data.'' While one commenter on the 2020 SNPRM noted that the exclusions in the proposed definition of ''research data'' of trade secrets and personal and medical information were not incorporated into the proposed definition of ''data,'' commenters did not request that the EPA maintain a definition of ''research data.'' The EPA is not including a definition of ''research data'' in this final rule given that it is finalizing the definition of ''data.''

8. *Significant regulatory actions.* In the 2018 proposed rule, the EPA defined the term ''regulatory decisions'' as final regulations determined to be significant regulatory actions under Executive Order (E.O.) 12866, *Regulatory Planning and Review.* Some commenters stated that the use of regulatory decisions was confusing given that the term was only intended to apply to a subset of regulations. The EPA agrees with these comments, and to clarify the definition, the Agency is changing the term from ''regulatory decisions'' to ''significant regulatory actions'' in the final rule.

9. *Science that serves as the basis for informing a significant regulatory action.* In the 2018 proposed rule, the EPA proposed to define the term ''regulatory science.'' A number of commenters expressed confusion over both the meaning and scope of this proposed term. One commenter noted that other Federal agencies have defined ''regulatory science.'' For example, the U.S. Food and Drug Administration (FDA) has described ''regulatory science'' as ''the science of developing new tools, standards, and approaches to assess the safety, efficacy, quality, and performance of all FDA-regulated products'' (Ref. 43).This commenter suggested that a simplified definition would be ''regulatory science consists of the scientific segment of the regulatory process.'' The EPA acknowledges that the term ''regulatory science'' may be confusing because it suggests either that the term refers to a scientific discipline of regulatory decision-making (akin to FDA's description), or that the EPA considers some science inherently regulatory. Neither of these interpretations reflects the Agency's intent in defining this term. The EPA considers the breadth of scientific evidence in its rulemakings; while this scientific evidence informs policy decisions, the EPA's consideration of the science does not make it ''regulatory science.'' To reflect this fact, in the final rule the EPA is changing the proposed term ''regulatory science'' to ''science that serves as the basis for informing a significant regulatory action.''

In the 2018 proposed rule, the EPA defined regulatory science as ''scientific information, including assessments, models, criteria documents, and regulatory impact analyses, that provide the basis for EPA final significant regulatory actions.'' Several commenters claimed that this definition was vague and without discernable meaning. The EPA disagrees with the assertion that the proposed definition was without meaning, but in response to comments

is altering the final definition to increase clarity. For example, the EPA notes that the proposed definition for ''regulatory science'' combined both general categories of scientific information, such as assessments and models, with specific examples of EPA scientific products, such as criteria documents and regulatory impact analyses. The EPA acknowledges that this may increase confusion and is therefore limiting the final definition to general categories. As such, the EPA is altering the definition of ''science that serves as the basis for informing a significant regulatory action'' in 40 CFR 30.2 to mean ''studies, analyses, models, and assessments of a body of evidence that provide the basis for EPA significant regulatory actions.'' Examples of models include those used in regulatory impact analyses. Examples of assessments of a body of evidence include risk assessments, hazard identifications, Integrated Risk Information System (IRIS) assessments, and criteria documents.

Other commenters expressed confusion over the scope of what constitutes science that serves as the basis for informing a final significant regulatory action, as defined in the proposed rule. One commenter asserted that the phrase ''provides the basis'' means that science that serves as the basis for informing a final significant regulatory action could be all the science considered, relied upon, and included in the administrative record of a rulemaking by the EPA. The EPA agrees with this and clarifies in the final rule that the scope of science that serves as the basis for informing a significant regulatory action is equivalent to the science included in the public docket as part of a rulemaking, but not all of that body of science would typically be considered ''pivotal science.''

D. Applicability of the Rule

In the 2018 proposed rulemaking, the EPA proposed to apply the requirements of this rulemaking on significant regulatory decisions. The EPA then solicited comment on whether the requirements of this rulemaking should apply to (1) other stages of the rulemaking process; (2) a narrower scope of coverage; and (3) certain categories of regulatory actions, such as individual party adjudications, enforcement activities, or permit proceedings or other agency actions. In the 2020 SNPRM, the EPA proposed to expand the applicability of this rulemaking to include influential scientific information.

The EPA received significant comment on the proposed applicability of this rulemaking to significant regulatory decisions and influential scientific information. Some commenters supported the proposed applicability, while other commenters disagreed with it.

A few commenters addressed the potential for expansion or narrowing of the scope of the rule to include other actions in addition to final significant regulatory decisions and influential scientific information. Of the few commenters that explicitly addressed potential expansion beyond the proposed rulemaking, a majority focused on recommendations to include the science underlying Integrated Science Assessments (ISAs) and IRIS assessments. A few commenters expressed support to expand the proposed rulemaking to include one or more of the following: TSCA risk evaluations; CERCLA remedial actions; RCRA corrective actions; as well as assessments and actions under the CWA. Additional comments recommended expansion of the scope of the proposed rulemaking to include enforcement and permitting actions, as well as agency guidance documents. Some commenters supported applying the requirements of this rulemaking to proposed rules and advance notices of proposed rulemakings. Other commenters specifically opposed expanding the proposed rulemaking to include the aforementioned actions. Additionally, some commenters recommended narrowing the scope to only rulemakings subject to the Congressional Review Act or economically significant regulatory actions under E.O. 12866 (*i.e.,* those rules that ''have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities'').

Some of the assessments that commenters suggested should be subject to the requirements of this rulemaking are categorized as influential scientific information. The EPA notes that many assessments categorized as influential scientific information support rulemakings and other actions under several environmental statutes that the EPA administers. For example, the ISA for lead and the IRIS assessment for trichloroethylene have been used in a variety of actions (including those that are not significant regulatory actions) under TSCA, RCRA, and the CAA. IRIS assessments are routinely used under the CAA, RCRA, and CERCLA. By finalizing the scope rule to include influential scientific information, the Agency is applying the applicability of the rule to an important category of scientific assessments that influence a wide range of EPA regulatory actions.

The EPA sees no need to include the proposed rule stage of final significant regulatory actions in the regulatory text because as a practical matter proposed rules must comply with this final rule before being finalized. As a general matter, the EPA does not introduce the studies and analyses it relies on for a rulemaking at the final rule stage. The scientific basis for a rulemaking is provided for public review and comment in the public docket when the proposed rule is issued or, if subsequently added to the docket, through a separate opportunity for public comment. Advance notices of proposed rulemakings are not consistent with the purpose of this rule, given their preliminary nature and frequent focus on soliciting comments on a regulatory issue or approach.

Transparency is important in ensuring that the decisions the EPA makes are based on sound science. The EPA is finalizing the applicability of this rule to significant regulatory actions and influential scientific information because of the potential broad impact of these actions and assessments on American lives and livelihoods. The EPA is not applying this rulemaking to permit proceedings, site-specific actions, or enforcement actions because these actions are typically focused on individual regulated entities.

E. Availability of Dose-Response Data

In the 2018 proposed rule, the EPA proposed to require at 40 CFR 30.5 that ''[w]hen promulgating final significant regulatory decisions, the Agency shall ensure that dose-response data and models underlying pivotal regulatory science are publicly available in a manner sufficient for independent validation.'' The EPA received a large number of comments stating that the approach in the 2018 proposed rule would likely preclude the use of valid data and models from consideration as pivotal science. The comments indicated that the proposed requirement to ensure data and models are publicly available in a manner sufficient for independent validation would prevent the use of data and models that include CBI, proprietary data, and PII that cannot be sufficiently de-identified to protect the data subjects, as well as many older studies. In response to such comments, in the 2020 SNPRM, the EPA proposed a modified version of the 2018 proposed regulatory text at 40 CFR 30.5. Proposed 40 CFR 30.5 would allow

agency consideration of studies with restricted access to data and models that have CBI, proprietary data, or PII that cannot be sufficiently de-identified to protect the data subjects. For all other studies, data and models should be publicly available if the studies were to be used as pivotal regulatory science or pivotal science. In the 2020 SNPRM, the EPA also proposed an alternative. Under the alternative 40 CFR 30.5 proposal, when promulgating significant regulatory decisions or developing influential scientific information, the Agency would, other things equal, give greater consideration to studies where the underlying data and models are available in a manner sufficient for independent validation either because the information is publicly available or available through tiered access when the data include CBI, proprietary data, or PII and appropriate techniques have been used to reduce the risk of re-identification. In the 2020 SNPRM, the Agency proposed that in developing the final significant regulatory decision or influential scientific information, the EPA would identify those studies that were given greater consideration and provide a short description of why and how greater consideration was given.

A few commenters contended that 40 CFR 30.5 as proposed in the 2018 proposed rule was superior to proposed 40 CFR 30.5 in the 2020 SNPRM and the alternative proposed 40 CFR 30.5 in the 2020 SNPRM. The commenters asserted that privacy or confidentiality should not have priority over transparency. They further asserted that the approaches in the 2020 SNPRM would impose substantial limits on the effect of the rule since privacy, confidentiality, and restricted access are all concepts and practices that inhibit full transparency.

Some commenters supported the categorical approach taken in proposed 40 CFR 30.5 in the 2020 SNPRM in which pivotal science would need to be available for independent validation. A few commenters suggested that it be expanded to apply to all studies, not only those that are pivotal science. Other commenters contended the proposed 2020 SNPRM approach was flawed because it would exclude from consideration valid scientific studies for which the underlying data at the stage required by this regulation are unavailable, regardless of whether the studies have been peer reviewed or would be considered part of the ''best available science'' under the environmental statutes that EPA administers that require the use of ''best available science.'' These commenters stated that such a categorical exclusion is inconsistent with current scientific standards and the requirements of the environmental statutes that the EPA administers. Other commenters noted that there are a variety of reasons, including the age of a study, why the underlying data at the stage required by this rulemaking would not be available, publicly or otherwise, for independent validation.

Some commenters supported and other commenters opposed alternate proposed 40 CFR 30.5 in which the Agency would, all else being equal, give greater consideration to studies where the underlying data and models are available in a manner sufficient for independent validation. Some commenters stated that this was a reasonable way to consider transparency because studies would be assessed on a case-by-case basis and valid studies would not be categorically excluded. Other commenters did not support alternate proposed 40 CFR 30.5 because they contended there is no scientific justification for a rule that directs the EPA to selectively give greater consideration to certain studies over others based on data availability.

Upon consideration of the comments, the EPA agrees that it is important not to categorically exclude any study because the data underlying a study at the stage required by this rulemaking may not be available for independent validation. Therefore, the EPA is not finalizing the primary proposal in the 2020 SNPRM that would have categorically required that for studies to be considered pivotal science, the underlying data would need to be available for independent validation. However, given that transparency is an important aspect of EPA's regulatory actions and assessments, it should be an important consideration in how the Agency considers pivotal science. As described in 40 CFR 30.5 of the final rule, the EPA will rely on the highest quality, most relevant studies available in determining the potential for hazard due to exposure to a pollutant, contaminant, or substance. Where there is convincing and well substantiated evidence to support a relationship between exposure and effect, the EPA will identify those studies—based on the exposure situation being addressed, the quality of the studies, the reporting adequacy, and the relevance of the endpoints—that would inform a dose-response assessment for those effect endpoints. From that subset, the specific dose-response studies or analyses that drive the requirements or quantitative analyses of an EPA significant regulatory action or influential scientific information will be identified as pivotal science.

Further, the EPA is finalizing the approach that gives greater consideration to pivotal science whose underlying dose-response data are publicly available or available through restricted access. Restricted or tiered access in this final rule means that the underlying dose-response data are available through a data sharing mechanism, such as through an agreement with the originating author or institution, access to a refined or redacted dataset that anonymizes the more sensitive portions of the analyzable dataset, a restricted access data repository or secure data enclave, or some other mechanism (*e.g.,* Data Use Agreements) that allows a qualified subject matter expert access to enough data to support independent validation while still protecting sensitive information.

Some commenters argued that the EPA did not sufficiently explain how it will identify ''pivotal science.'' For example, one commenter stated that the EPA did not explained what it means for a study to ''underly'' [sic] influential scientific information or to ''drive the requirements'' of final significant regulatory actions. Some commenters on the 2018 proposed rule asked for the EPA to clarify in what stage of the review process the Agency would identify pivotal science. In the 2020 SNPRM, the EPA explained, ''under this [proposed] regulation EPA would continue to use standard processes for identifying, evaluating, and reviewing available data, models, and studies. When the Agency has potentially identified multiple key studies or models of similar quality that could drive its subsequent decisions, the Agency will investigate the availability of the underlying data.'' In response to the 2020 SNPRM, one commenter suggested the EPA provide a transparent explanation of how and why studies are determined to be pivotal science over others. A commenter also argued that if the EPA interprets ''pivotal science'' narrowly (*i.e.,* not as all the studies included in the weight of evidence), this would introduce risk of selecting ''pivotal science'' in a biased manner without sufficient accountability. Another commenter recommended that the EPA establish criteria for designating studies as pivotal science.

The EPA disagrees with the proposition that designating a set of key studies as ''pivotal science'' will necessarily be biased or without accountability. The EPA follows an objective, unbiased process for identifying and evaluating scientific

studies and already identifies key or pivotal studies in some of its actions (*e.g.,* IRIS assessments). The EPA intends to issue implementation guidelines and statute-specific rulemakings that will further describe these criteria and how the EPA will identify pivotal science in its assessments and rulemakings. In general, the EPA will rely on the highest quality, most relevant studies available in determining the potential for hazard due to exposure to a pollutant, contaminant, or substance. Where there is convincing and well substantiated evidence to support a relationship between exposure and effect, the EPA will identify a subset of those studies based on the exposure situation being addressed, the quality of the studies, the reporting adequacy, and the relevance of the endpoints that would inform a dose-response assessment for those effect endpoints and drive the requirements and/or quantitative analyses of an EPA final significant regulatory action or influential scientific information will be identified as pivotal science.

Further, the EPA intends to promulgate regulations under the environmental statutes that the EPA administers to further clarify how the Agency will apply the definition of ''pivotal science'' in specific programs authorized under those statutes (*e.g.,* CAA, CWA, SDWA, RCRA, FIFRA, TSCA, EPCRA). The specific criteria for determining ''pivotal science'' may necessarily be specific to the authorizing statute, as well as the significant regulatory action or the influential scientific information. The EPA intends to explain in each significant regulatory action and for influential scientific information how the pivotal studies were identified.

In response to comments on the meaning of ''drive the requirements and/or quantitative analysis,'' these are the studies that are integral to quantitatively characterizing dose-response relationships for the toxicity endpoints that underlie the requirements or analyses of EPA significant regulatory actions or influential scientific information. The EPA may further interpret the meaning of ''drive,'' and describe the process for designating key studies as pivotal science in subsequent implementation guidelines and/or statute-specific rulemakings.

Some commenters stated that the EPA did not explain what was meant by ''other things being equal.'' Some of these commenters requested clarity on what factors in addition to transparency would be considered. Some specific suggestions from commenters include that EPA should give consideration to quality studies that evaluate a range of models, that are scientifically sound for the intended use, and that have study ''characteristics (*e.g.,* sample size, confidence intervals of results, or overall methods validity) [that] may compensate for any lack of full transparency.'' In consideration of these and other public comments, the EPA developed additional factors that clarify specific technical factors that it may consider in balancing study quality and data availability. Although the EPA is prioritizing transparency in pivotal science, the Agency also recognizes that there will be instances where the underlying dose-response data of pivotal science is unavailable for independent validation. In order to ensure that the Agency maintains a strong scientific basis for its decision-making, the availability of underlying dose-response data should be considered as long as other significant technical considerations can provide some level of certainty or confirmation of a study's conclusions, importance, and applicability, even in the absence of maximum transparency. Though EPA's list of factors herein is not exhaustive or exclusive, the EPA has identified several factors in 40 CFR 30.5(d) that balance some of the important technical considerations the EPA will consider in addition to data availability and that are particularly relevant to the stage of the analysis where dose-response data are used. These factors are intended to assist the EPA in determining the consideration to afford to pivotal science with underlying dose-response data that are not available for independent validation. The final rule requirements and the consideration of these factors apply to any data used in characterizing the relationship between the amount of dose or exposure to a pollutant, contaminant, or substance and an effect, regardless of the direction of that effect. Because study quality factors (including soundness, applicability and utility, clarity and completeness, uncertainty and variability, and evaluation and review) would have already been evaluated at an earlier stage in the assessment process (see 40 CFR 30.5(b)), the EPA envisions that at the stage of the evaluation that utilizes the factors described in 40 CFR 30.5(d), the studies to be evaluated would generally be of the highest quality available.

Some of the factors in 40 CFR 30.5(d) are intended to be evaluated for pivotal science with underlying data that are not available for independent validation relative to pivotal science with underlying data that are available for independent validation. For example, when assessing studies, the EPA may determine that greater consideration should be given to a study with underlying data that are unavailable for independent validation when that study is of higher quality compared to a medium-quality study with underlying data that are available for independent validation (factor 1), the conclusions of the significant regulatory action or influential scientific information are or are not highly sensitive to the exclusion of the study for which the underlying data are not available for independent validation (factor 3), the study with data unavailable for independent validation was better fit for the purpose of the EPA assessment (factor 4), or the results of the study for which the underlying data are not available are supported by other scientific evidence, such as mechanistic data (factor 6).

Importantly, the factors in 40 CFR 30.5(d) do not apply to other stages in the assessment process (although they are relevant to determining whether to grant an exemption under 40 CFR 30.7, as further explained below). For example, the consideration for exposures that were conducted at more environmentally relevant exposure concentrations (factor 5) does not suggest that epidemiological studies will automatically be given greater weight than laboratory studies. The EPA will continue to use established guidelines for identifying and integrating evidence and will use the factors in 40 CFR 30.5(d) only when evaluating the data availability requirements of this rule (or when determining whether to grant an exemption under 40 CFR 30.7, as further explained below). In addition, not all of these factors will be applicable to all studies or assessments. For example, some pollutants, chemicals, or substances may have unique scientific considerations (factor 7), such as the valence state of a metal compound or endogenous contributions to internal concentrations, that may not be relevant for other pollutants, chemicals, or substances. Therefore, the weight afforded to each factor by the EPA may vary by assessment, and how those factors were considered will be documented in the assessment. If two studies, one with and one without available data and are relatively equal with respect to the study quality factors in 40 CFR 30.5(b), the study where the underlying data is available will be given greater consideration and the weight of the other study will be based on an assessment of the factors in 40

CFR 30.5(d). In this way, the EPA will balance the importance of transparency with the need to maintain a strong scientific basis for its assessments.

This final rule requires the consideration of the factors in 40 CFR 30.5(d) when assessing pivotal studies for which the dose-response data are not available for independent validation. The EPA may adapt these factors in upcoming statute-specific rulemakings, as appropriate, for significant regulatory actions under the different environmental statutes that the EPA administers. How scientific information is to be considered varies among the different environmental statutes and sometimes within an individual statute. Interpretation of the assessment factors will be tailored to the specific circumstances and the specific environmental statutes.

Some commenters asserted that the 2018 proposed rule and the 2020 SNPRM failed to explain how historical data, which may have been collected under different policies and procedures, will be treated. These commenters noted that underlying dose-response data may have been lost for older studies due to record retention schedules. Some commenters also contended that a significant amount of work would be required to locate, curate, and retrospectively make datasets available for public access.

The EPA intends to determine the extent of the consideration that should be given to pivotal studies lacking available data on a case-by-case basis. The EPA will consider the circumstances specific to each such study when it applies the factors listed in 40 CFR 30.5(d) to that study. The age of the data is not a consideration under 40 CFR 30.5(d), but could be the basis for a 40 CFR 30.7 exemption request.

Some commenters stated that the EPA should not have the rulemaking apply retrospectively to studies given the potential difficulty accessing, reviewing, and making data available that were not originally intended to be disseminated, as would be required by this rulemaking. These commenters requested that the EPA apply the rulemaking provisions only to data and models underlying studies generated after the promulgation of this rule.

This final rule applies prospectively to significant regulatory actions and influential scientific information and has no retrospective effect on existing (*i.e.,* completed) significant regulatory actions or influential scientific information. For future, significant regulatory actions and influential scientific information, the final rule applies equally to all dose-response data underlying studies used as pivotal science, regardless of when the study or the data was created. Scientific transparency is important regardless of the age of the study or the dose-response data.

Some commenters contended that a substantial amount of work would be required in order to make data underlying studies available for independent validation, but that the EPA has not identified a responsible party for this work, nor has it made clear the timelines, electronic data sharing mechanisms, or how public reporting of such availability would be achieved, archived, and maintained over time. The EPA would like to emphasize that this final rule does not impose requirements on any entity outside of the EPA. This is a rule of internal procedures and does not direct or require any outside entity or the EPA to establish data sharing mechanisms. Further, the final rule does not require the EPA to collect, store, or publicly disseminate dose-response data underlying pivotal science.

Some commenters asserted that reproducing findings across similar studies is more informative than reanalyzing the data from a single study. Such commenters noted that confidence in the study findings is best gained when different groups are studying the same thing or are conducting similar studies. They asserted that the study results could then be averaged, compared, and further analyzed. One commenter noted that the ability to reanalyze the data from a study with very poor scientific quality does not strengthen the quality of the study. Commenters contended that reproducing studies (*i.e.,* producing something that is very similar to that research, but it is in a different medium or context) is generally viewed as a more informative and resource efficient approach to validation of research than reanalyzing the data of a particular study. Some commenters contended that reanalysis of the data and models underlying studies is not how to determine the quality of a study; rather, there are other key aspects of studies that are integral to assessing the quality of a study.

Other commenters supported the proposed requirement for independent validation by reanalysis of data and models underlying studies because they believe this is key to determining whether the science is accurate and of high quality. Some commenters contended that by reanalyzing the underlying data and models, independent researchers can evaluate the myriad of choices and assumptions the original researchers have made regarding the data and statistical models and the potential introduction of any sources of bias.

While the availability of dose-response data underlying a study in a manner sufficient for independent validation is an important component of determining the level of consideration to afford a study, the EPA agrees that availability by itself is not sufficient to determine study quality. As explained in 40 CFR 30.5(b), the EPA will use existing factors (including soundness, applicability and utility, clarity and completeness, uncertainty and variability, and evaluation and review) to evaluate study quality. Subsequently, after identifying the highest quality, most relevant studies that would inform a dose-response assessment and identifying the availability of pivotal science, the EPA would consider the additional applicable factors in 40 CFR 30.5(d) when determining the level of consideration to give pivotal science where the underlying dose-response data are not available for independent validation. Further, although the EPA agrees with commenters that meaningful insights can be obtained through similar studies in different media or context, the EPA continues to find that independent validation of the study findings and conclusions driving the EPA's dose-response assessments would provide important information. As detailed in Section III.A.1 of this preamble, there is scientific support for the usefulness of reanalyzing data, and the EPA finds this to be especially true for data that drive the quantitative requirements or analyses of EPA significant regulatory actions or influential scientific information. Implementation of this rule will increase transparency and, thus, the opportunity for independent subject matter experts to validate pivotal science, and as the dose-response data are better understood the public will, if they so choose, be able to more effectively comment, engage, and hold the EPA accountable during the development of future significant regulatory actions and influential scientific information.

F. Proposed 40 CFR 30.6

In the 2018 proposed rule, the EPA proposed requirements at 40 CFR 30.6 specific to dose-response data and models. These proposed requirements directed the EPA to describe and document the assumptions and methods it used; to evaluate the appropriateness of using default assumptions, including assumptions of a linear, no threshold dose-response; to explain the scientific

basis for each model assumption used; and to show the sensitivity of the modeled results to alternative assumptions. These proposed requirements also directed the EPA to give explicit consideration to high quality studies that explore a broad class of parametric dose-response models, non-parametric models that incorporate fewer assumptions, various threshold models, and models that investigate factors that might account for spatial heterogeneity.

The EPA received significant comment on the 2018 proposed rule regarding the proposed 40 CFR 30.6 requirement that the EPA evaluate the appropriateness of using default assumptions, ''including assumptions of a linear, no threshold dose-response.'' The vast majority of commenters asserted that the EPA should not focus the requirement to evaluate the appropriateness of using default assumptions specifically on linear, no threshold dose-response. In the 2020 SNPRM, in response to these comments, the EPA proposed a variation of the regulatory text which did not include the phrase ''including assumptions of a linear, no threshold dose-response,'' because this could imply that the regulation is specific to those particular assumptions.

The EPA also received significant comment on the 2018 proposed rule about the proposed 40 CFR 30.6 requirement to clearly explain the scientific basis for each model assumption used and to present analyses showing the sensitivity of the modeled results to alternative assumptions. Most commenters contended that such a requirement would be overly burdensome and unnecessary. They recommended that the EPA should present sensitivity analyses only on the most significant assumptions.

Considering these comments, in the 2020 SNPRM, the EPA clarified that the use of the terms ''model assumptions,'' ''assumptions'' and ''models'' in the proposed regulatory text at 40 CFR 30.6 apply to the critical assumptions that drive the model's analytic results, not to each assumption used in the model. The EPA's proposed revision of the 40 CFR 30.6 regulatory text reflected this clarification.

After considering comments on both the 2018 proposed rule and the 2020 SNPRM, the EPA has determined that this rule should apply to dose-response data rather than dose-response data *and models.* Given the specificity of 40 CFR 30.6 to dose-response data and models, and in particular dose-response models, the EPA is not finalizing 40 CFR 30.6. The EPA is adapting one provision of 40 CFR 30.6 as a factor in 40 CFR 30.5 in determining the consideration to afford pivotal science for which the dose-response data are not available for independent validation. Specifically, the EPA is finalizing as a factor in 40 CFR 30.5 the consideration that the EPA would give to high quality studies that explore a broad class of parametric dose-response models, non-parametric models that incorporate fewer assumptions, various threshold models, and models that investigate factors that might account for spatial heterogeneity.

Further, because the EPA is not finalizing any part of the provision that is specific to assumptions and methods associated with dose-response models, comments on the proposed requirements related to these issues are moot. However, while the EPA is not finalizing the provisions in 40 CFR 30.6 that include the term uncertainty, the EPA is responding to these comments because the term uncertainty is used in 40 CFR 30.5. The EPA is also responding to comments on the proposed 40 CFR 30.6 provision incorporated as part of 40 CFR 30.5.

Some commenters contended that the EPA's use of the term ''uncertainty'' at 40 CFR 30.6 is vague. A few other commenters contended that the EPA should include specific requirements in 40 CFR 30.6 as to the scope of an analysis of uncertainty. The EPA disagrees with the suggestion that the term ''uncertainty'' is vague or that there is significant ambiguity about what should be in the scope of a characterization of uncertainty. The characterization of uncertainty is a key factor in the assessments that the EPA conducts. It is a component of various EPA guidelines (*e.g., Framework for Human Health Risk Assessment to Inform Decision Making,* Ref. 36) that the EPA relies upon in conducting its assessments. The scope of the uncertainty analyses that the EPA conducts necessarily varies across assessments and actions. The intent of this regulation is not to force uncertainty analyses into a one-size-fits-all approach, as that is not practical, good policy, or good science. Thus, a regulation of internal procedures, such as this one, does not require a regulatory definition for a term that is already a key component of current EPA practices and guidelines and EPA's assessment process.

Several commenters contended that the proposed 40 CFR 30.6 requirement that the EPA give explicit consideration to high quality studies that explore a broad range of parametric dose-response or concentration-response models and to non-parametric models that incorporate fewer assumptions could force the EPA into situations in which it applies dose-response model(s) that are not appropriate for the data being assessed. The EPA notes that the final regulatory text in 40 CFR 30.5 does not require that a specific type of dose-response model be applied to a particular situation. Rather, in determining the consideration to afford pivotal science for which the dose-response data are not available for independent validation, the EPA will evaluate, as appropriate, the extent to which the study considered a broad range of parametric dose-response or concentration-response models, a robust set of potential confounding variables, nonparametric models that incorporate fewer assumptions, various threshold models across the dose or exposure range, and models that investigate factors that might account for spatial heterogeneity.

G. Administrator's Exemption

In the 2018 proposed rule, the EPA proposed that the Administrator could grant case-by-case exemptions to the requirements in proposed 40 CFR part 30 when compliance with those requirements is impracticable (proposed 40 CFR 30.9). In the 2020 SNPRM, the EPA modified proposed 40 CFR 30.9 to be consistent with other changes proposed in the 2020 SNPRM, such that the Administrator could grant case-by-case exemptions to the requirements in proposed 40 CFR part 30 under specific conditions for which compliance with the requirements in proposed 40 CFR part 30 is impracticable.

Some commenters supported the Administrator's exemption provision in proposed 40 CFR 30.9 while others opposed it. Commenters expressing support for the exemption provision noted that exemptions may be needed to account for lawful and reasonable restrictions on underlying data and models. Commenters expressing opposition to the exemption provision raised concerns about the Administrator granting exemptions from the requirements in proposed 40 CFR part 30. These commenters contended that the Administrator may lack the scientific expertise to make the appropriate exemption decisions and that the Administrator, as a political appointee, could be biased. Some public commenters recommended that the exemption process require formal consultation with EPA career scientists, the EPA's SAB, or another Agency advisory committee.

The EPA also received comment on the following proposed conditions

under which the Administrator could grant an exception in the 2020 SNPRM: Technological barriers render sharing of the data or models infeasible; the development of the data or model was completed or updated before the effective date of the final rule; or making the data and models available would conflict with laws governing privacy, confidentiality, CBI, or national security. Some commenters supported the condition that would allow the Administrator to grant an exemption based on the age of a study, noting that older studies may not have been conducted with the intention of providing access to underlying data and models for independent validation, particularly at the stage of data and models proposed in the 2020 SNPRM. Other commenters opposed this condition, contending that exempting studies based on the age of the study is unnecessary and undermines the goal of increasing transparency in the development of regulatory decisions. Some commenters noted it may be prohibitively expensive for researchers to make their data and models available.

The EPA finds that these comments have merit, in part. The Agency agrees with retaining the Administrator's exemption provision because there are conditions under which compliance with the requirements in 40 CFR part 30 might be impracticable. For example, the underlying dose-response data for some studies, particularly older studies, may not be readily publicly available because of the technological barriers to data sharing (*e.g.,* differences in data storage devices or data retention practices) that existed when they were developed. As a result, the EPA is finalizing the Administrator's exemption provision as proposed in the 2020 SNPRM, with additional conditions described here. Due to other changes described in this preamble, the Administrator's exemption provision, which was previously in 40 CFR 30.9 in the 2018 proposed rule and the 2020 SNPRM, is now 40 CFR 30.7 in the final rule.

The EPA does not agree with the comments regarding the role of the Administrator in determining whether to grant an exemption and finds that the Administrator is the appropriate decision maker in this context. To ensure that the Administrator's decision is appropriately transparent, in the final rule the EPA has included a provision in 40 CFR 30.7 that requires the Agency to document the rationale for any exemptions granted by the Administrator in the significant regulatory action or influential scientific information. This documentation would typically be provided as part of the proposed rulemaking, given that it would be part of the decision concerning what is the pivotal science for the rule. Regardless of what is provided in the proposed rule stage of the rulemaking, the final rulemaking will provide clear documentation.

Some commenters and the EPA's SAB (Ref. 27) also requested that the EPA include criteria that the Administrator will consider when determining whether to grant exemptions from the requirements in 40 CFR part 30. The EPA finds that these comments have merit and is including additional criteria in 30 CFR 30.7 that may be used by the Administrator when he or she is determining whether greater consideration should be afforded to pivotal science for which the underlying dose-response data are not available in a manner sufficient for independent validation. As a result, the Administrator may also determine that greater consideration is warranted when a third party has independently validated the underlying dose-response data through reanalysis or when the EPA's evaluation of the factors in 40 CFR 30.5(d) indicate that full consideration of the pivotal science is justified.

To assist the Administrator in determining whether to grant an exemption, the EPA program or Region responsible for the significant regulatory action or influential scientific information and public commenters can provide input when the Administrator is considering an exemption. The EPA will document the rationale for the Administrator's exemption in the significant regulatory action or influential scientific information. The EPA is confident that the above criteria provide sufficient clarity and boundaries for the Administrator to consider when granting an exemption under 40 CFR 30.7.

H. Peer Review

In the 2018 proposed rule and the 2020 SNPRM, the EPA proposed to require independent peer review on pivotal regulatory science and pivotal science. The EPA also proposed to require that the Agency ask peer reviewers to opine on the strengths and weaknesses of the EPA's justifications for the assumptions used in models.

Some commenters on the 2018 proposed rule and 2020 SNPRM specifically asked why the EPA would need to peer review health and scientific studies and scientific literature that had already undergone independent peer review. They stated that the EPA failed to explain why existing peer review requirements and mechanisms are insufficient. Such commenters also noted that in addition to being duplicative and unnecessary, the proposed requirement would cause unnecessary delays in the EPA actions and would result in increased costs for the Agency. One commenter noted that the EPA already has policies in place for peer review and referred to the EPA's Peer Review Handbook (Ref. 44). Another commenter stated that, while it is certainly best practice to consider only science that has been independently peer reviewed when making regulatory decisions, that does not necessitate independent peer review by the EPA. The commenter noted that most scientific bodies and publications—including *Nature, Science,* the Bipartisan Policy Center, and *Proceedings of the National Academy of Sciences*—employ some of the most robust peer review practices and that they already apply to the types of studies which the proposed rule would require the EPA to peer review anew. Some commenters also stated that the proposed peer review requirements specific to assumptions used in models suggest that the 40 CFR 30.7 regulatory text would require that the EPA conduct peer review of the proposed Agency action itself, rather than of the science underlying that action. One of the commenters contended that it is entirely unclear how peer review could be applied to EPA's reasoning itself, rather than the pivotal science supporting the regulatory decision.

The EPA finds that these comments have merit, in part. However, in this rule, the EPA is not changing the pre-existing requirements of the OMB Final Information Quality Bulletin for Peer Review (Ref 8). The preamble of the Bulletin states that ''the intensity of peer review is highly variable across journals'' and ''prior peer review and publication is not by itself sufficient grounds for determining that no further review is necessary'' (Ref. 8). Peer review does not typically include reanalysis of the underlying data (*i.e.,* the proper stage of data where the data that are ready to be analyzed to extract relevant information) and, thus, peer review is not considered a replacement for the data availability requirements of this rule.

The EPA is, therefore, finalizing the language at 40 CFR 30.6 (formerly 40 CFR 30.7 in the 2018 proposed rule and the 2020 SNPRM) to clarify that the Agency will evaluate whether or not to initiate peer review, consistent with the OMB Final Information Quality Bulletin for Peer Review (Ref. 8) and the EPA's Peer Review Handbook (Ref. 44), of

individual studies identified as pivotal science if the studies have already undergone journal peer review. If the Agency conducts peer review on pivotal science, the EPA shall ask peer reviewers to articulate the strengths and weaknesses of the justification for the assumptions applied in analyzing dose-response data and the implications of those assumptions for the results.

I. Changes to 40 CFR 30.4 ''What requirements apply to EPA's use of studies in significant regulatory actions?''

In the 2018 proposed rule, the EPA proposed to require at 40 CFR 30.4 that ''EPA shall clearly identify all studies (or other regulatory science) relied upon when it takes any final action. The EPA should make all such studies available to the public to the extent practicable.'' Some commenters expressed concern that proposed 40 CFR 30.4 would permit the Agency to exclude valid studies from consideration on the basis of the availability of underlying data or models. Another commenter noted that this section would apply to any final agency action, rather than regulatory decisions. In response to these comments, the EPA notes that this section does not require the EPA to exclude studies from consideration when developing final significant regulatory actions either on the basis of the availability of underlying data or models, or depending on the practicability of making these studies available to the public.

The EPA agrees with the commenter that the scope of 40 CFR 30.4 should be limited to significant regulatory actions, which are defined in 40 CFR 30.2 as ''final regulations determined to be 'significant regulatory actions' by the Office of Management and Budget pursuant to Executive Order 12866.'' The EPA is finalizing additional changes to the title and body of 40 CFR 30.4 by using terms defined in 40 CFR 30.2. In the title of 40 CFR 30.4, the EPA is replacing ''taking final action'' with ''significant regulatory actions'' to improve clarity and specificity, since the latter term is defined. In the body of 40 CFR 30.4, the EPA is replacing ''all studies (or other regulatory science) relied upon when it takes any final agency action'' with ''science that serves as the basis for informing a significant regulatory action'' to improve specificity, since the latter language is defined; replacing ''should'' with ''shall;'' ''studies'' with ''science that serves as the basis for informing a significant regulatory action'' to improve specificity, since the latter term is defined; and ''available to the public'' with ''publicly available'' to improve specificity, since the latter term is defined. Together, these changes are meant to clarify that the requirements of 40 CFR 30.4 are consistent with the EPA's existing practice of making science that serves as the basis for informing a significant regulatory action available in the public docket as part of the rulemaking.

J. Benefits and Costs

In the 2018 proposed rule, as part of its E.O. 12866 and E.O. 13563 reviews, the EPA stated that the benefits of the proposal justify the costs. The EPA's rationale was that the rule would facilitate expanded data sharing and exploration of key data sets, improve the ability to independently validate analyses underlying significant regulatory actions, and would be implemented in a cost-effective way. The 2020 SNPRM did not provide additional characterizations of benefits and costs. A number of commenters noted that the EPA did not provide an economic assessment to support the Agency's benefit-cost claims. Commenters also noted that the EPA did not characterize costs to the Agency, including administrative costs to ascertain the public availability of underlying data, costs for additional analyses required, and costs to ensure that PII and CBI are not disclosed. Other commenters noted that the EPA had not adequately explained the benefits of this rule, including enabling increased secondary analyses by third party researchers.

The EPA agrees that neither the 2018 proposed rule nor the 2020 SNPRM included a characterization of costs to the Agency. The EPA emphasizes that this is a rule of internal procedure promulgated under the EPA's housekeeping authority. However, the EPA has identified some incremental costs that the Agency may incur as a result of this final rule. As stated in Section III.A.2 of this preamble, the EPA will continue its current practice of conducting extensive review of scientific studies during the development of significant regulatory actions and influential scientific information. The additional procedures required by this rule apply only to pivotal science, which is a subset of the total number of studies that the EPA would evaluate. Given the costs of the current robust process for identifying and reviewing scientific studies and documentation that are existing Agency practice, as well as that the determination of dose-response data availability is limited to pivotal science underlying significant regulatory actions and influential scientific information, the EPA anticipates that the incremental costs of this rule will be small. The Agency may also incur other administrative costs to perform analyses and evaluations to support activities such as exemption decisions made by the Administrator, and documenting these or other decisions made pursuant to the requirements of the final rule. Again, the Agency anticipates that the incremental costs for these activities will be small relative to current administrative costs for developing significant regulatory actions or influential scientific information. Finally, this final rule does not require the EPA to disclose or host data, but to determine if dose-response data are available and to give greater consideration to those studies for which such data are available. Hence, this rule does not impose costs on the EPA or any other party to make data available, including costs to ensure that PII and CBI are not disclosed. The Agency may opt, at its discretion, to incur the costs associated with making data available when it is in the public interest to do so, but that will be decided on a case-by-case basis and is not a requirement of the final rule.

The EPA also agrees that the benefits of the rule were not fully characterized in the 2018 proposed rule or the 2020 SNPRM. The EPA emphasizes, however, that this is a rule of internal procedure promulgated under the EPA's housekeeping authority. As discussed in Section III.A.1 of this preamble, the main benefits of this rule spring from greater transparency in significant regulatory actions and influential scientific information. By placing greater emphasis on the availability of dose-response data underlying pivotal science, the rule will allow for greater scientific scrutiny as EPA decision makers are developing significant regulatory actions and influential scientific information and increases the likelihood that any errors will be identified and corrected. Greater transparency is also inherently valuable as a principle of good government and provides benefits to the public at large, including reducing the risk of errors in EPA analyses and in the science such analyses rely upon. The ability for independent subject matter experts to validate pivotal science will facilitate more effective comment and engagement with the public during development of future significant regulatory actions and influential scientific information.

Some commenters further argued that the EPA failed to account for costs external to the EPA as consequence of

this rule, including costs to third party researchers and their institutions to make their raw data available and protect PII/CBI through data-masking, de-identification, or deposition in public data repositories. The EPA disagrees with the argument that this rule would impose costs on third-party researchers. This is a rule of internal procedure that does not impose requirements on any party other than the EPA. This rule imposes no costs on researchers or their institutions, and the EPA will consider and evaluate all relevant and appropriate science in its significant regulatory actions and influential scientific information. The EPA recognizes that researchers and other third parties may voluntarily consider the EPA's position on data availability, as described in this rule, as they make their own decisions about how to conduct research and the extent to which they make data and models available. Researchers may choose to make more data and models available, but the EPA recognizes that these parties will weigh their own benefits and costs and make choices that they deem appropriate.

Some commenters argued the 2018 proposed rule and the 2020 SNPRM would impose costs on third parties because it would prohibit the EPA from using necessary science where the underlying data and models are not publicly available, which would prevent the EPA from meeting its statutory obligations and performing its mission of protecting human health and the environment. Some commenters also contended that the proposed rule requirements would impose costs to the public by delaying EPA regulatory actions that protect human health and the environment.

As described earlier, the EPA acknowledges and agrees with commenters that there may be pivotal science where the underlying data are not publicly available or available through restricted access. The final rule is limited to dose-response data and, as no studies are categorically excluded from consideration, the EPA will continue to rely on the full body of the highest quality, most relevant studies available in determining the potential for hazard due to exposure to a pollutant, contaminant, or substance. Consistent with the requirements of this rule, the EPA will identify a subset of those studies based on the exposure situation being addressed, the quality of the studies, the reporting adequacy, and the relevance of the endpoints that would inform a dose-response assessment, and will give greater consideration to pivotal science for which the underlying dose-response data are available. The EPA disagrees with commenters that the requirements of this rule will result in any meaningful delay in promulgating regulations. While this final rule requires the Agency to evaluate the availability of dose-response data for pivotal science, the incremental burden to the Agency to carry out these requirements is expected to be small given (1) the extensive scientific review the EPA already conducts regularly and (2) that the requirement is limited to pivotal science (*i.e.,* typically a small, though highly important, subset of the studies the EPA would review). Further, with this final rule, the EPA is maintaining language in 40 CFR 30.3 stating that the statutes that the EPA administers, or their implementing regulations, will control in the event of any conflicts with the requirements of this rule. The Agency will continue to comply with and abide by the requirements in those statutes and implementing regulations, including regulatory deadlines.

K. Proposed 40 CFR 30.8 ''How is EPA to account for cost under this subpart?''

In 2018, the EPA proposed in 40 CFR 30.8 that ''EPA shall implement the provisions of this subpart in a manner that minimizes costs.'' A number of commenters argued that this statement was vague and that the 2018 proposed rule neither explained what costs this rule would incur, nor how they would be minimized. One commenter further raised concern that, in order to minimize costs, proposed 40 CFR 30.8 may require the EPA to exclude valid data from consideration rather than take potentially expensive steps to protect CBI, proprietary data, and PII. Still other commenters interpreted proposed 40 CFR 30.8 as requiring the EPA to base its final significant regulatory actions and influential scientific information on cost. Commenters expressed concern that this would be at the exclusion of considerations such as the best available science and public health. A commenter further argued that the EPA does not have the statutory authority to base its assessment of science on cost without consideration of public health and environmental costs and benefits and privacy-related costs and benefits, and that doing so would be irrational and arbitrary.

As explained in Section III.J of this preamble, this rule of internal procedure is anticipated to incur small incremental costs related to the additional review of data availability, as compared to the Agency's existing costs for extensive review and documentation as part of the development of significant regulatory actions and influential scientific information. In consideration of the public comments, however, the EPA is not finalizing proposed 40 CFR 30.8 ''How is EPA to account for cost under this subpart?'' This rule is not intended to require the EPA to exclude valid data from consideration on the basis of cost, nor interpret the EPA's statutory authority to consider costs in significant regulatory actions or influential scientific information. Given the EPA's existing commitment to fulfill its duties in a cost-effective manner, the EPA has determined not to finalize proposed 40 CFR 30.8.

IV. References

The following is a listing of the documents that are specifically referenced in this notice. The docket includes these documents and other information considered by EPA, including documents referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

1. E.O. 13777, *Enforcing the Regulatory Reform Agenda,* 82 FR 12285 (March 1, 2017), *available at https://www.federalregister.gov/documents/2017/03/01/2017-04107/enforcing-the-regulatory-reform-agenda.*
2. E.O. 13783, *Promoting Energy Independence and Economic Growth,* 82 FR 16093 (March 31, 2017), *available at https://www.federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth.*
3. Office of Mgmt. & Budget, Exec. Office of the President, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies,* 67 FR 8451 (February 22, 2002), *available at https://www.federalregister.gov/documents/2002/02/22/R2-59/guidelines-for-ensuring-and-maximizing-the-quality-objectivity-utility-and-integrity-of-information.*
4. Office of Mgmt. & Budget, Exec. Office of the President, *Open Data Policy—Managing Information as an Asset,* OMB M–13–13 (May 9, 2013), *available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2013/m-13-13.pdf.*
5. U.S. EPA. Strengthening Transparency in Regulatory Science; Proposed Rule, 83 FR 18768 (April 30, 2018) (FRL–9977–40), *available at https://www.federalregister.gov/documents/2018/04/30/2018-09078/strengthening-transparency-in-regulatory-science.*
6. U.S. EPA. Strengthening Transparency in Regulatory Science; Proposed Rule, 83 FR 24255 (May 25, 2018) (FRL–9978–31),

available at https://www.federalregister.gov/documents/2018/05/25/2018-11316/strengthening-transparency-in-regulatory-science-extension-of-comment-period-and-notice-of-public.

7. U.S. EPA. Strengthening Transparency in Regulatory Science; Supplemental Notice of Proposed Rulemaking, 85 FR 15396 (March 18, 2020) (FRL–10004–72–ORD), *available at https://www.federalregister.gov/documents/2020/03/18/2020-05012/strengthening-transparency-in-regulatory-science.*
8. Office of Mgmt. & Budget, Exec. Office of the President, *Final Information Quality Bulletin for Peer Review,* 70 FR 2664 (January 14, 2005), *available at https://www.federalregister.gov/documents/2005/01/14/05-769/final-information-quality-bulletin-for-peer-review.*
9. U.S. EPA. (2016). Plan to Increase Access to Results of EPA-Funded Scientific Research. (EPA/601–R–16–005). Washington, DC: U.S. Environmental Protection Agency. *Available at https://www.epa.gov/sites/production/files/2016-12/documents/epascientificresearchtransperancyplan.pdf.*
10. U.S. EPA. (2018). Open Government Plan 5.0. Washington, DC: U.S. Environmental Protection Agency. *Available at https://www.epa.gov/sites/production/files/2018-10/documents/epaopengovplan version5_0final.pdf.*
11. Office of Mgmt. & Budget, Exec. Office of the President, OMB M–10–06, *Open Government Directive* (December 8, 2009), *available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2010/m10-06.pdf.*
12. Office of Science and Technology Policy. (2013). Memorandum for the Heads of Executive Departments and Agencies: Increasing Access to the Results of Federally Funded Scientific Research. *Available at https://www.epa.gov/sites/production/files/2015-01/documents/ostp_memo_increasing_public_access.pdf.*
13. Office of Mgmt. & Budget, Exec. Office of the President, OMB M–19–23, *Phase 1 Implementation of the Foundations for Evidence-Based Policymaking Act of 2018—Learning Agendas, Personnel, and Planning Guidance* (July 10, 2019), *available at https://www.whitehouse.gov/wp-content/uploads/2019/07/M-19-23.pdf.*
14. Office of Mgmt. & Budget, Exec. Office of the President, OMB M–20–12, *Phase 4 Implementation of the Foundations for Evidence-Based Policymaking Act of 2018—Program Evaluation Standards and Practices* (March 10, 2020), *available at https://www.whitehouse.gov/wp-content/uploads/2020/03/M-20-12.pdf.*
15. McNutt, M. (2016). Taking up TOP. *Science* 352, 1147. *Available at https://doi.org/10.1126/science.aag2359.*
16. NAS (National Academies of Sciences, Engineering, and Medicine). (2019). Reproducibility and replicability in science. Washington, DC: The National Academies Press. *Available at https://www.nationalacademies.org/our-work/reproducibility-and-replicability-in-science.*
17. Nosek, B.A. et al. (2015). Promoting an open research culture. *Science* 348, 1422–1425. *Available at https://doi.org/10.1126/science.aab2374.*
18. Office of Mgmt. & Budget, Exec. Office of the President, OMB M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), *available at https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf.*
19. Calabrese, E.J. (2019). EPA transparency proposal: Testimony of Edward J. Calabrese, Ph.D., October 3, 2018. *J Cell Commun Signal.* 13(1): 145–147. *https://doi.org/10.1007%2Fs12079-018-0497-8.*
20. Perrone, J. (2014). Secrets are no fun. *The Hill. Available at https://thehill.com/blogs/congress-blog/energy-environment/224583-secrets-are-no-fun.*
21. U.S. Congress. (2010). Current Science on Public Exposures to Toxic Chemicals: Hearing before the Subcommittee on Superfund, Toxics and Environmental Health of the Committee on Environment and Public Works, 111th Congress. *Available at https://www.govinfo.gov/content/pkg/CHRG-111shrg21160/html/CHRG-111shrg21160.htm.*
22. U.S. Congress. (2010). Letter to EPA Administrator Jackson. *Available at https://assets.documentcloud.org/documents/1202768/letter-from-congress-to-lisa-jackson-on-arsenic.pdf.*
23. U.S. Congress. (2011). EPA's IRIS Program: Evaluating the Science and Process Behind Chemical Risk Assessment: Hearing before the Subcomm. on Oversight & Investigations of the H. Comm. on Science, Space, & Technology, 112th Cong. *Available at https://www.govinfo.gov/content/pkg/CHRG-112hhrg67255/html/CHRG-112hhrg67255.htm.*
24. McNutt, M. (2014). Journals unite for reproducibility. *Science* 346(6210): 679. *Available at https://doi.org/10.1126/science.aaa1724.*
25. Munafò, M.R. et al. (2017). A manifesto for reproducible science. *Nature Human Behaviour* 1(0021). *Available at https://doi.org/10.1038/s41562-016-0021.*
26. NAS (National Academies of Sciences, Engineering, and Medicine). (2016). Principles and obstacles for sharing data from environmental health research: Workshop summary. Washington, DC: The National Academies Press. *Available at https://doi.org/10.17226/21703.*
27. U.S. EPA's Science Advisory Board. (2020). Science Advisory Board Consideration of the Scientific and Technical Basis of EPA's Proposed Rule Titled ''Strengthening Transparency in Regulatory Science.'' EPA–SAB–20–005. *Available at https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentBOARD/2DB3986BB8390B308525855800630FCB/$File/EPA-SAB-20-005.pdf.*
28. Alsheikh-Ali, A.A., Qureshi, W., Al-Mallah, M.H., and Ioannidis, J.P. (2011). Public availability of published research data in high-impact journals. *PloS ONE* 6, e24357. *Available at https://doi.org/10.1371/journal.pone.0024357.*
29. Iqbal, S.A., Wallach, J.D., Khoury, M.J., Schully, S.D., and Ioannidis, J.P. (2016). Reproducible research practices and transparency across the biomedical literature. *PLoS Biol.* 14, e1002333. *Available at https://doi.org/10.1371/journal.pbio.1002333.*
30. Peterson, E.D. and Rockhold, F.W. (2018). Finding means to fulfill the societal and academic imperative for open data access and sharing. *JAMA Cardiology. Available at https://doi.org/10.1001/jamacardio.2018.0129.*
31. Wicherts, J.M., Borsboom, D., Kats, J. and Molenaar, D. (2006). The poor availability of psychological research data for reanalysis. *Am. Psychol.* 61, 726–728. *Available at https://doi.org/10.1037/0003-066x.61.7.726.*
32. Christensen, G., Dafoe, A., Miguel, E., Moore, D.A., and Rose, A.K. (2019). A study of the impact of data sharing on article citations using journal policies as a natural experiment. *PLoS ONE* 14(12): e0225883. *Available at https://doi.org/10.1371/journal.pone.0225883.*
33. Vasilevsky, N.A. et al. (2017). Reproducible and reusable research: Are journal data sharing policies meeting the mark? *PeerJ* 5:e3208. *Available at https://doi.org/10.7717/peerj.3208.*
34. Stodden V., Seiler J., and Ma Z. (2018). An empirical analysis of journal policy effectiveness for computational reproducibility. PNAS 115(11): 2584–2589. *Available at https://doi.org/10.1073/pnas.1708290115.*
35. U.S. EPA. (2002). Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency. (EPA/260R–02–008). Washington, DC: U.S. Environmental Protection Agency. *Available at https://www.epa.gov/sites/production/files/2020-02/documents/epa-info-quality-guidelines_pdf_version.pdf.*
36. U.S. EPA. (2014). Framework for Human Health Risk Assessment to Inform Decision Making. (EPA/100/R–14/001). Washington, DC: U.S. Environmental Protection Agency, Office of the Science Advisor, Risk Assessment Forum. *Available at https://www.epa.gov/sites/production/files/2014-12/documents/hhra-framework-final-2014.pdf.*
37. U.S. EPA. (2003). A Summary of General Assessment Factors for Evaluating the Quality of Scientific and Technical Information. (EPA 100/B–03/001). Washington, DC: U.S. Environmental Protection Agency. *Available at https://www.epa.gov/sites/production/files/2015-01/documents/assess2.pdf.*
38. Lewandowsky, S. and Oberauer, K. (2020). Low replicability can support robust and efficient science. *Nat Commun* 11, 358. *https://doi.org/10.1038/s41467-019-14203-0.*
39. Mueller-Langer, F., Fecher, B., Harhoff, D., and Wagner, G.G. (2019). Replication studies in economics—How many and which papers are chosen for replication, and why? *Research Policy* 48: 62–83. *Available at https://doi.org/10.1016/j.respol.2018.07.019.*

40. Field, S.M. et al. (2019). When and Why to Replicate: As Easy as 1, 2, 3? *Collabra: Psychology,* 5(1): 46. *Available at https://doi.org/10.1525/collabra.218.*
41. Hardwicke, T., Tessler, M., Peloquin, B., and Frank, M. (2018). A Bayesian decision-making framework for replication. *Behavioral and Brain Sciences,* 41, E132. *Available at https://doi.org/10.1017/s0140525x18000675.*
42. U.S. EPA. (2020). Freedom of Information Act Annual Report Fiscal Year 2019. Washington, DC: U.S. Environmental Protection Agency. *Available at https://www.epa.gov/foia/epa-foia-annual-report-2019.*
43. FDA (Food and Drug Administration). (2011). Advancing Regulatory Science at FDA. *Available at https://www.fda.gov/science-research/advancing-regulatory-science/strategic-plan-regulatory-science.*
44. U.S. EPA. (2015). Peer Review Handbook, 4th Edition. (EPA/100/B–15/001). Washington, DC: U.S. Environmental Protection Agency. *Available at https://www.epa.gov/sites/production/files/2020-08/documents/epa_peer_review_handbook_4th_edition.pdf.*

V. Statutory and Executive Orders Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket. The EPA does not anticipate that this rulemaking will have an economic impact on regulated entities.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not subject to Executive Order 13771 because this final rule is a rulemaking of agency organization, procedure, or practice.

C. Paperwork Reduction Act (PRA)

This action does not contain any information collection activities and therefore does not impose an information collection burden under the PRA.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action does not regulate any entity outside the Federal Government.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' within the meaning of Executive Order 13211. It is not likely to have a significant adverse effect on the supply, distribution or use of energy, and it has not otherwise been designated as a significant energy action by the Administrator of the Office of Information and Regulatory Affairs (OIRA).

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action is not subject to Executive Order 12898 (59 FR 7629, February 16, 1994) because it does not establish an environmental health or safety standard.

L. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties.

List of Subjects in 40 CFR Part 30

Environmental protection, Administrative practice and procedure, Reporting and recordkeeping requirements.

Andrew Wheeler,
Administrator.

■ For the reasons set forth in the preamble, the EPA is adding 40 CFR part 30 to read as follows:

PART 30—TRANSPARENCY IN SIGNIFICANT REGULATORY ACTIONS AND INFLUENTIAL SCIENTIFIC INFORMATION

Sec.
30.1 What is the purpose of this part?
30.2 What definitions apply to this part?
30.3 How do the provisions of this part apply?
30.4 What requirements apply to the EPA's use of studies in significant regulatory actions?
30.5 What requirements apply to the EPA's use of dose-response data underlying pivotal science?
30.6 What role does independent peer review have in this part?
30.7 May the EPA Administrator grant exemptions to this part?

Authority: 5 U.S.C. App.; Pub. L. 98–80, 84 Stat. 2086.

§ 30.1 What is the purpose of this part?

This part directs the EPA to give greater consideration to pivotal science when the underlying dose-response data are available in a manner sufficient for independent validation.

§ 30.2 What definitions apply to this part?

For the purposes of this part:

Data means the set of recorded factual material commonly accepted in the scientific community as necessary to validate research findings in which obvious errors, such as keystroke or coding errors, have been removed and that is capable of being analyzed by either the original researcher or an independent party.

Dose-response data means the data used to characterize the quantitative relationship between the amount of dose or exposure to a pollutant, contaminant, or substance and an effect.

Independent validation means the reanalysis of study dose-response data by subject matter experts who have not contributed to the development of the study to evaluate whether results similar to those reported in the study are produced.

Influential scientific information means scientific information the Agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.

Pivotal science means the specific dose-response studies or analyses that drive the requirements or quantitative analyses of EPA significant regulatory actions or influential scientific information.

Publicly available means lawfully available to the general public from Federal, state, or local government records; the internet; widely distributed media; or disclosures to the general public that are required to be made by Federal, state, or local law. The public must be able to access the information on the date of publication of the proposed rule (or, as appropriate, a supplemental notice of proposed rulemaking, or notice of availability) for the significant regulatory action or on the date of dissemination of the draft influential scientific information for public review and comment.

Reanalyze means to analyze exactly the same dose-response data to determine whether a similar result emerges from the analysis by using the same methods, statistical software, models, or statistical methodologies that were used to analyze the dose-response data, as well as to assess potential analytical errors and variability in the underlying assumptions of the original analysis.

Science that serves as the basis for informing a significant regulatory action means studies, analyses, models, and assessments of a body of evidence that provide the basis for EPA significant regulatory actions.

Significant regulatory actions means final regulations determined to be ''significant regulatory actions'' by the Office of Management and Budget pursuant to Executive Order 12866.

§ 30.3 How do the provisions of this part apply?

(a) The provisions of this part apply to science that serves as the basis for informing a significant regulatory action or influential scientific information, as well as to dose-response data underlying pivotal science, regardless of the source of funding or identity of the party conducting the science. The provisions of this part apply to significant regulatory actions for which a proposed rule was published in the **Federal Register** after January 6, 2021 and influential scientific information submitted for peer review after January 6, 2021.

(b) The provisions of this part do not apply to physical objects (like laboratory samples), drafts, and preliminary analyses, and influential scientific information or pivotal science that meet one or more of the exemptions identified in Section IX of the OMB Final Information Quality Bulletin for Peer Review. In the event the procedures outlined in this part conflict with statutes the EPA administers, or their implementing regulations, the statutes and regulations will control. Except where explicitly stated otherwise, the provisions of this part do not apply to any other type of Agency action, including individual party adjudications, enforcement activities, site-specific actions, or permit proceedings.

§ 30.4 What requirements apply to the EPA's use of studies in significant regulatory actions?

The EPA shall clearly identify the science that serves as the basis for informing a significant regulatory action. The EPA shall make all such science that serves as the basis for informing a significant regulatory action publicly available to the extent permitted by law.

§ 30.5 What requirements apply to the EPA's use of dose-response data underlying pivotal science?

(a) When promulgating a significant regulatory action or developing influential scientific information that relies on dose-response data, the Agency shall follow best practices to evaluate potential links between exposure to a pollutant, contaminant, or substance and the effect and the nature of the dose-response relationship.

(b) The EPA will use the following factors to assess the quality of studies identified in the systematic review: soundness, applicability and utility, clarity and completeness, uncertainty and variability, and evaluation and review. The EPA will rely on the highest quality, most relevant studies in determining the potential for hazard due to exposure to a pollutant, contaminant, or substance. Where there is convincing and well-substantiated evidence of a relationship between exposure and effect, the EPA will identify those studies based on the exposure situation being addressed, the quality of the studies, the reporting adequacy, and the relevance of the endpoints that would inform a dose-response assessment for those effect endpoints. From the subset in the preceding sentence, the specific dose-response studies or analyses that drive the requirements, quantitative analyses, or both of an EPA significant regulatory action or influential scientific information will be identified as pivotal science.

(c) The EPA shall give greater consideration to pivotal science where the underlying dose-response data are publicly available in a manner sufficient for independent validation. The Agency shall also give greater consideration to pivotal science based on dose-response data that include confidential business information, proprietary information or personally identifiable information if these data are available through restricted access in a manner sufficient for independent validation. For pivotal science where there is no access to dose-response data, or access is limited, the Agency may still consider these studies but will give them lesser consideration unless the Administrator grants an exemption under § 30.7. The Agency will identify the pivotal science that was given lesser consideration and provide a short description of why lesser consideration was given.

(d) In determining the degree of consideration to afford pivotal science for which the dose-response data are not available for independent validation, the EPA shall consider the following factors and any other relevant factors, as applicable:

(1) The quality of the study relative to other studies for which the dose-response data are available;

(2) The extent to which there are other studies for which the dose-response data are available;

(3) The sensitivity of the conclusions in the significant regulatory action or influential scientific information based on the use of the study;

(4) The extent to which the study is fit for the purpose or intended use relative to other pivotal science for which the dose-response data are available;

(5) The use of exposures or doses in a range and duration that is relevant for the intended use and that minimizes the need for extrapolations;

(6) The extent to which the study is supported by other scientific evidence;

(7) The extent to which the study accounted for unique scientific considerations;

(8) The extent to which the study minimizes the use of defaults and assumptions, uses appropriate and strong statistical methods, and includes a robust representation of uncertainty and confidence intervals; and

(9) The study's consideration of a broad range of parametric dose-response or concentration-response models, a robust set of potential confounding variables, nonparametric models that incorporate fewer assumptions, various threshold models across the dose or exposure range, and models that investigate factors that might account for spatial heterogeneity.

(e) The EPA shall also describe critical assumptions and methods used in its dose-response assessment and shall characterize the variability and uncertainty of the assessment. The EPA shall evaluate the appropriateness of using default assumptions on a case-by-case basis. The EPA shall clearly explain the scientific basis for critical assumptions used in the dose-response assessment that the EPA relied on for the significant regulatory action or influential scientific information.

(f) Where the Agency is making dose-response data publicly available, it shall do so in a fashion that is consistent with law, protects privacy, confidentiality, confidential business information, and is sensitive to national security. Dose-response data is considered ''publicly available in a manner sufficient for independent validation'' when it includes the information necessary for the public to understand, assess, and reanalyze findings and may include, for example:

(1) Data (data would be made available subject to access and use restrictions);

(2) Associated protocols necessary to understand, assess, and extend conclusions;

(3) Computer codes and models involved in the creation and analysis of such information;

(4) Recorded factual materials; and

(5) Detailed descriptions of how to access and use such information.

(g) The provisions of this section apply to dose-response data underlying studies that are pivotal science, regardless of who funded or conducted the studies. The Agency shall make all reasonable efforts to explore methodologies, technologies, and institutional arrangements for making such data available before it concludes that doing so in a manner consistent with law and protection of privacy, confidentiality, national security is not possible.

§ 30.6 What role does independent peer review have in this part?

The EPA shall conduct independent peer review consistent with the requirements of the OMB Final Information Quality Bulletin for Peer Review and the exemptions described therein. The EPA will evaluate whether or not to conduct additional peer review of individual studies identified as pivotal science if the studies have already undergone journal peer review. Because transparency in pivotal science includes addressing issues associated with assumptions used in analyzing dose-response data, the EPA shall ask peer reviewers to articulate the strengths and weaknesses of the justification for the assumptions applied and the implications of those assumptions for the results.

§ 30.7 May the EPA Administrator grant exemptions to this part?

(a) The Administrator may grant an exemption to this part for a study on a case-by-case basis if he or she determines that greater consideration is warranted because:

(1) Technological or other barriers render sharing of the dose-response data infeasible;

(2) The development of the dose-response data was completed or updated before January 6, 2021;

(3) Making the dose-response data available would conflict with laws and regulations governing privacy, confidentiality, confidential business information, or national security;

(4) A third-party has conducted independent validation of the study's underlying dose-response data through reanalysis; or

(5) The factors used in determining the consideration to afford to the pivotal science indicate full consideration is justified.

(b) When making a decision to grant an exemption, the Administrator may consider input from EPA staff and public commenters. The EPA shall document the rationale for exemptions granted by the Administrator in the significant regulatory action or influential scientific information.

[FR Doc. 2020–29179 Filed 1–5–21; 8:45 am]

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AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412–AA86

Leave and Holidays for U.S. Personal Services Contractors, including Family and Medical Leave; Corrections

AGENCY: Agency for International Development.

ACTION: Correcting amendments; final rule.

SUMMARY: On October 16, 2020, the U.S. Agency for International Development (USAID) issued a final rule revising provisions of the AID Acquisition Regulation (AIDAR) that pertain to the General Provision contract clause 5, entitled ''Leave and Holidays'' for U.S. personal services contractors (USPSCs.) This document corrects typographical errors in the final rule by revising the text of clause 5, adding the effective dates in the titles of clauses 6 and 16, and revising the authority citation.

DATES: Effective January 6, 2021.

FOR FURTHER INFORMATION CONTACT: Richard E. Spencer, Procurement Analyst, by phone at 202–916–2629, or email at *rspencer@usaid.gov.* All communications regarding this rule must cite AIDAR RIN No. 0412–AA86.

SUPPLEMENTARY INFORMATION: USAID is correcting errors in the final rule entitled ''Leave and Holidays for U.S. Personal Services Contractors, including Family and Medical Leave,'' under AIDAR 48 CFR chapter 7, appendix D, which was published in the **Federal Register** on October 16, 2020 (85 FR 65734). This document corrects the following typographical errors in AIDAR appendix D. In section 12 clause 5, the title is revised to remove italics, and the last sentence of paragraph (a)(3) is revised because the final rule mistakenly included the word ''either'' twice, making the application of the sub-paragraphs (i) and (ii) illogical and impossible to apply. This document corrects the construction of this sentence in paragraph (a)(3) to ensure only one of the two sub-paragraphs (i) or (ii) may apply, and by using the matching terminology for ''exceptional circumstances'' that appears earlier in the paragraph. In the titles for clauses 6, ''Differential and Allowances,'' and 16, ''Termination'', the effective dates missing from the final rule are inserted for each clause. Lastly, the final rule mistakenly included an instruction to add a parenthetical authority citation at the end, unnecessarily creating a double citation. This document instead revises

the one authority citation that already exists. This document does not make any substantive changes to the final rule.

List of Subjects in 48 CFR Chapter 7, Appendix D

Government procurement.

Accordingly, 48 CFR chapter 7 is corrected by making the following amendments:

CHAPTER 7— AGENCY FOR INTERNATIONAL DEVELOPMENT

■ 1. Amend appendix D to chapter 7 by:

■ a. In section 12:

■ i. In clause 5, by revising the clause heading, the last sentence in paragraph (a)(3) introductory text, paragraphs (a)(3)(i) and (ii); and

■ ii. In clauses 6 and 16, revising the clause headings; and

■ b. Revising the parenthetical authority citation at the end of the appendix.

The revisions read as follows:

Appendix D to Chapter 7—Direct USAID Contracts with a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

* * * * *

12. General Provisions for a Contract With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

* * * * *

5. Leave and Holidays

[Insert the following clause in all USPSC contracts.]

Leave and Holidays (NOV 2020)

(a) * * *

(3) * * * Annual leave restored must be scheduled and used no later than the earlier of either—

(i) The end of the leave year two years after the date fixed by the approving official as the termination date of the exceptional circumstances beyond the contractor's control, which resulted in the forfeiture; or

(ii) The end of the contract.

* * * * *

6. Differentials and Allowances (NOV 2020)

* * * * *

16. Termination (NOV 2020)

* * * * *

(**Authority:** Sec. 621 of Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435)

Mark A. Walther,

Chief Acquisition Officer.

[FR Doc. 2020–28047 Filed 1–5–21; 8:45 am]

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Proposed Rules

Federal Register
Vol. 86, No. 3
Wednesday, January 6, 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 HOMELAND SECURITY

6 CFR Part 27

[Docket No. CISA–2020–0014]

RIN 1670–AA03

Removal of Certain Explosive Chemicals From the Chemical Facility Anti-Terrorism Standards

AGENCY: Cybersecurity and Infrastructure Security Agency, DHS.

ACTION: Advance Notice of Proposed Rulemaking (ANPRM).

SUMMARY: The Cybersecurity and Infrastructure Security Agency (CISA) is considering removing all 49 Division 1.1 explosive chemicals of interest from Appendix A of the Chemical Facility Anti-Terrorism Standards (CFATS) regulations. Currently, both CISA and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) regulate facilities possessing these chemicals for security concerns. Removing these chemicals of interest from coverage under CFATS would reduce regulatory requirements for facilities currently covered by both CFATS and ATF's regulatory frameworks and relieve compliance burdens for a small number of affected facilities.

DATES: Comments on this ANPRM must be received by March 8, 2021.

ADDRESSES: You may submit comments, identified by docket number CISA–2020–0014 through the Federal eRulemaking Portal available at *http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All comments received via *https://www.regulations.gov* will be posted to the public docket at *https://www.regulations.gov,* including any personal information provided.

Do not submit comments that include trade secrets, confidential commercial or financial information, Chemical-terrorism Vulnerability Information (CVI), Protected Critical Infrastructure Information (PCII), or Sensitive Security Information (SSI) directly to the public regulatory docket. Contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section below with questions about comments containing such protected information. CISA will not place comments containing such protected information in the public docket and will handle them in accordance with applicable safeguards and restrictions on access. Additionally, CISA will hold them in a separate file to which the public does not have access and place a note in the public docket that CISA has received such protected materials from the commenter. If CISA receives a request to examine or copy this information, CISA will treat it as any other request under the Freedom of Information Act (FOIA), 5 U.S.C. 552, and the Department's FOIA regulation found in part 5 of Title 6 of the Code of Federal Regulations (CFR).

Docket: For access to the docket and to read comments received visit *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Lona Saccomando, (703) 603–4868, *CISARulemaking@cisa.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Regulatory Information

CISA is issuing this Advance Notice of Proposed Rulemaking (ANPRM) to solicit comments on the advisability of removing Division 1.1 explosives from Appendix A to the Chemical Facility Anti-Terrorism Standards (CFATS) regulations located at 6 CFR part 27. As described below, we believe that these regulations may be unnecessarily burdensome for facilities that are already subject to security regulations for the same chemicals by another Federal agency, ATF. We encourage comments describing the nature of compliance operations in cases where regulatory duplication and overlap may exist, as well as on the costs and benefits of CFATS-specific security measures.

II. Background

CISA's CFATS program is an important part of our nation's counterterrorism efforts. The agency works with industry stakeholders to keep dangerous chemicals out of the hands of persons or organizations who wish to harm the United States. Since the CFATS program was created, the Department of Homeland Security (DHS) [1] has engaged with industry representatives to identify high-risk chemical facilities to ensure security measures are in place to reduce the risks associated with their possession of Chemicals of Interest (COI) listed on Appendix A to the CFATS regulations. The progress made in securing high-risk chemical facilities through the CFATS program since its implementation has significantly enhanced the security of the nation's chemical infrastructure.

The CFATS program identifies chemical facilities of interest and regulates the security of high-risk chemical facilities through risk-based performance standards.[2] The COI are listed in Appendix A to the CFATS regulations. If chemical facilities of interest possess the COI in the amounts and concentrations listed in Appendix A, chemical facilities of interest must complete and submit a Top-Screen survey to CISA.[3] CISA evaluates the information submitted in a Top-Screen and performs a risk assessment. Based upon this risk assessment, CISA determines which chemical facilities of interest qualify as high risk and are subject to full coverage under CFATS. Each of these covered chemical facilities is assigned a tier that ranges from Tier 1 (the highest risk of the high-risk covered chemical facilities) to Tier 4 (the lowest risk of the high-risk covered chemical facilities).[4] A facility that is determined to present a high-risk is required to develop and submit a Site Security Plan (SSP) addressing 18 risk-based performance standards containing physical security, cybersecurity, and various other security-focused measures and procedures.

On November 20, 2007, DHS published a list of COI in Appendix A to 6 CFR part 27.[5] The final version of

[1] We note that CISA was created in 2018, and that the CFATS program was previously run by an element of the Department of Homeland Security with a different name. In this document, we refer to CISA when describing present-day actions, and DHS when referring to actions that took place prior to 2018.

[2] The Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014 (also known as the CFATS Act of 2014, Public Law 113–254) codified the CFATS program into the Homeland Security Act of 2002. *See* 6 U.S.C. 621 *et seq.,* as amended by Public Law 116–136, Sec. 16007 (2020).

[3] *See* 6 CFR 27.200(b)(2).

[4] *See* 6 CFR 27.220.

[5] Appendix A to the CFATS Final Rule, 72 FR 65396, 65420–65434 (Nov. 20, 2007).

Appendix A included 49 chemicals that the Department of Transportation (DOT) lists as Class 1, Division 1.1 explosives at 49 CFR 172.101, with two broad exceptions.[6] Appendix A classifies all Division 1.1 explosives as posing both Release-Explosive and Theft/diversion-Explosives/Improvised Explosive Device Precursor (Theft/diversion-EXP/IEDP) security issues.

DHS included Division 1.1 explosives in Appendix A notwithstanding the Department of Justice's ATF regulation of the purchase, possession, storage, and transportation of the same types of explosives.[7] In an ANPRM that preceded the promulgation of the CFATS regulations and Appendix A, DHS noted that the authorizing statute [8] for CFATS excluded many types of facilities that were already the subject of existing federal security regulations.[9] This suggested a possibility of regulatory overlap between CFATS and ATF regulatory programs. DHS stated that ''where there is concurrent jurisdiction [between DHS and ATF or another Federal agency], the Department will work closely with other Federal agencies [(*e.g.,* ATF)] to ensure that regulated facilities can comply with applicable regulations while minimizing any duplication.'' [10]

Division 1.1 explosives included in Appendix A are ''explosive materials'' as defined in 18 U.S.C. 841(c) and are subject to ATF regulation. ATF regulations require persons storing any explosives to follow certain safety and theft-prevention precautions, including specific requirements governing the secure storage of explosives and inspection of magazines.[11] While ATF regulations and CFATS regulations are both geared towards preventing the theft and release of explosive materials, the two agencies do not regulate facilities in a similar manner, which can potentially lead to additional security efforts and regulatory compliance burdens for Division 1.1 explosives. The business premises of an explosives licensee or permittee is subject to entry by ATF for the specific purpose of inspective or examining records and documents required to be kept by a licensee or permitee pursuant to 18 U.S.C. chapter 40 and its implementing regulations, as well as any explosive materials kept or stored at the premises.[12] While magazines in which explosive materials are stored must meet standards of public safety and security against theft as provided in 27 CFR part 555, subpart K, ATF may not require additional measures—such as those described above in the CFATS regulations—to address security risks or vulnerability to terrorist attack or incident of a business premises when issuing a new or renewal license or permit.[13]

CFATS and ATF regulations differ substantially, and the interaction between them can be complex. In many instances, compliance with the measures required to comply with ATF regulations and industry best practices result in some facilities not tiering as high-risk under CFATS. Therefore, this small portion of facilities has no additional regulatory obligations under CFATS after submission of a Top-Screen. For example, all explosives must be stored in compliance with ATF standoff-distance [14] and similar requirements, which mitigate the consequences of an explosion at the facility. The consequences from an explosion is a factor that CISA uses to determine whether a facility is high-risk. Because facilities that possess threshold quantities of release-explosive COI are required to comply with ATF standoff/storage regulations, CISA has never designated a facility as high risk on the basis that the facility contains COI classified as a ''release-explosives'' threat.

While the above is an example of a way in which CFATS and ATF regulations dovetail effectively, sometimes the regulations do not correspond so cleanly. For example, a small number of facilities, despite adhering to ATF regulations regarding the secure storage of explosive materials,[15] have been: (1) Considered high-risk under CFATS as a result of possession of explosives under the ''theft/diversion'' security issue, and (2) required to implement additional security measures to satisfy CFATS requirements, such as implementing cybersecurity and detection mechanisms.

The partial regulatory overlap has led to frustration among some stakeholders in the explosives community and has led CISA to conduct a comprehensive review of the respective programs' regulatory requirements. As a result, CISA is considering modifications to Appendix A to remove Division 1.1 explosive chemicals from the COI listed in Appendix A.

III. Discussion

It is the policy of the executive branch to prudently manage the costs associated with governmental imposition of private expenditures required to comply with Federal regulations.[16] Agencies have long been charged to ''avoid regulations that are inconsistent, incompatible, or duplicative with [their] other regulations or those of other Federal agencies.'' [17] Given these and other polices, and given the partial overlap between DHS and ATF regulations on Division 1.1 explosives, as well as the relatively small number of facilities subject to this overlap, CISA is reconsidering whether to regulate facilities that possess explosives subject to ATF regulations is ''prudent and financially responsible in the expenditure of funds, from both public and private sources.''

At this time, CISA is considering whether the elimination of the burden of dual regulation of Division 1.1 explosive chemicals between CISA and ATF programs could be warranted. To this end, CISA is soliciting comments on amending Appendix A to remove all Division 1.1 explosives from the list of COI listed in Appendix A. If Appendix A is so amended, facility operators would no longer be required to count Division 1.1 explosives when determining whether their facilities are subject to the Top-Screen requirements pursuant to 6 CFR 27.200.

At the time of the promulgation of CFATS, DHS believed that the increased security value of having high-risk facilities that possessed Division 1.1 explosives regulated under CFATS was worth the increased cost. In 2007, DHS distinguished its approach from the deference that the Environmental Protection Agency (EPA) had shown ATF regulations by noting that ''EPA's decisions were based on safety and the prevention of an accidental release [and that] DHS is concerned with an

[6] These exceptions include explosives which DOT uses a generic shipping name with the suffix ''N.O.S.'' or ''not otherwise specified'', and articles or devices listed on DOT's Hazardous Materials Table at 49 CFR 172.101. *See* 75 FR at 65402–03.

[7] *See* 27 CFR part 555, subpart C.

[8] *See* Public Law 109–295, sec. 550 (Oct. 4, 2006) (codified as amended at 6 U.S.C. 621(3)(B) and (4)).

[9] *See* Chemical Facility Anti-Terrorism Standards; Advance Notice of Rulemaking, 71 FR 78276, 78290 (Dec. 28, 2006).

[10] *See* Chemical Facility Anti-Terrorism Standards; Interim Final Rule, 72 FR 17688, 17718–19 (Apr. 9, 2007).

[11] *See* 27 CFR part 555, subpart K.

[12] *See* 18 U.S.C. 843(f) and 27 CFR 555.24.

[13] *See* 18 U.S.C. 843 and 27 CFR part 555, subparts D and E.

[14] ''Standoff distance'' refers to the requirement that explosive materials be stored a prescribed distance away from inhabited buildings, public highways, other magazines, and other infrastructure. *See* 27 CFR 555.218–224.

[15] *See* 27 CFR part 555, subpart K.

[16] Exec. Order No. 13,771, Sec. 1., 82 FR 9339 at 9339 (Feb. 3, 2017).

[17] Exec. Order No. 12,866, Sec. 1(b)(10), 58 FR 51735 (Oct. 4, 1993).

intentional attack on an explosives facility.'' [18] For these reasons, CFATS listed Division 1.1 explosives as presenting both Release-Explosive [19] and Theft/diversion-EXP/IEDP [20] security issues.

However, since implementation of the CFATS program, CISA has found that, for many facilities, possession of Division 1.1 explosives at the quantity triggering reporting for the Release-Explosive security issue under CFATS (*i.e.,* 5,000 pounds or more) would not result in the risk of a large number of fatalities if attacked. Thus, CISA does not currently regulate any facilities for possession of Division 1.1 explosives for the Release-Explosive security concern. This is because facilities that possess Division 1.1 explosives are required to comply with ATF's table of distances for storage of explosive materials (*i.e.* standoff distances) at 27 CFR 555.218–224. The enhanced CFATS risk-tiering methodology implemented beginning in October 2016 accounts for the increased security resulting from ATF's table-of-distance regulations, which protects against offsite impacts of an explosive release, whether accidental or intentional.

We note that while ATF's and CISA's regulations differ substantially, other agencies have deferred to ATF's explosives expertise when considering regulation of explosives facilities. In 1998, while developing the Risk Management Plan regulations, the EPA issued a final rule removing Division 1.1 explosives from its list of regulated substances for accidental release prevention.[21] In removing Division 1.1 explosives from regulation, the EPA concluded that the ''. . . current [ATF and other] regulations and current and contemplated industry practices promote safety and accident prevention in storage, handling, transportation, and use of explosives,'' making them adequate for EPA's purposes.[22] While the ATF regulates explosives materials and the CFATS regulates the chemical facilities *possessing* explosive materials, CISA notes that ATF's current regulations address a number of the same safety and security precautions as the CFATS regulations for Division 1.1 explosives.

Other facilities that possess Division 1.1 explosives are considered high-risk under CFATS under the Theft/diversion-EXP/IEDP security issue, in part because of the concerns presented by the prospect of physical or cyber-focused security breaches. CISA currently regulates 85 facilities that possess Division 1.1 explosive COI under the Theft/diversion-EXP/IEDP security issue. Many of these facilities possess other COI regulated by CFATS that are not Division 1.1 explosives. If Division 1.1 explosives were removed from Appendix A, CISA estimates that 24 facilities would no longer be regulated as high-risk under CFATS.

Though CFATS includes cybersecurity and some other requirements such as security plans, security equipment, training, or recording/reporting of threats that are not accounted for in ATF's framework, ATF regulations include some important theft-prevention and inventory-tracking standards [23] and adherence with ATF requirements is verified through periodic regulatory inspections of ATF's construction and locking requirements for magazines as well as reporting of theft/loss.[24] For these reasons, it may be appropriate to rely solely on ATF's standards to address the threat that Division 1.1 explosives could be diverted. Further supporting this argument is the fact that ATF's secure-storage and related requirements appear to have successfully driven down the number of thefts of commercial explosives nationwide—with only three such thefts having been reported during the 2019 calendar year.[25] However, there has been a slight increase in the number of reported losses.[26] ATF's standards are applied across the explosives industry, covering thousands of entities that manufacture, distribute, receive, ship, and/or import explosives, while DHS' standards are applied only to a small number of the highest-risk facilities (85 chemical facilities). Given the wide application of ATF regulations across the explosives industry and their success in limiting thefts of commercial explosives, we believe there may be value in uniform application of security measures for these materials.

IV. Request for Comments

Prior to implementing the enhanced tiering methodology in October of 2016, DHS published a CFATS ANPRM on August 18, 2014, to seek public comment on ways in which the CFATS regulation and program might be improved.[27] The ANPRM solicited public comments on any and all aspects of 6 CFR part 27, including Appendix A. The Department also conducted seven listening sessions for the ANPRM. In addition, the Department published a notice on October 16, 2015 in the **Federal Register** soliciting additional public comments through November 30, 2015 about Appendix A to the CFATS regulation and conducted a roundtable discussion and public listening session on October 27, 2015.[28]

In response to the 2014 CFATS ANPRM, the Department received several detailed comments relevant to the coverage of Division 1.1 explosives under CFATS generally encouraging the Department to remove Division 1.1 explosives for both release-explosive and theft/diversion-EXP/IEDP security issues.[29] Commenters also generally suggested that ATF's regulations governing commerce in explosives located at 27 CFR part 555 are sufficient and that the security obligations imposed by CFATS under 6 CFR part 27 are unnecessary. CISA also published a retrospective economic analysis of the CFATS program and received one responsive comment about facilities that are regulated by CFATS and the ATF.[30]

In light of the time that has passed since 2015, and the changes to the tiering methodology made since then, CISA is soliciting comments from stakeholders on the current coverage of release-explosive and theft/diversion-EXP/IEDP COI under CFATS and on the proposed elimination of these COI from Appendix A. Specifically:

(1) Should CISA remove Division 1.1 explosives for consideration as a release-explosive security concern? Why or why not?

(2) Should CISA remove Division 1.1 explosives for consideration as a theft/diversion-EXP/IEDP security concern? Why or why not?

[18] 72 FR 65396, 65403 (emphasis added).

[19] Release-Explosive chemicals have potential to affect populations within and beyond the facility if intentionally denotated. 72 FR 65396, 65397 (Nov. 20, 2007).

[20] Theft/Diversion-Explosives EXP/IEDP chemicals could be stolen or diverted and used in explosives or IEDs. *Id.* at 65397.

[21] List of Regulated Substances and Thresholds for Accidental Release Prevention; Amendments, 63 FR 640, 641 (Jan. 6, 1998) (announcing effective date of final rule amending 40 CFR part 68).

[22] *Id.*

[23] *See* 27 CFR part 555.

[24] *See* 27 CFR 555.207–211 and 555.30.

[25] United States Bomb Data Center, 2019 Explosives Incident Report, 15 (2019), *https://www.atf.gov/file/143481/download.*

[26] *Id.* at 16. The number of reported losses at commercial facilities nationwide has increased somewhat in the past five years, from 95 in 2015 to 113 in 2019.

[27] CFATS Advance Notice of Proposed Rulemaking, 79 FR 48693 (Aug. 18, 2014).

[28] CFATS Appendix A, Notice of Public Meeting, 80 FR 62504 (Oct. 16, 2015).

[29] The public comments provided in response to the August 2014 ANPRM are posted on *www.regulations.gov* under docket number DHS–2014–0016.

[30] Retrospective Analysis of the Chemical Facility Anti-Terrorism Standards, 85 FR 37393 (Jun. 22, 2020).

(3) How would the removal of Division 1.1 explosives impact the security posture of chemical facilities?

(4) Would the removal of Division 1.1 explosives impact the regulatory burden of CFATS on chemical facilities? If so, in what ways and to what extent?

V. Signature

The Acting Secretary of Homeland Security, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Chad R. Mizelle, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

Chad R. Mizelle,

Senior Official Performing the Duties of the General Counsel Department of Homeland Security.

[FR Doc. 2020–27768 Filed 1–5–21; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 310

[Docket ID DoD–2020–OS–0095]

RIN 0790–AK96

Privacy Act of 1974; Implementation

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: The DoD is giving concurrent notice of an updated system of records pursuant to the Privacy Act of 1974 for the DoD 0004 ''Defense Repository for Common Enterprise Data (DRCED)'' system of records and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the DRCED system of records from certain provisions of the Privacy Act because of national security requirements.

DATES: Send comments on or before March 8, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Lyn Kirby, Chief, Defense Privacy, Civil Liberties, and Transparency Division, Directorate for Oversight and Compliance, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700; *OSD.DPCLTD@mail.mil;* (703) 571–0070.

SUPPLEMENTARY INFORMATION:

I. Background

The DoD 0004 DRCED system of records is a DoD-wide system of records that supports multiple information systems that provide DoD-wide and component-level enterprise solutions for integrating and analyzing targeted data from existing DoD systems to develop timely, actionable, and insightful conclusions in support of national strategies. These systems are used to automate financial and business transactions, perform cost-management analysis, produce oversight and audit reports, and provide critical data linking to improve performance of mission objectives. These systems are also capable of creating predictive analytic models based upon specific data streams to equip decision makers with critical data necessary for execution of fiscal and operational requirements.

II. Privacy Act Exemption

The Privacy Act allows federal agencies to exempt eligible records in a system of records from certain provisions of the Act, including the provisions providing individuals with a right to request access to and amendment of their own records. If an agency intends to exempt a particular system of records, it must typically first go through the rulemaking process to provide public notice and an opportunity to comment on the proposed exemption. This proposed rule explains why an exemption is being claimed for this system of records and invites public comment, which DoD will consider before the issuance of a final rule implementing the exemption.

The DoD proposes to modify 32 CFR part 310 to add a new Privacy Act exemption rule for the DoD 0004 DRCED system of records. The DoD proposes an exemption for DoD 0004 DRCED because some of its records may contain classified national security information and disclosure of those records to an individual may cause damage to national security. The Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), authorizes agencies to claim an exemption for systems of records that contain information properly classified pursuant to executive order. DoD is proposing to claim an exemption from the access and amendment requirements of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1), to prevent disclosure of any information properly classified pursuant to executive order, as implemented by DoD Instruction (DoDI) 5200.01 and DoD Manual (DoDM) 5200.01, Volumes 1 and 3.

If implemented, this proposed rule will deny an individual access under the Privacy Act to only those portions of records for which the claimed exemption applies. In addition, records in the DoD 0004 DRCED system of records are only exempt from the Privacy Act to the extent the purposes underlying the exemption pertain to the record.

A notice of a modified system of records for DoD 0004 DRCED is also published in this issue of the **Federal Register**.

Regulatory Analysis

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

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, distribute 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. It has been determined that this proposed rule is not a significant regulatory action.

Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs''

This proposed rule has been deemed not significant under Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' therefore, the requirements of E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs'' do not apply.

Congressional Review Act

This proposed rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C Chapter 6)

It has been certified that this proposed rule does not have a significant economic impact on a substantial number of small entities because it is concerned only with the administration of Privacy Act Systems of Records within the DoD. A Regulatory Flexibility Analysis is not required.

Public Law 96–511, ''Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that this proposed rule does not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Section 202, Public Law 104–4, ''Unfunded Mandates Reform Act''

It has been determined that this proposed rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more and that it will not significantly or uniquely affect small governments.

Executive Order 13132, ''Federalism''

It has been determined that this proposed rule does not have federalism implications. This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

List of Subjects in 32 CFR Part 310

Privacy.

Accordingly, 32 CFR part 310 is proposed to be amended as follows:

PART 310—PROTECTION OF PRIVACY AND ACCESS TO AND AMENDMENT OF INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF 1974

■ 1. The authority citation for 32 CFR part 310 continues to read as follows:

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

■ 2. Section 310.13 is amended by adding paragraph (e)(3) as follows:

§ 310.13 Exemptions for DoD-wide systems.

* * * * *

(e) * * *

(3) *System identifier and name:* DoD 0004, ''Defense Repository for Common Enterprise Data (DRCED).''

(i) *Exemptions:* This system of records is exempt from subsections 5 U.S.C. 552a(c)(3), (d)(1), (d)(2), (d)(3), and (d)(4) of the Privacy Act.

(ii) *Authority:* 5 U.S.C. 552a(k)(1).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsection (c)(3) (accounting of disclosures).* Because common enterprise records may contain information properly classified pursuant to Executive Order, the disclosure accountings of such records may also contain information properly classified pursuant to executive order, the disclosure of which may cause damage to national security.

(B) *Subsections (d)(1), (2), (3), and (4) (record subject's right to access and amend records).* Access to and amendment of records by the record subject could disclose information properly classified pursuant to executive order. Disclosure of classified records to an individual may cause damage to national security.

(iv) *Exempt records from other systems.* In addition, in the course of carrying out the overall purpose for this system, exempt records from other system of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

Dated: December 22, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–28791 Filed 1–5–21; 8:45 am]

BILLING CODE 5001–06–P

Notices

Federal Register

Vol. 86, No. 3

Wednesday, January 6, 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.

DEPARTMENT OF COMMERCE

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Notice of Withdrawal; Reporting Process for Complaint of Employment Discrimination Based on Sexual Orientation Against the Department of Commerce

AGENCY: Office of the Secretary, Office of Civil Rights, Commerce.

ACTION: Notice; withdrawal.

SUMMARY: On Thursday, October 1, 2020, the Department of Commerce (DOC) published a notice entitled, ''Agency Information Collection Activities: Proposed Collection; Comment Request; Reporting Process for Complaint of Employment Discrimination Based on Sexual Orientation Against the Department of Commerce.'' That notice invited public comments on the proposed, and continuing information collection request for OMB Control Number 0694–0024, Form Number: CD–545. Through the publication of this document, we are withdrawing the request for approval from the Office of Management and Budget (OMB) to collect this information collection.

DATES: The request for public comment preceding submission of the collection to OMB published on October 1, 2020 and ended November 30, 2020.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** on October 1, 2020 (85 FR 61923), the Department of Commerce proposed to extend the information collection for the Form CD–545. However, we are withdrawing the request for this collection approval from the Office of Management and Budget (OMB), and instead, we are discontinuing the Form CD–545.

Background

Executive Order (E.O.) 13087, issued on May 28, 1998, amended E.O. 11478, *Equal Employment Opportunity in the Federal Government,* to include sexual orientation as a prohibited basis of discrimination in Federal employment. Consistent with this E.O., Department Administrative Order (DAO) 215–11, *Complaint Process for Sexual Orientation Discrimination,* was established in 1999 to provide Department of Commerce employees and applicants for employment with a Department-wide and uniform complaint process by which to seek redress for claims of sexual orientation discrimination. Form CD–545 has been used in connection with the Department of Commerce's *Complaint Process for Sexual Orientation Discrimination.*

At the time DAO 215–11 was established and many years thereafter, Department employees and applicants were unable to pursue sexual orientation discrimination claims under Title VII of the Civil Rights Act of 1964, as amended, and thus could not utilize the process afforded to Federal employees and applicants outlined in Title 29, Code of Federal Regulations (CFR), Part 1614. However, the Supreme Court, in *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020), recently interpreted the prohibition against sex-based discrimination contained in Title VII of the Civil Rights Act of 1964, as amended, to include sexual orientation discrimination in Federal employment. As such, Department employees and applicants are now able to pursue sexual orientation discrimination claims under Title VII of the Civil Rights Act of 1964, as amended, and may utilize the process afforded to Federal employees and applicants outlined in 29 CFR part 1614.

In response to the request for public comment, comments were received from Lisa Schnall, Senior Attorney Advisor, Office of Legal Counsel, Equal Employment Opportunity Commission, on November 30, 2020, concerning Form CD–545 (Complaint of Employment Discrimination Based on Sexual Orientation Against the Department of Commerce). In her comments, Ms. Schnall cited the Supreme Court's decision in *Bostock* v. *Clayton County* holding that the prohibition of sex discrimination in Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination based on sexual orientation, and recommended that the Department of Commerce withdraw Form CD–545, commenting that withdrawing the form would streamline and enhance the efficiency of the complaint process by ensuring that complaints of protected employment discrimination are reported on an existing form currently in use at the Department of Commerce.

Since the matter of sexual orientation being a form of prohibited sex discrimination has now been decided with finality, we agree that withdrawing Form CD–545 would streamline and enhance the efficiency of the process for raising claims of sexual orientation and are therefore requesting the form's discontinuation.

Paul Redpath, Chief, Program Implementation Division, Office of Civil Rights, Department of Commerce, approved the publication of this Notice in the **Federal Register**.

Dated: December 31, 2020.

Sheleen Dumas,

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

[FR Doc. 2020–29254 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–BP–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–57–2020]

Foreign-Trade Zone (FTZ) 7—Mayaguez, Puerto Rico; Authorization of Production Activity; Patheon Puerto Rico, Inc. (Pharmaceutical Products) Manatí, Puerto Rico

On September 2, 2020, Patheon Puerto Rico, Inc. (Patheon), submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 7L, in Manatí, Puerto Rico.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (85 FR 56577—56578). On December 31, 2020, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act

and the FTZ Board's regulations, including Section 400.14.

Dated: December 31, 2020.

Elizabeth Whiteman,

Acting Executive Secretary.

[FR Doc. 2020–29271 Filed 1–5–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–908]

Passenger Vehicle and Light Truck Tires From the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that passenger vehicle and light truck tires (passenger tires) from the Republic of Korea (Korea) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019, through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable January 6, 2021.

FOR FURTHER INFORMATION CONTACT: Elfi Blum or Jun Jack Zhao, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0197 or (202) 482–1396, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on June 29, 2020.[1] On October 16, 2020, Commerce postponed the preliminary determination of this investigation by 50 days, to December 29, 2020, pursuant to section 733(c)(1)(A) of the Act and 19 CFR 351.205(e).[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are passenger tires from Korea. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments on the record of this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] As discussed in the Preliminary Scope Decision Memorandum, Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

The deadline to submit scope case briefs is established in the Preliminary Scope Decision Memorandum. There will be no further opportunity for comments on scope-related issues.[7]

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export price and constructed export price in accordance with section 772 of the Act. Normal value (NV) is calculated in accordance with section 773 of the Act. Furthermore, pursuant to sections 776(a) and (b) of the Act, Commerce has preliminarily relied on partial facts otherwise available, with adverse inferences, for Hankook Tire & Technology Co. Ltd (Hankook).[8] For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding rates that are zero, *de minimis,* or determined entirely under section 776 of the Act. In this investigation, Commerce calculated estimated weighted-average dumping margins for Hankook and Nexen that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others' rate using an average of the estimated weighted-average dumping margins calculated for the examined respondents weighted by each company's publicly-ranged total

[1] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 38854 (June 29, 2020) (*Initiation Notice*).

[2] *See Passenger Vehicle and Light Truck Tires From the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 65791 (October 16, 2020); *see also* Petitioners' Letter, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Petitioner's Request for Extension of Preliminary Determination,'' dated October 1, 2020.

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Passenger Vehicle and Light Truck Tires from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 85 FR at 38855.

[6] *See* Memorandum, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Comments Decision Memorandum,'' dated concurrently with this preliminary determination (Preliminary Scope Decision Memorandum).

[7] Case briefs and rebuttal briefs submitted in response to this preliminary LTFV determination should not include scope-related issues. *See* Preliminary Scope Decision Memorandum and the ''Public Comment'' section of this notice.

[8] In its section A questionnaire response, Hankook stated that in March 1999, the name Hankook Tire Mfg. Co., Ltd. was changed to Hankook Tire Co., Ltd. In May 2019, the name of Hankook Tire Co. Ltd. was changed to Hankook Tire & Technology Co. Ltd. Hankook Tire America Corp. and Hankook Tire Manufacturing Tennessee, LP, are directly and indirectly wholly-owned subsidiaries of Hankook Tire & Technology Co. Ltd. *See* Hankook's Letter, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea (A–580–908): Initial Section A Questionnaire Response,'' dated September 14, 2020.

U.S. sale values for the merchandise under consideration.[9]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
Hankook Tire & Technology Co. Ltd (Hankook)	38.07
Nexen Tire Corporation (Nexen)	14.24
All Others	27.81

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit for estimated antidumping duties equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. However, due to current travel restrictions in response to the global COVID–19 pandemic, Commerce is unable to conduct on-site verification in this investigation. Accordingly, we intend to verify the information relied upon in making the final determination through alternative means in lieu of an on-site verification.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. 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.[10] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[11] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date and time of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On December 2 and 9, 2020, Hankook and Nexen, respectively, requested that, in the event of an affirmative preliminary determination in this investigation, Commerce postpone its final determination in accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii) and extend the application of the provisional measures prescribed under section 733(d) of the Act and 19 CFR 351.210(e)(2) from a four-month to a six-month period.[12] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary

[9] With two respondents under examination, Commerce normally calculates: (A) A weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sale quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010). As complete publicly ranged sales data was available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, please *see* Commerce's Memorandum ''Preliminary Determination of the Less-Than-Fair Value Investigation of Passenger Vehicles and Light Truck Tires from Korea: Rate for Non-Examined Companies,'' dated concurrently with this FR notice.

[10] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[11] *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).

[12] *See* Hankook's Letter, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea (A–580–908): Request to Extend the Final Determination and Provisional Measures,'' dated December 2, 2020; and Nexen's Letters, ''Passenger Vehicle and Light Truck Tires From South Korea: Request for Postponement of the Final Determination,'' dated December 9, 2020.

determination is affirmative; (2) the requesting exporter accounts for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 after the final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 29, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

Appendix I

Scope of the Investigation

The scope of this investigation is passenger vehicle and light truck tires. Passenger vehicle and light truck tires are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation. Tires covered by this investigation may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers or the replacement market.

Subject tires have, at the time of importation, the symbol ''DOT'' on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Subject tires may also have the following prefixes or suffix in their tire size designation, which also appears on the sidewall of the tire:

Prefix designations:

P—Identifies a tire intended primarily for service on passenger cars.

LT—Identifies a tire intended primarily for service on light trucks.

Suffix letter designations:

LT—Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service.

All tires with a ''P'' or ''LT'' prefix, and all tires with an ''LT'' suffix in their sidewall markings are covered by these investigations regardless of their intended use.

In addition, all tires that lack a ''P'' or ''LT'' prefix or suffix in their sidewall markings, as well as all tires that include any other prefix or suffix in their sidewall markings, are included in the scope, regardless of their intended use, as long as the tire is of a size that fits passenger cars or light trucks. Sizes that fit passenger cars and light trucks include, but are not limited to, the numerical size designations listed in the passenger car section or light truck section of the Tire and Rim Association Year Book, as updated annually. The scope includes all tires that are of a size that fits passenger cars or light trucks, unless the tire falls within one of the specific exclusions set out below.

Passenger vehicle and light truck tires, whether or not attached to wheels or rims, are included in the scope. However, if a subject tire is imported attached to a wheel or rim, only the tire is covered by the scope.

Specifically excluded from the scope are the following types of tires:

(1) Racing car tires; such tires do not bear the symbol ''DOT'' on the sidewall and may be marked with ''ZR'' in size designation;

(2) pneumatic tires, of rubber, that are not new, including recycled and retreaded tires;

(3) non-pneumatic tires, such as solid rubber tires;

(4) tires designed and marketed exclusively as temporary use spare tires for passenger vehicles which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in Table PCT–1R (''T'' Type Spare Tires for Temporary Use on Passenger Vehicles) or PCT–1B (''T'' Type Diagonal (Bias) Spare Tires for Temporary Use on Passenger Vehicles) of the Tire and Rim Association Year Book,

(b) the designation ''T'' is molded into the tire's sidewall as part of the size designation, and,

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed is 81 MPH or a ''M'' rating;

(5) tires designed and marketed exclusively as temporary use spare tires for light trucks which, in addition, exhibit each of the following physical characteristics:

(a) The tires have a 265/70R17, 255/80R17, 265/70R16, 245/70R17, 245/75R17, 265/70R18, or 265/70R18 size designation;

(b) ''Temporary Use Only'' or ''Spare'' is molded into the tire's sidewall;

(c) the tread depth of the tire is no greater than 6.2 mm; and

(d) Uniform Tire Quality Grade Standards (''UTQG'') ratings are not molded into the tire's sidewall with the exception of 265/70R17 and 255/80R17 which may have UTGC molded on the tire sidewall;

(6) tires designed and marketed exclusively for specialty tire (ST) use which, in addition, exhibit each of the following conditions:

(a) The size designation molded on the tire's sidewall is listed in the ST sections of the Tire and Rim Association Year Book,

(b) the designation ''ST'' is molded into the tire's sidewall as part of the size designation,

(c) the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''For Trailer Service Only'' or ''For Trailer Use Only'',

(d) the load index molded on the tire's sidewall meets or exceeds those load indexes listed in the Tire and Rim Association Year Book for the relevant ST tire size, and

(e) either

(i) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed does not exceed 81 MPH or an ''M'' rating; or

(ii) the tire's speed rating molded on the sidewall is 87 MPH or an ''N'' rating, and in either case the tire's maximum pressure and maximum load limit are molded on the sidewall and either

(1) both exceed the maximum pressure and maximum load limit for any tire of the same size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book; or

(2) if the maximum cold inflation pressure molded on the tire is less than any cold inflation pressure listed for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book, the maximum load limit molded on the tire is higher than the maximum load limit listed at that cold inflation pressure for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book;

(7) tires designed and marketed exclusively for off-road use and which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in the off-the-road, agricultural, industrial or ATV section of the Tire and Rim Association Year Book,

(b) in addition to any size designation markings, the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''Not For Highway Service'' or ''Not for Highway Use'',

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 55 MPH or a ''G'' rating, and

(d) the tire features a recognizable off-road tread design;

(8) Tires designed and marketed for off-road use as all-terrain-vehicle (ATV) tires or utility-terrain-vehicle (UTV) tires, and which, in addition, exhibit each of the following characteristics:

(a) The tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 87 MPH or an ''N'' rating, and

(b) both of the following physical characteristics are satisfied:

(i) The size designation and load index combination molded on the tire's sidewall does not match any of those listed in the passenger car or light truck sections of the Tire and Rim Association Year Book, and

(ii) The size designation and load index combination molded on the tire's sidewall matches any of the following size designation (American standard or metric) and load index combinations:

American standard size	Metric size	Load index
26x10R12	254/70R/12	72
27x10R14	254/65R/14	73
28x10R14	254/70R/14	75
28x10R14	254/70R/14	86
30X10R14	254/80R/14	79
30x10R15	254/75R/15	78
30x10R14	254/80R/14	90
31x10R14	254/85R/14	81
32x10R14	254/90R/14	95
32x10R15	254/85R/15	83
32x10R15	254/85R/15	94
33x10R15	254/90R/15	86
33x10R15	254/90R/15	95
35x9.50R15	241/105R/15	82
35x10R15	254/100R/15	97

The products covered by this investigation are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.10.10.10, 4011.10.10.20, 4011.10.10.30, 4011.10.10.40, 4011.10.10.50, 4011.10.10.60, 4011.10.10.70, 4011.10.50.00, 4011.20.10.05, and 4011.20.50.10. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.10.10, 4011.90.10.50, 4011.90.20.10, 4011.90.20.50, 4011.90.80.10, 4011.90.80.50, 8708.70.45.30, 8708.70.45.46, 8708.70.45.48, 8708.70.45.60, 8708.70.60.30, 8708.70.60.45, and 8708.70.60.60. While HTSUS subheadings are provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Postponement of Final Determination and Extension of Provisional Measures
V. Scope of The Investigation
VI. Scope Comments
VII. Application of Facts Available and Use of Adverse Inference
VIII. Discussion of the Methodology
IX. Currency Conversion
X. Recommendation

[FR Doc. 2020–29299 Filed 1–5–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–828]

Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that passenger vehicle and light truck tires (passenger tires) from the Socialist Republic of Vietnam (Vietnam) are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is October 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable January 6, 2021.

FOR FURTHER INFORMATION CONTACT: Jasun Moy or Robert Scully, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–8194 or (202) 482–0572, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on June 29, 2020.[1] On October 16, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now December 29, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are passenger tires from Vietnam. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments on the record of this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] As discussed in the Preliminary Scope Decision Memorandum, Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

The deadline to submit scope case briefs is established in the Preliminary Scope Decision Memorandum. There will be no further opportunity to comment on scope-related issues.[7]

[1] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 38854 (June 29, 2020) (*Initiation Notice*).

[2] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 65791 (October 16, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 85 FR at 38855.

[6] *See* Memorandum, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Comments Decision Memorandum,'' dated concurrently with this preliminary determination (Preliminary Scope Decision Memorandum).

[7] Case briefs and rebuttal briefs submitted in response to this preliminary LTFV determination should not include scope-related issues. *See* Preliminary Scope Decision Memorandum and the ''Public Comment'' section of this notice.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices and constructed export prices in accordance with sections 772(a) and 772(b) of the Act, respectively. Because Vietnam is a non-market economy, within the meaning of section 771(18) of the Act, Commerce has calculated normal value in accordance with section 773(c) of the Act. Furthermore, pursuant to section 776(a) and (b) of the Act, Commerce has preliminarily relied upon facts otherwise available with adverse inferences to determine the estimated weighted-average dumping margin for the Vietnam-wide entity. For a full description of the methodology underlying Commerce's preliminary determination, *see* the Preliminary Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[8] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[9] In this investigation, we assigned producer/exporter combination rates for respondents eligible for separate rates.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offset) (percent)
Kenda Rubber (Vietnam) Co. Ltd	Kenda Rubber (Vietnam) Co. Ltd	0.00	0.00
Sailun Group (HongKong) Co., Limited/Sailun Tire Americas Inc.	Sailun (Vietnam) Co., Ltd	0.00	0.00
Bridgestone Corporation	Bridgestone Tire Manufacturing Vietnam LLC	0.00	0.00
Bridgestone Tire Manufacturing Vietnam LLC	Bridgestone Tire Manufacturing Vietnam LLC	0.00	0.00
Kumho Tire (Vietnam) Co., Ltd	Kumho Tire (Vietnam) Co., Ltd	0.00	0.00
The Yokohama Rubber Co., Ltd	Yokohama Tyre Vietnam Co	0.00	0.00
Vietnam-Wide Entity		22.30	22.27

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**, as discussed below. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the weighted-average amount by which normal value exceeds U.S. price, as indicated in the chart above as follows: (1) For the producer/exporter combinations listed in the table above, except those specified for Kenda Rubber (Vietnam) Co. Ltd. (Kenda) and Sailun Group (HongKong) Co., Limited/Sailun Tire Americas Inc. (Sailun), the cash deposit rate is equal to the estimated weighted-average dumping margin listed for that combination in the table; (2) for all combinations of Vietnam producers/exporters of merchandise under consideration that have not established eligibility for their own separate rates, the cash deposit rate will be equal to the estimated weighted-average dumping margin established for the Vietnam-wide entity; and (3) for all third-country exporters of merchandise under consideration not listed in the table above, the cash deposit rate is the cash deposit rate applicable to the Vietnam producer/exporter combination (or the Vietnam-wide entity) that supplied that third-country exporter.

Because the estimated weighted-average dumping margins for Kenda and Sailun in the above-specified producer/exporter combinations are zero or *de minimis* (*i.e.,* less than two percent), Commerce will not direct CBP to suspend liquidation of entries of subject merchandise from those producer/exporter combinations. Entries of subject merchandise from these exporters supplied by any other producer, or from these producers that supplied any other exporter, or from third-country exporters that sourced from these producer/exporter combinations, are subject to suspension of liquidation and provisional measures at the cash deposit rate established for the Vietnam-wide entity.

As explained in the Preliminary Decision Memorandum, in accordance with section 735(a)(4) of the Act and 19 CFR 351.204(e)(1), should the final estimated weighted-average dumping margins be zero or *de minimis* for Kenda or Sailun in the producer/exporter combination identified above, and should the investigation result in an antidumping duty order pursuant to section 736 of the Act, entries of merchandise from those producer/exporter combinations will be excluded from the order.[10] Such exclusions will not be applicable to merchandise exported to the United States by any other producer/exporter combinations or by third-country exporters that sourced from the excluded producer/exporter combinations.

Commerce normally adjusts cash deposits for estimated antidumping duties by the amount of domestic subsidy pass-through and export subsidies countervailed in a companion countervailing duty (CVD) proceeding, when CVD provisional measures are in effect. Accordingly, where Commerce preliminarily made an affirmative determination for domestic subsidy pass-through or export subsidies, Commerce has offset the estimated weighted-average dumping margin by the appropriate rates. Any such adjusted cash deposit rate may be found in the Preliminary Determination section above.

Should provisional measures in the companion CVD investigation expire prior to the expiration of provisional measures in this LTFV investigation,

[8] *See Initiation Notice,* 85 FR at 38858.

[9] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' April 5, 2005 (Policy Bulletin 05.1), available on Commerce's website at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

[10] Specifically, Commerce only intends to exclude from the order the mandatory respondents with a final estimated weighted-average dumping margin of zero or *de minimis.* If any of the separate rate companies are assigned a final estimated weighted-average dumping margin of zero or *de minimis,* Commerce does not intend to exclude such companies from the order.

Commerce will direct CBP to begin collecting cash deposits at a rate equal to the estimated weighted-average dumping margins calculated in this preliminary determination unadjusted for export subsidies at the time the CVD provisional measures expire.

These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. However, due to current travel restrictions in response to the global COVID–19 pandemic, Commerce is unable to conduct on-site verification in this investigation. Accordingly, we intend to verify the information relied upon in making the final determination through alternative means in lieu of an on-site verification.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties will be notified of the timeline for the submission of case briefs and written comments on non-scope issues at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[11] Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[12] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date and time of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On December 1 and 7, 2020, pursuant to 19 CFR 351.210(e), Sailun and Kenda requested, respectively, that Commerce postpone the final determination and that provisional measures be extended for a period not to exceed six months.[13] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 29, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The scope of this investigation is passenger vehicle and light truck tires. Passenger vehicle and light truck tires are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation. Tires covered by this investigation may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers or the replacement market.

Subject tires have, at the time of importation, the symbol ''DOT'' on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Subject tires may also have the following prefixes or suffix in their tire size designation, which also appears on the sidewall of the tire:

Prefix designations:

P—Identifies a tire intended primarily for service on passenger cars.

LT—Identifies a tire intended primarily for service on light trucks.

Suffix letter designations:

LT—Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service.

All tires with a ''P'' or ''LT'' prefix, and all tires with an ''LT'' suffix in their sidewall markings are covered by these investigations regardless of their intended use.

[11] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19, 85 FR 17006 (March 26, 2020) (Temporary Rule); and Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period, 85 FR 41363 (July 10, 2020).*

[13] *See* Sailun's Letter, ''Sailun's Request to Extend the Final Determination: Antidumping Duty Investigation of Passenger Vehicle and Light Truck Tires (''PVLT'') from Vietnam (A–552–828),'' dated December 1, 2020; *see also* Kenda's Letter ''Investigation of Passenger Vehicle and Light Truck Tires from Vietnam: Request to Extend the Final Determination,'' dated December 7, 2020.

In addition, all tires that lack a ''P'' or ''LT'' prefix or suffix in their sidewall markings, as well as all tires that include any other prefix or suffix in their sidewall markings, are included in the scope, regardless of their intended use, as long as the tire is of a size that fits passenger cars or light trucks. Sizes that fit passenger cars and light trucks include, but are not limited to, the numerical size designations listed in the passenger car section or light truck section of the Tire and Rim Association Year Book, as updated annually. The scope includes all tires that are of a size that fits passenger cars or light trucks, unless the tire falls within one of the specific exclusions set out below.

Passenger vehicle and light truck tires, whether or not attached to wheels or rims, are included in the scope. However, if a subject tire is imported attached to a wheel or rim, only the tire is covered by the scope.

Specifically excluded from the scope are the following types of tires:

(1) Racing car tires; such tires do not bear the symbol ''DOT'' on the sidewall and may be marked with ''ZR'' in size designation;

(2) pneumatic tires, of rubber, that are not new, including recycled and retreaded tires;

(3) non-pneumatic tires, such as solid rubber tires;

(4) tires designed and marketed exclusively as temporary use spare tires for passenger vehicles which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in Table PCT–1R (''T'' Type Spare Tires for Temporary Use on Passenger Vehicles) or PCT–1B (''T'' Type Diagonal (Bias) Spare Tires for Temporary Use on Passenger Vehicles) of the Tire and Rim Association Year Book,

(b) the designation ''T'' is molded into the tire's sidewall as part of the size designation, and,

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed is 81 MPH or a ''M'' rating;

(5) tires designed and marketed exclusively as temporary use spare tires for light trucks which, in addition, exhibit each of the following physical characteristics:

(a) The tires have a 265/70R17, 255/80R17, 265/70R16, 245/70R17, 245/75R17, 265/70R18, or 265/70R18 size designation;

(b) ''Temporary Use Only'' or ''Spare'' is molded into the tire's sidewall;

(c) the tread depth of the tire is no greater than 6.2 mm; and

(d) Uniform Tire Quality Grade Standards (''UTQG'') ratings are not molded into the tire's sidewall with the exception of 265/70R17 and 255/80R17 which may have UTGC molded on the tire sidewall;

(6) tires designed and marketed exclusively for specialty tire (ST) use which, in addition, exhibit each of the following conditions:

(a) The size designation molded on the tire's sidewall is listed in the ST sections of the Tire and Rim Association Year Book,

(b) the designation ''ST'' is molded into the tire's sidewall as part of the size designation,

(c) the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''For Trailer Service Only'' or ''For Trailer Use Only'',

(d) the load index molded on the tire's sidewall meets or exceeds those load indexes listed in the Tire and Rim Association Year Book for the relevant ST tire size, and

(e) either

(i) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed does not exceed 81 MPH or an ''M'' rating; or

(ii) the tire's speed rating molded on the sidewall is 87 MPH or an ''N'' rating, and in either case the tire's maximum pressure and maximum load limit are molded on the sidewall and either

(1) both exceed the maximum pressure and maximum load limit for any tire of the same size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book; or

(2) if the maximum cold inflation pressure molded on the tire is less than any cold inflation pressure listed for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book, the maximum load limit molded on the tire is higher than the maximum load limit listed at that cold inflation pressure for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book;

(7) tires designed and marketed exclusively for off-road use and which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in the off-the-road, agricultural, industrial or ATV section of the Tire and Rim Association Year Book,

(b) in addition to any size designation markings, the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''Not For Highway Service'' or ''Not for Highway Use'',

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 55 MPH or a ''G'' rating, and

(d) the tire features a recognizable off-road tread design;

(8) Tires designed and marketed for off-road use as all-terrain-vehicle (ATV) tires or utility-terrain-vehicle (UTV) tires, and which, in addition, exhibit each of the following characteristics:

(a) The tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 87 MPH or an ''N'' rating, and

(b) both of the following physical characteristics are satisfied:

(i) The size designation and load index combination molded on the tire's sidewall does not match any of those listed in the passenger car or light truck sections of the Tire and Rim Association Year Book, and

(ii) The size designation and load index combination molded on the tire's sidewall matches any of the following size designation (American standard or metric) and load index combinations:

American standard size	Metric size	Load index
26x10R12	254/70R/12	72
27x10R14	254/65R/14	73
28x10R14	254/70R/14	75
28x10R14	254/70R/14	86
30X10R14	254/80R/14	79
30x10R15	254/75R/15	78
30x10R14	254/80R/14	90
31x10R14	254/85R/14	81
32x10R14	254/90R/14	95
32x10R15	254/85R/15	83
32x10R15	254/85R/15	94
33x10R15	254/90R/15	86
33x10R15	254/90R/15	95
35x9.50R15	241/105R/15	82
35x10R15	254/100R/15	97

The products covered by this investigation are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.10.10.10, 4011.10.10.20, 4011.10.10.30, 4011.10.10.40, 4011.10.10.50, 4011.10.10.60, 4011.10.10.70, 4011.10.50.00, 4011.20.10.05, and 4011.20.50.10. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.10.10, 4011.90.10.50, 4011.90.20.10, 4011.90.20.50, 4011.90.80.10, 4011.90.80.50, 8708.70.45.30, 8708.70.45.46, 8708.70.45.48, 8708.70.45.60, 8708.70.60.30, 8708.70.60.45, and 8708.70.60.60. While HTSUS subheadings are provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope of Investigation
V. Scope Comments
VI. Affiliation and Single Entity Treatment
VII. Application of Facts Available and Use of Adverse Inferences
VIII. Determination Not to Select KTV as a Voluntary Respondent
IX. Discussion of the Methodology
X. Adjustment Under Section 777A(F) of the Act
XI. Adjustment to Cash Deposit Rate for Export Subsidies
XII. Currency Conversion
XIII. Recommendation

[FR Doc. 2020–29301 Filed 1–5–21; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–869]

Passenger Vehicle and Light Truck Tires From Taiwan: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that passenger vehicle and light truck (PVLT) tires from the Taiwan are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable January 6, 2021.

FOR FURTHER INFORMATION CONTACT: Lauren Caserta or Chien-Min Yang, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4737 or (202) 482–5484, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on June 29, 2020.[1] On October 16, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now December 29, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics addressed in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are PLVT tires from Taiwan. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments on the record of this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] As discussed in the Preliminary Scope Decision Memorandum, Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

The deadline to submit scope case briefs is established in the Preliminary Scope Decision Memorandum. There will be no further opportunity to comment on scope-related issues.[7]

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices and constructed export prices in accordance with sections 772(a) and 772(b) of the Act, respectively. Normal value (NV) is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying Commerce's preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. In this investigation, Commerce calculated estimated weighted-average dumping margins for Cheng Shin Rubber Ind. Co. Ltd. (Cheng Shin) and Nankang Rubber Tire Corp. Ltd. (Nankang) that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate using a weighted average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[8]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

[1] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 38854 (June 29, 2020) (*Initiation Notice*).

[2] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations of Antidumping Duty Investigations,* 85 FR 65791 (October 16, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Passenger Vehicle and Light Truck Tires from the Socialist Republic of Taiwan,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 85 FR at 38855.

[6] *See* Memorandum, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Comments Decision Memorandum,'' dated concurrently with this preliminary determination (Preliminary Scope Decision Memorandum).

[7] Case briefs and rebuttal briefs submitted in response to this preliminary LTFV determination should not include scope-related issues. *See* Preliminary Scope Decision Memorandum and the ''Public Comment'' section of this notice.

[8] With two respondents under examination, Commerce normally calculates (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sale quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010). As complete publicly ranged sales data was available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, *see* the All-Others Rate Calculation Memorandum.

Exporter/producer	Estimated weighted-average dumping margin (percent)
Cheng Shin Rubber Ind. Co. Ltd	52.42
Nankang Rubber Tire Corp. Ltd	98.44
All Others	88.82

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. However, due to current travel restrictions in response to the global COVID–19 pandemic, Commerce is unable to conduct on-site verification in this investigation. Accordingly, we intend to verify the information relied upon in making the final determination through alternative means in lieu of an on-site verification.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. A timeline for the submission of case briefs and written comments on non-scope issues will be notified to interested parties at a later date. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than seven days after the deadline date for case briefs.[9] Commerce has modified certain of its requirements for serving documents containing business proprietary information until further notice.[10] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date and time of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On December 7 and 8, 2020, pursuant to 19 CFR 351.210(e), Cheng Shin and Nankang requested, respectively, that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[11] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

[9] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[10] *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).

[11] *See* Cheng Shin's Letter, ''Passenger Vehicle and Light Truck Tires from Taiwan: Request to Postpone Final Determination and to Extend Provisional Measures,'' dated December 7, 2020; *see also* Nankang's Letter, ''Antidumping Investigation of Passenger Vehicle and Light Truck Tires from Taiwan—Request for Extension of Final Determination,'' dated December 8, 2020.

Dated: December 29, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The scope of this investigation is passenger vehicle and light truck tires. Passenger vehicle and light truck tires are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation. Tires covered by this investigation may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers or the replacement market.

Subject tires have, at the time of importation, the symbol ''DOT'' on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Subject tires may also have the following prefixes or suffix in their tire size designation, which also appears on the sidewall of the tire:

Prefix designations:

P—Identifies a tire intended primarily for service on passenger cars.

LT—Identifies a tire intended primarily for service on light trucks.

Suffix letter designations:

LT—Identifies light truck tires for service on trucks, buses, trailers, and multipurpose passenger vehicles used in nominal highway service.

All tires with a ''P'' or ''LT'' prefix, and all tires with an ''LT'' suffix in their sidewall markings are covered by these investigations regardless of their intended use.

In addition, all tires that lack a ''P'' or ''LT'' prefix or suffix in their sidewall markings, as well as all tires that include any other prefix or suffix in their sidewall markings, are included in the scope, regardless of their intended use, as long as the tire is of a size that fits passenger cars or light trucks. Sizes that fit passenger cars and light trucks include, but are not limited to, the numerical size designations listed in the passenger car section or light truck section of the Tire and Rim Association Year Book, as updated annually. The scope includes all tires that are of a size that fits passenger cars or light trucks, unless the tire falls within one of the specific exclusions set out below.

Passenger vehicle and light truck tires, whether or not attached to wheels or rims, are included in the scope. However, if a subject tire is imported attached to a wheel or rim, only the tire is covered by the scope.

Specifically excluded from the scope are the following types of tires:

(1) Racing car tires; such tires do not bear the symbol ''DOT'' on the sidewall and may be marked with ''ZR'' in size designation;

(2) pneumatic tires, of rubber, that are not new, including recycled and retreaded tires;

(3) non-pneumatic tires, such as solid rubber tires;

(4) tires designed and marketed exclusively as temporary use spare tires for passenger vehicles which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in Table PCT–1R (''T'' Type Spare Tires for Temporary Use on Passenger Vehicles) or PCT–1B (''T'' Type Diagonal (Bias) Spare Tires for Temporary Use on Passenger Vehicles) of the Tire and Rim Association Year Book,

(b) the designation ''T'' is molded into the tire's sidewall as part of the size designation, and,

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed is 81 MPH or a ''M'' rating;

(5) tires designed and marketed exclusively as temporary use spare tires for light trucks which, in addition, exhibit each of the following physical characteristics:

(a) The tires have a 265/70R17, 255/80R17, 265/70R16, 245/70R17, 245/75R17, 265/70R18, or 265/70R18 size designation;

(b) ''Temporary Use Only'' or ''Spare'' is molded into the tire's sidewall;

(c) the tread depth of the tire is no greater than 6.2 mm; and

(d) Uniform Tire Quality Grade Standards (''UTQG'') ratings are not molded into the tire's sidewall with the exception of 265/70R17 and 255/80R17 which may have UTGC molded on the tire sidewall;

(6) tires designed and marketed exclusively for specialty tire (ST) use which, in addition, exhibit each of the following conditions:

(a) The size designation molded on the tire's sidewall is listed in the ST sections of the Tire and Rim Association Year Book,

(b) the designation ''ST'' is molded into the tire's sidewall as part of the size designation,

(c) the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''For Trailer Service Only'' or ''For Trailer Use Only'',

(d) the load index molded on the tire's sidewall meets or exceeds those load indexes listed in the Tire and Rim Association Year Book for the relevant ST tire size, and

(e) either

(i) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed does not exceed 81 MPH or an ''M'' rating; or

(ii) the tire's speed rating molded on the sidewall is 87 MPH or an ''N'' rating, and in either case the tire's maximum pressure and maximum load limit are molded on the sidewall and either

(1) both exceed the maximum pressure and maximum load limit for any tire of the same size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book; or

(2) if the maximum cold inflation pressure molded on the tire is less than any cold inflation pressure listed for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book, the maximum load limit molded on the tire is higher than the maximum load limit listed at that cold inflation pressure for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book;

(7) tires designed and marketed exclusively for off-road use and which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in the off-the-road, agricultural, industrial or ATV section of the Tire and Rim Association Year Book,

(b) in addition to any size designation markings, the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''Not For Highway Service'' or ''Not for Highway Use'',

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 55 MPH or a ''G'' rating, and

(d) the tire features a recognizable off-road tread design;

(8) Tires designed and marketed for off-road use as all-terrain-vehicle (ATV) tires or utility-terrain-vehicle (UTV) tires, and which, in addition, exhibit each of the following characteristics:

(a) The tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 87 MPH or an ''N'' rating, and

(b) both of the following physical characteristics are satisfied:

(i) The size designation and load index combination molded on the tire's sidewall does not match any of those listed in the passenger car or light truck sections of the Tire and Rim Association Year Book, and

(ii) The size designation and load index combination molded on the tire's sidewall matches any of the following size designation (American standard or metric) and load index combinations:

American standard size	Metric size	Load index
26x10R12	254/70R/12	72
27x10R14	254/65R/14	73
28x10R14	254/70R/14	75
28x10R14	254/70R/14	86
30X10R14	254/80R/14	79
30x10R15	254/75R/15	78
30x10R14	254/80R/14	90
31x10R14	254/85R/14	81
32x10R14	254/90R/14	95
32x10R15	254/85R/15	83
32x10R15	254/85R/15	94
33x10R15	254/90R/15	86
33x10R15	254/90R/15	95
35x9.50R15	241/105R/15	82
35x10R15	254/100R/15	97

The products covered by this investigation are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.10.10.10, 4011.10.10.20, 4011.10.10.30, 4011.10.10.40, 4011.10.10.50, 4011.10.10.60, 4011.10.10.70, 4011.10.50.00, 4011.20.10.05, and 4011.20.50.10. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.10.10, 4011.90.10.50, 4011.90.20.10, 4011.90.20.50, 4011.90.80.10, 4011.90.80.50, 8708.70.45.30, 8708.70.45.46, 8708.70.45.48, 8708.70.45.60, 8708.70.60.30, 8708.70.60.45,

and 8708.70.60.60. While HTSUS subheadings are provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope of the Investigation
V. Scope Comments
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2020–29303 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

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

SUMMARY: The Department of Commerce (Commerce) has received requests to conduct administrative reviews of various antidumping duty (AD) and countervailing duty (CVD) orders and findings with November anniversary dates. In accordance with Commerce's regulations, we are initiating those administrative reviews.

DATES: Applicable January 6, 2021.

FOR FURTHER INFORMATION CONTACT: Brenda E. Brown, 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

Commerce has received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of various AD and CVD orders and findings with November anniversary dates.

All deadlines for the submission of various types of information, certifications, or comments or actions by Commerce discussed below refer to the number of calendar days from the applicable starting time.

Notice of No Sales

If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (POR), it must notify Commerce within 30 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *https://access.trade.gov* in accordance with 19 CFR 351.303.[1] Such submissions are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). Further, in accordance with 19 CFR 351.303(f)(1)(i), a copy must be served on every party on Commerce's service list.

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 POR. We intend to place the CBP data on the record within five days of publication of the initiation notice and to make our decision regarding respondent selection within 30 days of publication of the initiation **Federal Register** notice. Comments regarding the CBP data and respondent selection should be submitted within seven days after the placement of the CBP data on the record of this review. Parties wishing to submit rebuttal comments should submit those comments within five days after the deadline for the initial comments.

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, the following guidelines regarding collapsing of companies for purposes of respondent selection will apply. In general, Commerce has found that determinations concerning whether particular companies should be ''collapsed'' (*e.g.,* 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 this 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 AD proceeding (*e.g.,* investigation, administrative review, new shipper review, or changed circumstances review). For any company subject to this 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 the Quantity and Value (Q&V) 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 this proceeding where Commerce considered collapsing that entity, complete Q&V 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 has requested 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 a particular market situation (PMS) for purposes of constructed value under section 773(e) of the Act.[2] 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

[1] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

[2] *See* Trade Preferences Extension Act of 2015, Public Law 114–27, 129 Stat. 362 (2015).

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 responses to section D of the questionnaire.

Separate Rates

In proceedings involving non-market economy (NME) countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is Commerce's policy to assign all exporters of merchandise subject to an administrative review in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

To establish whether a firm is sufficiently independent from government control of its export activities to be entitled to a separate rate, Commerce analyzes each entity exporting the subject merchandise. In accordance with the separate rates criteria, Commerce assigns separate rates to companies in NME cases only if respondents can demonstrate the absence of both *de jure* and *de facto* government control over export activities.

All firms listed below that wish to qualify for separate rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate rate eligibility, Commerce requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. The Separate Rate Certification form will be available on Commerce's website at *https://enforcement.trade.gov/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the certification, please follow the ''Instructions for Filing the Certification'' in the Separate Rate Certification. Separate Rate Certifications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Certification applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers who purchase and export subject merchandise to the United States.

Entities that currently do not have a separate rate from a completed segment of the proceeding [3] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. In addition, companies that received a separate rate in a completed segment of the proceeding that have subsequently made changes, including, but not limited to, changes to corporate structure, acquisitions of new companies or facilities, or changes to their official company name,[4] should timely file a Separate Rate Application to demonstrate eligibility for a separate rate in this proceeding. The Separate Rate Application will be available on Commerce's website at *https://enforcement.trade.gov/nme/nme-sep-rate.html* on the date of publication of this **Federal Register** notice. In responding to the Separate Rate Application, refer to the instructions contained in the application. Separate Rate Applications are due to Commerce no later than 30 calendar days after publication of this **Federal Register** notice. The deadline and requirement for submitting a Separate Rate Application applies equally to NME-owned firms, wholly foreign-owned firms, and foreign sellers that purchase and export subject merchandise to the United States.

For exporters and producers who submit a Separate Rate Application or Certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate rate status unless they respond to all parts of the questionnaire as mandatory respondents.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following AD and CVD orders and findings. We intend to issue the final results of these reviews not later than November 30, 2021.

	Period to be reviewed
AD Proceedings	
AUSTRIA: Strontium Chromate, A–433–813	6/18/19–10/31/20
Habich GmbH	
FRANCE: Strontium Chromate, A–427–830	5/17/19–10/31/20
Société Nouvelle des Couleurs Zinciques	
INDONESIA: Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses, A–560–823	11/1/19–10/31/20
PT. Pindo Deli Pulp and Paper Mills	
PT. Pabrik Kertas Tjiwi Kimia Tbk	
PT. Indah Kiat Pulp & Paper Tbk	
INDONESIA: Monosodium Glutamate, A–560–826	11/1/19–10/31/20
PT. Cheil Jedang Indonesia	
PT. Miwon Indonesia	
MEXICO: Carbon and Certain Alloy Steel Wire Rod,[5] A–201–830	10/1/19–9/30/20
ArcelorMittal Las Truchas, S.A. de C.V.	
MEXICO: Certain Circular Welded Non-Alloy Steel Pipe, A–201–805	11/1/19–10/31/20
Abastecedora y Perfiles y Tubos, S.A. de C.V.	

[3] Such entities include entities that have not participated in the proceeding, entities that were preliminarily granted a separate rate in any currently incomplete segment of the proceeding (*e.g.,* an ongoing administrative review, new shipper review, *etc.*) and entities that lost their separate rate in the most recently completed segment of the proceeding in which they participated.

[4] Only changes to the official company name, rather than trade names, need to be addressed via a Separate Rate Application. Information regarding new trade names may be submitted via a Separate Rate Certification.

	Period to be reviewed
ArcelorMittal Tubular Products Monterrey, S.A. de C.V.	
Arceros El Aguila y Arco Metal, S.A. de C.V.	
Burner Systems International De Mexico, S.A. de C.V.	
Conduit, S.A. de C.V.	
Fabricaciones Industriales Tumex, S.A. de C.V.	
fischer Mexicana Stainless Steel Tubing S.A. de C.V.	
fischer Tubtech Mexicana, S.A de C.V.	
Forza Steel, S.A. de C.V.	
Galvak, S.A. de C.V.	
Impulsora Tlaxcalteca de Industrias, S.A. de C.V.	
Industrias Monterrey S.A. de C.V.	
La Metálica S.A. de C.V.	
Lamina y Placa Comercial, S.A. de C.V.	
Mach 1 Aero Servicios, S. de R.L. de C.V.	
Mach 1 Global Services, Inc.	
Maquilacero, S.A. de C.V.	
Metalsa S.A.	
Mueller Comercial de Mexico, S. de R.L. de C.V.	
Nacional de Acero, S.A de C.V.	
Nova Tube and Coil de Mexico, S. de R.L. de C.V.	
Perfiles y Herrajes LM, S.A. de C.V.	
Precitubo S.A de C.V.	
Productos Especializados de Acero, S.A. de C.V.	
Productos Laminados de Monterrey, S.A. de C.V.	
PYTCO, S.A. de C.V.	
Regiomontana de Perfiles y Tubos, S.A. de C.V.	
Servicios Swecomex, S.A. de C.V.	
Talleres Acerorey, S.A. de C.V.	
Ternium Mexico, S.A. de C.V.	
Tubac, S.A. de C.V.	
Tubacero S. R.L. de C.V.	
Tubería Laguna, S.A. de C.V.	
Tuberias Procarsa, S.A. de C.V.	
Tubesa, S.A. de C.V.	
Tubos Omega	
MEXICO: Steel Concrete Reinforcing Bar, A–201–844	11/1/19–10/31/20
Aceros Especiales Simec Tlaxcala, S.A. de C.V.	
Compania Siderurgica del Pacifico S.A. de C.V.	
Deacero S.A.P.I. de C.V.	
Fundiciones de Acero Estructurales, S.A. de C.V.	
Grupo Acerero S.A. de C.V.	
Grupo Chant, S.A.P.I. de C.V.	
Grupo Simec	
Operadora de Perfiles Sigosa, S.A. de C.V.	
Orge S.A. de C.V.	
Perfiles Comerciales Sigosa, S.A. de C.V.	
RRLC S.A.P.I. de C.V.	
Sidertul S.A. de C.V.	
Siderurgica del Occidente y Pacifico S.A. de C.V.	
Siderurgicos Noroeste, S.A. de C.V.	
Simec International 6 S.A. de C.V.	
Simec International 7, S.A. de C.V.	
Simec International 9 S.A. de C.V.	
Simec International, S.A. de C.V.	
REPUBLIC OF KOREA: Circular Welded Non-Alloy Steel Pipe, A–580–809	11/1/19–10/31/20
Aju Besteel	
Bookook Steel	
Chang Won Bending	
Dae Ryung	
Daewoo Shipbuilding & Marine Engineering (Dsme)	
Daiduck Piping	
Dong Yang Steel Pipe	
Dongbu Steel	
Eew Korea Company	
Histeel	
Husteel Co., Ltd	
Hyundai Rb	
Hyundai Steel (Pipe Division)	
Hyundai Steel Company	
Kiduck Industries	
Kum Kang Kind	
Kumsoo Connecting	
Miju Steel Mfg	
Nexteel Co., Ltd.	

	Period to be reviewed
Samkang M & T	
Seah Fs	
Seah Steel	
Steel Flower	
Vesta Co., Ltd	
Ycp Co.	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses, A–570–958	11/1/19–10/31/20
Chenming HK, Ltd.	
Gold East (Hong Kong) Trading Co., Ltd.	
Gold East Paper (Jiangsu) Co., Ltd.	
Gold Huasheng Paper Co., Ltd.	
Hainan Jinhai Pulp and Paper Co., Ltd.	
International Paper and Sun Cartonboard Co., Ltd.	
Jingxi Chenming Paper Co., Ltd.	
Ningbo Asia Pulp and Paper Co., Ltd.	
Ningbo Zhonghua Paper Co., Ltd.	
Shandong Chenming Paper Holding Ltd.	
Shandong Huatai Paper Industry Shareholding Co., Ltd.	
Shandong International Paper and Sun Coated Paperboard Co., Ltd.	
Shandong Sun Paper Industry Joint Stock Co., Ltd.	
Sinar Mas Paper (China) Investment Co. Ltd.	
Yanzhou Tianzhang Paper Industry Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Diamond Sawblades and Parts Thereof, A–570–900	11/1/19–10/31/20
ASHINE Diamond Tools Co., Ltd.	
Bosun Tools Co., Ltd.	
Chengdu Huifeng New Material Technology Co. Ltd.[6]	
Danyang City Ou Di Ma Tools Co., Ltd.	
Danyang Hantronic Import & Export Co., Ltd.	
Danyang Huachang Diamond Tools Manufacturing Co., Ltd.	
Danyang Like Tools Manufacturing Co., Ltd.	
Danyang NYCL Tools Manufacturing Co., Ltd.	
Danyang Tongyu Tools Co., Ltd.	
Danyang Tsunda Diamond Tools Co., Ltd.	
Danyang Weiwang Tools Manufacturing Co., Ltd.	
Diamond Tools Technology (Thailand) Co., Ltd.	
Fujian Quanzhou Aotu Precise Machine Co., Ltd.	
Guilin Tebon Superhard Material Co., Ltd.	
Hangzhou Deer King Industrial and Trading Co., Ltd.	
Hangzhou Kingburg Import & Export Co., Ltd.	
Husqvarna (Hebei) Co., Ltd.[7]	
Hebei XMF Tools Group Co., Ltd.	
Henan Huanghe Whirlwind Co., Ltd.	
Henan Huanghe Whirlwind International Co., Ltd.	
Hong Kong Hao Xin International Group Limited	
Hubei Changjiang Precision Engineering Materials Technology Co., Ltd.	
Hubei Sheng Bai Rui Diamond Tools Co., Ltd.	
Huzhou Gu's Import & Export Co., Ltd.	
Jiangsu Fengtai Single Entity[8]	
Jiangsu Huachang Diamond Tools Manufacturing Co., Ltd.	
Jiangsu Inter-China Group Corporation	
Jiangsu Yaofeng Tools Co., Ltd.	
Jiangsu Youhe Tool Manufacturer Co., Ltd.	
Orient Gain International Limited	
Pantos Logistics (HK) Company Limited	
Protec Tools Co., Ltd.	
Pujiang Talent Diamond Tools Co., Ltd.	
Qingdao Hyosung Diamond Tools Co., Ltd.	
Qingyuan Shangtai Diamond Tools Co., Ltd.	
Qingdao Shinhan Diamond Industrial Co., Ltd.	
Quanzhou Sunny Superhard Tools Co., Ltd.	
Quanzhou Zhongzhi Diamond Tool Co., Ltd.	
Rizhao Hein Saw Co., Ltd.	
Saint-Gobain Abrasives (Shanghai) Co., Ltd.	
Shanghai Jingquan Industrial Trade Co., Ltd.	
Shanghai Starcraft Tools Co. Ltd.	
Shanghai Vinon Tools Industrial Co.	
Sino Tools Co., Ltd.	
Weihai Xiangguang Mechanical Industrial Co., Ltd.	
Wuhan Baiyi Diamond Tools Co., Ltd.	
Wuhan Sadia Trading Co., Ltd.	
Wuhan Wanbang Laser Diamond Tools Co., Ltd.[9]	
Wuhan ZhaoHua Technology Co., Ltd.	
Xiamen ZL Diamond Technology Co., Ltd.	

	Period to be reviewed
Zhejiang Wanli Tools Group Co., Ltd.	
ZL Diamond Technology Co., Ltd.	
ZL Diamond Tools Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Fresh Garlic, A–570–831	11/1/19–10/31/20
China Jiangsu International Economic Technical Cooperation Corporation	
Hebei Holy Flame International	
Hengshui Chaoran International Trade	
Jining Alpha Food Co. Ltd.	
Jining Greenstream Fruits & Vegetables Co., Ltd.	
Jining Shunchang Food Co., Ltd.	
Jining Shunchang Import & Export Co., Ltd.	
Jinxiang Qingtian Garlic Industries	
Jinxiang Wanxing Garlic Co., Ltd.	
Laiwu Manhing Vegetables Fruits Corp.	
Linyi Mingda Food Co., Ltd.	
Qingdao Maycarrier Import & Export Co., Ltd.	
Qingdao Ritai Food Co., Ltd.	
Shandong Happy Foods Co., Ltd.	
Shijiazhuang Goodman Trading Co., Ltd.	
Weifang Hongqiao International Logistics Co., Ltd.	
Yingxin (Wuqiang) International Trade	
Zhengzhou Harmoni Spice Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Forged Steel Fittings, A–570–067	11/1/19–10/31/20
Both-Well Taizhou Steel Fittings Co., Ltd.	
Shanghai Maorun International Co., Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Lightweight Thermal Paper, A–570–920	11/1/19–10/31/20
Avery Dennison (China) Co., Ltd.	
Century Paper Group	
Dong Nam Pack	
Gold Huasheng Paper (Suzhou IP) Co.	
Gold Shengpu Paper Products (Suzhou)	
Henan Jianghe Paper Co. Ltd.,	
Jinan Fuzhi Paper Co., Ltd.	
Jinya Intelligent Technology SHA	
Pax Technology Limited	
Prosper (HK) Co., Ltd.	
Sailing International Limited	
Shenzhen Baiyuan Paper Co., Ltd.	
Shenzhen Formers Printing Co., Ltd.	
Shenzhen HDB Network Technology	
Shenzhen Likexin Industrial Co., Ltd.	
Shenzhen Speedy Import & Export Co., Ltd.	
Suzhou Xiandai Paper Production Co.	
SYCDA Company Limited	
Wuxi Honglinxin International Trade	
Xiamen ATP Technology Co. Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Polyethylene Terephthalate Film, Sheet and Strip, A–570–924	11/1/19–10/31/20
Fuwei Films (Shandong) Co., Ltd.	
Shaoxing Xiangyu Green Packing Co., Ltd.	
Sichuan Dongfang Insulating Material Co., Ltd.	
Tianjin Wanhua Co., Ltd.	
CVD Proceedings	
INDONESIA: Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses, C–560–824	1/1/19–12/31/19
PT. Pindo Deli Pulp and Paper Mills	
PT. Pabrik Kertas Tjiwi Kimia Tbk	
PT. Indah Kiat Pulp & Paper Tbk	
THE PEOPLE'S REPUBLIC OF CHINA: Certain Coated Paper Suitable For High-Quality Print Graphics Using Sheet-Fed Presses, C–570–959	1/1/19–12/31/19
Chenming HK, Ltd.	
Gold East (Hong Kong) Trading Co., Ltd.	
Gold East Paper (Jiangsu) Co., Ltd.	
Gold Huasheng Paper Co., Ltd.	
Hainan Jinhai Pulp and Paper Co., Ltd.	
International Paper and Sun Cartonboard Co., Ltd.	
Jingxi Chenming Paper Co., Ltd.	
Ningbo Asia Pulp and Paper Co., Ltd.	
Ningbo Zhonghua Paper Co., Ltd.	
Shandong Chenming Paper Holding Ltd.	
Shandong Huatai Paper Industry Shareholding Co., Ltd.	
Shandong International Paper and Sun Coated Paperboard Co., Ltd.	
Shandong Sun Paper Industry Joint Stock Co., Ltd.	
Sinar Mas Paper (China) Investment Co. Ltd.	
Yanzhou Tianzhang Paper Industry Co., Ltd.	

	Period to be reviewed
THE PEOPLE'S REPUBLIC OF CHINA: Forged Steel Fittings, C–570–068	1/1/19–12/31/19
Both-Well (Taizhou) Steel Fittings, Co., Ltd	
THE PEOPLE'S REPUBLIC OF CHINA: Lightweight Thermal Paper, C–570–921	1/1/19–12/31/19
Avery Dennison (China) Co., Ltd.	
Century Paper Group	
Dong Nam Pack	
Gold Huasheng Paper (Suzhou IP) Co.	
Gold Shengpu Paper Products (Suzhou)	
Henan Jianghe Paper Co. Ltd.	
Jinan Fuzhi Paper Co., Ltd.	
Jinya Intelligent Technology SHA	
Pax Technology Limited	
Prosper (HK) Co., Ltd.	
Sailing International Limited	
Shenzhen Baiyuan Paper Co., Ltd.	
Shenzhen Formers Printing Co., Ltd.	
Shenzhen HDB Network Technology	
Shenzhen Likexin Industrial Co., Ltd.	
Shenzhen Speedy Import & Export Co., Ltd.	
Suzhou Xiandai Paper Production Co.	
SYCDA Company Limited	
Wuxi Honglinxin International Trade	
Xiamen ATP Technology Co. Ltd.	
THE PEOPLE'S REPUBLIC OF CHINA: Truck and Bus Tires, C–570–041	2/15/19–12/31/19
Qingdao Shinego Tyre Tech Co., Ltd.[10]	
TURKEY: Steel Concrete Reinforcing Bar, C–489–819	1/1/19–12/31/19
A G Royce Metal Marketing	
Acemar International Limited	
Agir Haddecilik A.S.	
Ans Kargo Lojistik Tas ve Tic	
As Gaz Sinai ve Tibbi Gazlar A.S.	
Asil Celik Sanayi ve Ticaret A.S.	
Bastug Metalurji Sanayi AS	
Baykan Dis Ticaret	
Colakoglu Dis Ticaret A.S., Colakoglu Metalurji A.S., and their Cross-Owned Affiliates	
Demirsan Haddecilik Sanayi Ve Ticaret AS	
Diler Dis Ticaret AS	
Duferco Celik Ticaret Limited	
Duferco Investment Services SA	
Ege Celik Endustrisi Sanayi ve Ticaret A.S.	
Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S., and its Cross-Owned Affiliates	
Izmir Demir Celik Sanayi A.S.	
Kaptan Demir Celik Endustrisi ve Ticaret A.S., Kaptan Metal Dis Ticaret ve Nakliyat A.S., and their Cross-Owned Affiliates	
Kocaer Haddecilik Sanayi Ve Ticar A.S.	
Meral Makina Iml Ith Ihr Gida	
Mettech Metalurji Madencilik Muhendislik Uretim Danismanlik ve Ticaret Limited Sirketi	
MMZ Onur Boru Profil A.S	
Ozkan Demir Celik Sanayi A.S.	
Sami Soybas Demir Sanayi ve Ticaret	
Wilmar Europe Trading BV	

Suspension Agreements

None.

[5] In the initiation notice that published on December 8, 2020 (85 FR 78990), Commerce incorrectly initiated on ArcelorMittal Las Truchas, S.A. de C.V. (AMLT). Because Commerce found that nearly all of AMLT's assets were sold to Arcelor Mittal Mexico and is no longer in operation, we will not be conducting a review of AMLT. *See Final Results of Changed Circumstances Review: Antidumping Duty Order on Carbon and Certain Alloy Steel Wire Rod from Mexico,* 82 FR 53456 (November 16, 2017).

[6] Commerce determined that Chengdu Huifeng New Material Technology Co., Ltd. is the successor-in-interest to Chengdu Huifeng Diamond Tools Co., Ltd., for which Commerce received a request for review. *See Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review,* 82 FR 60177 (December 19, 2017).

[7] Commerce determined that Husqvarna (Hebei) Co., Ltd. is the successor-in-interest to Hebei Husqvarna Jikai Diamond Tools Co., Ltd. and for which Commerce received a request for review. *See Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review,* 78 FR 48414 (August 8, 2013).

[8] Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., Jiangsu Fengtai Tools Co., Ltd., and Jiangsu Fengtai Sawing Industry Co., Ltd., comprise the Jiangsu Fengtai Single Entity. *See Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014–2015,* 82 FR 26912, 26913, n. 5 (June 12, 2017). We received review requests for Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd., and Jiangsu Fengtai Tools Co., Ltd.

Duty Absorption Reviews

During any administrative review covering all or part of a period falling between the first and second or third

[9] Commerce determined that Wuhan Wanbang Laser Diamond Tools Co., Ltd. is the successor-in-interest to Wuhan Wanbang Laser Diamond Tools Co. and for which Commerce received a request for review. *See Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review,* 81 FR 20618 (April 8, 2016).

[10] Commerce received a review request for Qingdao Shiengo Tire Tech Co., Limited (also known as Qingdao Shinego Tyre Tech Co., Ltd.). Commerce inadvertently did not include the second company name in the April 2020 initiation notice (*See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 19730 (April 8, 2020)). This notice corrects that omission.

and fourth anniversary of the publication of an AD order under 19 CFR 351.211 or a determination under 19 CFR 351.218(f)(4) to continue an order or suspended investigation (after sunset review), Commerce, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether AD duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Gap Period Liquidation

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 ''gap'' period of the order (*i.e.,* the period following the expiry of provisional measures and before definitive measures were put into place), if such a gap period is applicable to the POR.

Administrative Protective Orders and Letters of Appearance

Interested parties must submit applications for disclosure under administrative protective orders in accordance with the procedures outlined in Commerce's regulations at 19 CFR 351.305. Those procedures apply to administrative reviews included in this notice of initiation. Parties wishing to participate in any of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Factual Information Requirements

Commerce's regulations identify five categories of factual information in 19 CFR 351.102(b)(21), which are summarized as follows: (i) Evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). These regulations require any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct. The regulations, at 19 CFR 351.301, also provide specific time limits for such factual submissions based on the type of factual information being submitted. Please review the *Final Rule,*[11] available at *https://enforcement.trade.gov/frn/2013/1304frn/2013-08227.txt,* prior to submitting factual information in this segment. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[12]

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information using the formats provided at the end of the *Final Rule.*[13] Commerce intends to reject factual submissions in any proceeding segments if the submitting party does not comply with applicable certification requirements.

Extension of Time Limits Regulation

Parties may request an extension of time limits before a time limit established under Part 351 expires, or as otherwise specified by Commerce.[14] In general, an extension request will be considered untimely if it is filed after the time limit established under Part 351 expires. For submissions which are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. on the due date. Examples include, but are not limited to: (1) Case and rebuttal briefs, filed pursuant to 19 CFR 351.309; (2) factual information to value factors under 19 CFR 351.408(c), or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2), filed pursuant to 19 CFR 351.301(c)(3) and rebuttal, clarification and correction filed pursuant to 19 CFR 351.301(c)(3)(iv); (3) comments concerning the selection of a surrogate country and surrogate values and rebuttal; (4) comments concerning CBP data; and (5) Q&V questionnaires. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in the letter or memorandum setting forth the deadline (including a specified time) by which extension requests must be filed to be considered timely. This policy also requires that an extension request must be made in a separate, stand-alone submission, and clarifies the circumstances under which Commerce will grant untimely-filed requests for the extension of time limits. Please review the *Final Rule,* available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm,* prior to submitting factual information in these segments.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: December 30, 2020.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2020–29272 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–DS–P

[11] *See Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[12] *See Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 41363 (July 10, 2020).

[13] *See* section 782(b) of the Act; *see also Final Rule;* and the frequently asked questions regarding the *Final Rule,* available at *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[14] *See* 19 CFR 351.302.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–549–842]

Passenger Vehicle and Light Truck Tires From Thailand: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures

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

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that passenger vehicle and light truck tires (passenger tires) from Thailand are being, or are likely to be, sold in the United States at less than fair value (LTFV). The period of investigation is April 1, 2019 through March 31, 2020. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable January 6, 2021.

FOR FURTHER INFORMATION CONTACT: Myrna Lobo or Leo Ayala, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade

Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2371 or (202) 482–3945, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on June 29, 2020.[1] On October 16, 2020, Commerce postponed the preliminary determination of this investigation and the revised deadline is now December 29, 2020.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/.* The signed and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Scope of the Investigation

The products covered by this investigation are passenger tires from Thailand . For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments on the record of this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] As discussed in the Preliminary Scope Decision Memorandum, Commerce is preliminarily modifying the scope language as it appeared in the *Initiation Notice. See* the revised scope in Appendix I to this notice.

The deadline to submit scope case briefs is established in the Preliminary Scope Decision Memorandum. There will be no further opportunity to comment on scope-related issues.[7]

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices and constructed export prices in accordance with sections 772(a) and 772(b) of the Act, respectively. Normal value (NV) is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying the preliminary determination, *see* the Preliminary Decision Memorandum.

All-Others Rate

Sections 733(d)(1)(ii) and 735(c)(5)(A) of the Act provide that in the preliminary determination Commerce shall determine an estimated all-others rate for all exporters and producers not individually examined. This rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 of the Act. In this investigation, Commerce calculated estimated weighted-average dumping margins for LLIT Thailand Co., Ltd. (LLIT) and Sumitomo Rubber (Thailand) Co., Ltd. (SRT) that are not zero, *de minimis,* or based entirely on facts otherwise available. Commerce calculated the all-others rate using a weighted average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged values for the merchandise under consideration.[8]

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter/producer	Estimated weighted-average dumping margin (percent)
LLIT Thailand Co., Ltd	22.21
Sumitomo Rubber (Thailand) Co., Ltd	13.25
All Others	16.66

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise, as described in Appendix I, entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to section 733(d)(1)(B) of the Act and 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the estimated weighted-average dumping margin or the estimated all-others rate, as follows: (1) The cash deposit rate for the respondents listed above will be equal to the company-specific estimated weighted-average dumping margins determined in this preliminary determination; (2) if the exporter is not a respondent identified above, but the producer is, then the cash

[1] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations,* 85 FR 38854 (June 29, 2020) (*Initiation Notice*).

[2] *See Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 85 FR 65791 (October 16, 2020).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Passenger Vehicle and Light Truck Tires from Thailand,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice,* 85 FR at 38855.

[6] *See* Memorandum, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Preliminary Scope Comments Decision Memorandum,'' dated concurrently with this preliminary determination (Preliminary Scope Decision Memorandum).

[7] Case briefs and rebuttal briefs submitted in response to this preliminary LTFV determination should not include scope-related issues. *See* Preliminary Scope Decision Memorandum and the ''Public Comment'' section of this notice.

[8] With two respondents under examination, Commerce normally calculates (A) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents; (B) a simple average of the estimated weighted-average dumping margins calculated for the examined respondents; and (C) a weighted-average of the estimated weighted-average dumping margins calculated for the examined respondents using each company's publicly-ranged U.S. sale quantities for the merchandise under consideration. Commerce then compares (B) and (C) to (A) and selects the rate closest to (A) as the most appropriate rate for all other producers and exporters. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part,* 75 FR 53661, 53663 (September 1, 2010). As complete publicly ranged sales data was available, Commerce based the all-others rate on the publicly ranged sales data of the mandatory respondents. For a complete analysis of the data, *see* the All-Others Rate Calculation Memorandum.

deposit rate will be equal to the company-specific estimated weighted-average dumping margin established for that producer of the subject merchandise; and (3) the cash deposit rate for all other producers and exporters will be equal to the all-others estimated weighted-average dumping margin. These suspension of liquidation instructions will remain in effect until further notice.

Disclosure

Commerce intends to disclose its calculations and analysis performed to interested parties in this preliminary determination within five days of any public announcement or, if there is no public announcement, within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify the information relied upon in making its final determination. Normally, Commerce verifies information using standard procedures, including an on-site examination of original accounting, financial, and sales documentation. However, due to current travel restrictions in response to the global COVID–19 pandemic, Commerce is unable to conduct on-site verification in this investigation. Accordingly, we intend to verify the information relied upon in making the final determination through alternative means in lieu of an on-site verification.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. 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.[9] Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[10] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date and time of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. Section 351.210(e)(2) of Commerce's regulations requires that a request by exporters for postponement of the final determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

On December 4, 2020, pursuant to 19 CFR 351.210(e), LLIT requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[11] On December 1, 2020, the petitioner requested, pursuant to 19 CFR 351.210(b)(2)(i), that Commerce postpone the final determination, contingent on a negative preliminary determination.[12] In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because: (1) The preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce will make its final determination no later than 135 days after the date of publication of this preliminary determination, pursuant to section 735(a)(2) of the Act.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: December 29, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The scope of this investigation is passenger vehicle and light truck tires. Passenger vehicle and light truck tires are new pneumatic tires, of rubber, with a passenger vehicle or light truck size designation. Tires covered by this investigation may be tube-type, tubeless, radial, or non-radial, and they may be intended for sale to original equipment manufacturers or the replacement market.

Subject tires have, at the time of importation, the symbol ''DOT'' on the sidewall, certifying that the tire conforms to applicable motor vehicle safety standards. Subject tires may also have the following prefixes or suffix in their tire size designation, which also appears on the sidewall of the tire:

Prefix designations:

P—Identifies a tire intended primarily for service on passenger cars.

LT—Identifies a tire intended primarily for service on light trucks.

Suffix letter designations:

LT—Identifies light truck tires for service on trucks, buses, trailers, and multipurpose

[9] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[10] *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).

[11] *See* LLIT's Letter, ''Passenger Vehicle and Light Truck Tires from Thailand: Request for an Extension of the Final Determination,'' dated December 4, 2020.

[12] *See* Petitioner's Letter, ''Passenger Vehicle and Light Truck Tires from the Republic of Korea, Taiwan, Thailand, and the Socialist Republic of Vietnam: Request to Extend the Final Determination,'' dated December 1, 2020.

passenger vehicles used in nominal highway service.

All tires with a ''P'' or ''LT'' prefix, and all tires with an ''LT'' suffix in their sidewall markings are covered by these investigations regardless of their intended use.

In addition, all tires that lack a ''P'' or ''LT'' prefix or suffix in their sidewall markings, as well as all tires that include any other prefix or suffix in their sidewall markings, are included in the scope, regardless of their intended use, as long as the tire is of a size that fits passenger cars or light trucks. Sizes that fit passenger cars and light trucks include, but are not limited to, the numerical size designations listed in the passenger car section or light truck section of the Tire and Rim Association Year Book, as updated annually. The scope includes all tires that are of a size that fits passenger cars or light trucks, unless the tire falls within one of the specific exclusions set out below.

Passenger vehicle and light truck tires, whether or not attached to wheels or rims, are included in the scope. However, if a subject tire is imported attached to a wheel or rim, only the tire is covered by the scope.

Specifically excluded from the scope are the following types of tires:

(1) Racing car tires; such tires do not bear the symbol ''DOT'' on the sidewall and may be marked with ''ZR'' in size designation;

(2) pneumatic tires, of rubber, that are not new, including recycled and retreaded tires;

(3) non-pneumatic tires, such as solid rubber tires;

(4) tires designed and marketed exclusively as temporary use spare tires for passenger vehicles which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in Table PCT–1R (''T'' Type Spare Tires for Temporary Use on Passenger Vehicles) or PCT–1B (''T'' Type Diagonal (Bias) Spare Tires for Temporary Use on Passenger Vehicles) of the Tire and Rim Association Year Book,

(b) the designation ''T'' is molded into the tire's sidewall as part of the size designation, and,

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed is 81 MPH or a ''M'' rating;

(5) tires designed and marketed exclusively as temporary use spare tires for light trucks which, in addition, exhibit each of the following physical characteristics:

(a) The tires have a 265/70R17, 255/80R17, 265/70R16, 245/70R17, 245/75R17, 265/70R18, or 265/70R18 size designation;

(b) ''Temporary Use Only'' or ''Spare'' is molded into the tire's sidewall;

(c) the tread depth of the tire is no greater than 6.2 mm; and

(d) Uniform Tire Quality Grade Standards (''UTQG'') ratings are not molded into the tire's sidewall with the exception of 265/70R17 and 255/80R17 which may have UTGC molded on the tire sidewall;

(6) tires designed and marketed exclusively for specialty tire (ST) use which, in addition, exhibit each of the following conditions:

(a) The size designation molded on the tire's sidewall is listed in the ST sections of the Tire and Rim Association Year Book,

(b) the designation ''ST'' is molded into the tire's sidewall as part of the size designation,

(c) the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''For Trailer Service Only'' or ''For Trailer Use Only'',

(d) the load index molded on the tire's sidewall meets or exceeds those load indexes listed in the Tire and Rim Association Year Book for the relevant ST tire size, and

(e) either

(i) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by Tire and Rim Association Year Book, and the rated speed does not exceed 81 MPH or an ''M'' rating; or

(ii) the tire's speed rating molded on the sidewall is 87 MPH or an ''N'' rating, and in either case the tire's maximum pressure and maximum load limit are molded on the sidewall and either

(1) both exceed the maximum pressure and maximum load limit for any tire of the same size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book; or

(2) if the maximum cold inflation pressure molded on the tire is less than any cold inflation pressure listed for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book, the maximum load limit molded on the tire is higher than the maximum load limit listed at that cold inflation pressure for that size designation in either the passenger car or light truck section of the Tire and Rim Association Year Book;

(7) tires designed and marketed exclusively for off-road use and which, in addition, exhibit each of the following physical characteristics:

(a) The size designation and load index combination molded on the tire's sidewall are listed in the off-the-road, agricultural, industrial or ATV section of the Tire and Rim Association Year Book,

(b) in addition to any size designation markings, the tire incorporates a warning, prominently molded on the sidewall, that the tire is ''Not For Highway Service'' or ''Not for Highway Use'',

(c) the tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 55 MPH or a ''G'' rating, and

(d) the tire features a recognizable off-road tread design;

(8) Tires designed and marketed for off-road use as all-terrain-vehicle (ATV) tires or utility-terrain-vehicle (UTV) tires, and which, in addition, exhibit each of the following characteristics:

(a) The tire's speed rating is molded on the sidewall, indicating the rated speed in MPH or a letter rating as listed by the Tire and Rim Association Year Book, and the rated speed does not exceed 87 MPH or an ''N'' rating, and

(b) both of the following physical characteristics are satisfied:

(i) The size designation and load index combination molded on the tire's sidewall does not match any of those listed in the passenger car or light truck sections of the Tire and Rim Association Year Book, and

(ii) The size designation and load index combination molded on the tire's sidewall matches any of the following size designation (American standard or metric) and load index combinations:

American standard size	Metric size	Load index
26x10R12	254/70R/12	72
27x10R14	254/65R/14	73
28x10R14	254/70R/14	75
28x10R14	254/70R/14	86
30X10R14	254/80R/14	79
30x10R15	254/75R/15	78
30x10R14	254/80R/14	90
31x10R14	254/85R/14	81
32x10R14	254/90R/14	95
32x10R15	254/85R/15	83
32x10R15	254/85R/15	94
33x10R15	254/90R/15	86
33x10R15	254/90R/15	95
35x9.50R15	241/105R/15	82
35x10R15	254/100R/15	97

The products covered by this investigation are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4011.10.10.10, 4011.10.10.20, 4011.10.10.30, 4011.10.10.40, 4011.10.10.50, 4011.10.10.60, 4011.10.10.70, 4011.10.50.00, 4011.20.10.05, and 4011.20.50.10. Tires meeting the scope description may also enter under the following HTSUS subheadings: 4011.90.10.10, 4011.90.10.50, 4011.90.20.10, 4011.90.20.50, 4011.90.80.10, 4011.90.80.50, 8708.70.45.30, 8708.70.45.46, 8708.70.45.48, 8708.70.45.60, 8708.70.60.30, 8708.70.60.45, and 8708.70.60.60. While HTSUS subheadings are provided for convenience and for customs purposes, the written description of the subject merchandise is dispositive.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope of the Investigation
V. Scope Comments
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2020–29300 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA739]

New England Fishery Management Council; Public Hearings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of public hearings.

SUMMARY: The New England Fishery Management Council is convening Supplemental Scoping Hearings on Draft Amendment 5 to the Northeast Skate Complex Fishery Management Plan via webinar to consider actions affecting New England fisheries in the exclusive economic zone. The public input received will be brought to the full Council for formal consideration and action, if appropriate.

DATES: These webinars will be held on Thursday, January 21, 2021 from 3:30 p.m. to 5:30 p.m. and Monday, February 8, 2021, from 4 p.m. to 6 p.m.

ADDRESSES:

Meeting address: These hearings will be held via webinar.

All interested parties can register to join the webinars, for the January 21 webinar: *https://attendee.gotowebinar.com/register/3036577748943629579;* and February 8 webinar: *https://attendee.gotowebinar.com/register/6858166806279145739.*

Council address: New England Fishery Management Council, 50 Water Street, Mill #2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Public comments: Mail to Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Mill #2, Newburyport, MA 01950. Mark the outside of the envelope ''Northeast Skate Complex Amendment 5 Scoping Comments. Comments may also be sent via fax to 978–465–3116 or submitted via email to *comments@nefmc.org* with ''Northeast Skate Complex Amendment 5 Scoping Comments'' in the subject line.

Agenda

During the hearings, Council staff will brief the public on Draft Amendment 5 before receiving comments on the amendment. The hearing will begin promptly at the time indicated above. If all attendees who wish to do so have provided their comments prior to the end time indicated, the hearing may conclude early. To the extent possible, the Council may extend hearings beyond the end time indicated above to accommodate all attendees who wish to speak.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this hearing. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the hearing date.

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

Dated: December 31, 2020.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–29239 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA766]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting via webinar of its Groundfish Recreational Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Wednesday, January 20, 2021 at 9 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/7059051979136795917.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Recreational Advisory Panel will discuss and develop recommendations to the Groundfish Committee on fishing year 2021 recreational measures for Gulf of Maine cod and Gulf of Maine haddock. They will receive a summary of public feedback on developing a strawman proposal for a potential limited entry program for party/charter vessels in the recreational groundfish fishery, discuss the proposal, and develop recommendations for next steps to the Groundfish Committee. The Panel will also receive an update on work to revise acceptable biological catch (ABC) control rules for groundfish stocks. Other business will be discussed, as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: December 31, 2020.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–29243 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; An Observer Program for At-Sea Processing Vessels in the Pacific Coast Groundfish Fishery

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 8, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0500 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Matt Dunlap, Fishery Policy Analyst, West Coast Regional Office, 7600 Sand Point Way NE, Seattle, WA 98115, (206) 526–6119, or *matthew.dunlap@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

In 2011, the National Marine Fisheries Service (NMFS) mandated observer requirements for the West Coast groundfish trawl catch shares program. For all fishery sectors, observers must be obtained through third-party observer provider companies operating under permits issued by NMFS. The regulations at §§ 660.140(h), 660.150(j), and 660.160(g), specify observer coverage requirements for trawl vessels and define the responsibilities for observer providers, including reporting requirements. Regulations at § 660.140(i) specify requirements for catch monitor coverage for first receivers. Data collected by observers are used by NMFS to estimate total landed catch and discards, monitor the attainment of annual groundfish allocations, estimate catch rates of prohibited species, and as a component in stock assessments. These data are necessary to comply with the Magnuson-Stevens Act requirements to prevent overfishing. In addition, observer data is used to assess fishing related mortality of protected and endangered species.

II. Method of Collection

This collection utilizes both electronic and paper forms, depending on the specific item. Methods of submittal include email of electronic forms, and mail and facsimile transmission of paper forms. Additionally, this collection utilizes interviews for some information collection and phone calls for transmission of other information.

III. Data

OMB Control Number: 0648–0500.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 268 (5 providers (supplying a total of 75 observers or catch monitors) and 263 fishing vessels).

Estimated Time per Response: For providers: 15 minutes for observer training/briefing/debriefing registration, notification of observer physical examination, observer status reports, other reports on observer harassment, safety concerns, or performance problems, catch monitor status reports, and other catch monitor reports on harassment, prohibited actions, illness or injury, or performance problems; 5 minutes for observer safety checklist submission to NMFS, observer provider contracts, observer information materials, catch monitor provider contracts, and catch monitor informational materials; 10 minutes for certificate of insurance; 7 minutes for catch monitor training/briefing registration, notification of catch monitor physical examination, and catch monitor debriefing registration. For vessels: 10 minutes for fishing departure reports and cease-fishing reports.

Estimated Total Annual Burden Hours: 525 (305 for providers and 220 for fishing vessels.

Estimated Total Annual Cost to Public: $0 in capital costs as it is assumed that each of the 5 observer/catch monitor providers will maintain a computer system with email capacity for general business purposes and that each vessel owner/operator has access to a telephone for toll-free calls.

Respondent's Obligation: Mandatory.

Legal Authority: The regulations at §§ 660.140(h), 660.150(j), and 660.160(g), specify observer coverage requirements for trawl vessels and define the responsibilities for observer providers, including reporting requirements. Regulations at § 660.140(i) specify requirements for catch monitor coverage for first receivers.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

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

[FR Doc. 2020–29269 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA744]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Crab Plan Team will meet January 11, 2021 through January 14, 2021.

DATES: The meeting will be held on Monday, January 11, 2021 through Wednesday, January 13, 2021, from 8 a.m. to 4 p.m., and from 8 a.m. to 11 a.m. on Thursday, January 14, 2021 Alaska Time.

ADDRESSES: The meeting will be a web conference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/1845.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave., Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting via video conference are given under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Jim Armstrong, Council staff; phone; (907) 271–2809; email: *james.armstrong@noaa.gov.* For technical support please contact our admin Council staff, email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Monday, January 11, 2021 Through Thursday, January 14, 2021

The Crab Plan Team will review the final 2021 stock assessment for Norton Sound red king crab. Additionally the Crab Plan Team will discuss model scenarios for the May 2021 stock assessment for Aleutian Island golden king crab, the 2021 crab survey, a crab risk matrix, VAST modeling, the 2020 economic SAFE report, crab bycatch, a range of crab research topics, plans for the Team's May 2021 meeting, and a workshop discussion of crab stock assessment challenges within the GMACS modeling framework. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/1845* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/1845.*

Public Comment

Public comment letters will be accepted and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/1845.*

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

Dated: December 31, 2020.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–29242 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA743]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Committee via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Friday, January 22, 2021 at 9 a.m. via webinar.

ADDRESSES: All meeting participants and interested parties can register to join the webinar at *https://attendee.gotowebinar.com/register/5689812556573938448.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scallop Committee will discuss Framework Adjustment 33 (FW 33): specifically, a review of specifications alternatives in FW 33 and make final recommendations. FW 33 will set specifications including acceptable biological catch/annual catch limit (ABC/ACLs), days-at-sea (DAS), access area allocations for Limited Access (LA) and Limited Access General Category (LAGC), Total Allowable Catch (TAC) for Northern Gulf of Maine (NGOM) management area, target-TAC for LAGC incidental catch and set-asides for the observer and research programs for fishing year 2021 and default specifications for fishing year 2022. Review options for mitigating impacts on Georges Bank yellowtail flounder and northern windowpane flounder and make final recommendations. They will also discuss Scallop Priorities: Reviewing the existing 2021 scallop work priorities and correspondence from the Scallopers Campaign requesting the Council consider changing the scallop priorities by adding LA scallop leasing listening sessions to the priority list and develop a recommendation for the Council to consider. The Committee may recommend deleting a priority if a new priority is added. Other business may be discussed, as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: December 31, 2020.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–29241 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA742]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Scallop Advisory Panel via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Thursday, January 21, 2021 at 9 a.m.

ADDRESSES: All meeting participants and interested parties can register to join the webinar at *https://attendee.gotowebinar.com/register/4846438759558045968.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scallop Advisory Panel (AP) will discuss Framework Adjustment 33 (FW 33): Specifically, a review of specifications alternatives in FW 33 and make final recommendations. FW 33 will set specifications including acceptable biological catch/annual catch limit (ABC/ACLs), days-at-sea (DAS), access area allocations for Limited Access (LA) and Limited Access General Category (LAGC), Total Allowable Catch (TAC) for Northern Gulf of Maine (NGOM) management area, target-TAC for LAGC incidental catch and set-asides for the observer and research programs for fishing year 2021 and default specifications for fishing year 2022. Review options for mitigating impacts on Georges Bank yellowtail flounder and northern windowpane flounder and make final recommendations. They will also discuss Scallop Priorities: Reviewing the existing 2021 scallop work priorities and correspondence from the Scallopers Campaign requesting the Council consider changing the scallop priorities by adding LA scallop leasing listening sessions to the priority list and develop a recommendation for the Council to consider. The AP may recommend deleting a priority if a new priority is added. Other business may be discussed, as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: December 31, 2020.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–29240 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Atlantic Highly Migratory Species Individual Bluefin Tuna Quota (IBQ) Tracking and Appeals

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on August 31, 2020, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Atlantic Highly Migratory Species (HMS) Individual Bluefin Tuna Quota Tracking.

OMB Control Number: 0648–0677.

Form Number(s): None.

Type of Request: Regular submission (extension of a currently approved information collection).

Number of Respondents: 220.

Average Hours per Response: 10 minutes for initial application for IBQ account; 15 minutes per IBQ allocation lease.

Burden Hours: 54.

Needs and Uses: Amendment 7 to the 2006 Consolidated HMS Fishery Management Plan (79 FR 71510, December 2, 2014) implemented individual bluefin tuna quota (IBQ) shares and allocations for vessels permitted in the Atlantic Tunas Longline category, and also implemented distribution of Atlantic Tunas Purse Seine category quota through the IBQ online system. IBQs are intended to fairly and effectively allocate limited quota for incidental capture of Atlantic bluefin tuna among vessels in the Longline category, while minimizing dead discards and discouraging interactions with bluefin tuna, and better utilizing the Purse Seine category quota. An online system developed by NMFS tracks allocations and allocation leases, and reconciles allocation with bluefin tuna catches for quota monitoring. This collection of information accounts for the reporting burden associated with allocation and lease tracking.

First-time vessel permit holders in the affected categories must obtain and set up an IBQ account in the online ''Catch Shares Online System'' in order to be issued IBQ shares and resultant allocation, to lease IBQ, and to resolve quota debt. To use the electronic IBQ System, first–time participants will need to request an account and set their account up with background information. The information collected during account issuance and set-up will be used by NMFS to verify the identity of the individual/business and whether they qualify for IBQ allocation leasing.

The lease monitoring information collected by the online system will be used by each permit holder to keep track of their individual IBQ allocation, and document allocation leases with other IBQ participants. NMFS will use these data to ensure proper accounting of allocations among participants, and

to track use of quota allocations and reconcile allocation usage with bluefin tuna catch and landings.

Affected Public: Businesses or other for-profit organizations (vessel owners).

Frequency: Infrequent. Initially application for an IBQ account is a one-time occurrence. Subsequent leases of IBQ allocation are only conducted on an as needed basis, and averages one lease a year.

Respondent's Obligation: Mandatory.

Legal Authority: Under the provisions of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), the National Marine Fisheries Service (NMFS) is responsible for management of the Nation's marine fisheries. NMFS must also promulgate regulations, as necessary and appropriate, to carry out obligations the United States undertakes internationally regarding tuna management through the Atlantic Tunas Convention Act (ATCA, 16 U.S.C. 971 *et seq.*).

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

Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function and entering either the title of the collection or the OMB Control Number 0648–0677.

Sheleen Dumas,

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

[FR Doc. 2020–29259 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA767]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting via webinar of its Groundfish Advisory Panel to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Wednesday, January 20, 2021 at 1:30 p.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/7242925507673157645.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Groundfish Advisory Panel will discuss the last component of the Framework Adjustment 61/Specifications and Management Measures action—a proposed universal sector exemption to allow fishing for redfish and make preferred alternative recommendations to the Groundfish Committee. They will also receive an update on work to revise ABC control rules for groundfish stocks. Other business will be discussed, as necessary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date. This meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

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

Dated: December 31, 2020.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–29244 Filed 1–5–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army

U.S. Army Science Board; Notice of Federal Advisory Committee Meeting

AGENCY: Department of the Army, DoD.

ACTION: Notice of Federal Advisory Committee meeting; cancellation.

SUMMARY: The Department of the Army published a notice of a Federal Advisory Committee meeting of the U.S. Army Science Board (ASB) in the **Federal Register** on Monday, December 21, 2020. The purpose of the meeting on January 5, 2021 was for ASB members to review, deliberate, and vote on the findings and recommendations on the following study: ''An Independent Assessment of the 2040 Battlefield and its Implications for 5th Generation Combat Vehicle Technologies''. The meeting on January 5, 2021 is cancelled.

FOR FURTHER INFORMATION CONTACT: Ms. Heather J. Gerard, (703) 545–8652, *heather.j.gerardi.civ@mail.mil* or Ms. Gloria Mudge at *gloria.l.mudge.civ@mail.mil.* Mailing address is Army Science Board, 2530 Crystal Drive, Suite 7098, Arlington, VA 22202. Website: *https://asb.army.mil/.*

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer for the U.S. Army Science Board was unable to provide public notification required by 41 CFR 102–3.150(a) concerning the cancellation of the previously noticed January 5, 2021 meeting of the U.S. Army Science Board. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

James W. Satterwhite Jr.,

Alternate, Federal Register Liaison Officer.

[FR Doc. 2020–29275 Filed 1–5–21; 8:45 am]

BILLING CODE 5061–AP–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2020–OS–0106]

Proposed Collection; Comment Request

AGENCY: Defense Finance and Accounting Service, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Service announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 1, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Finance and Accounting Services, Kellen Stout, 8899 E 56th St, Indianapolis, IN 46249 or call (317) 212–1801.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Dependency Statements; Parent (DD Form 137–3), Incapacitated Child Over Age 21 (DD Form 137–5), Full Time Student 21–22 Years of Age (DD Form 137–6), and Ward of a Court (DD Form 137–7); OMB Control Number 0730–0014.

Needs and Uses: The information collection requirement is necessary to certify dependency or obtain information to determine entitlement to basic allowance for housing (BAH) with dependent rate, travel allowance, or uniformed services identification and privilege card. Information regarding a parent, an incapacitated child over age 21, a student age 21–22, or a ward of a court is provided by the military member. A medical doctor or psychiatrist, college administrator, or a dependent's employer may need to provide information for claims. Pursuant to 37 U.S.C. 401, 403, 406, and 10 U.S.C. 1072 and 1076, the member must provide more than one half of the claimed dependent's monthly expenses. DoDFMR 7000.14–R, Vol 7A, defines dependency and directs that dependency be proven. Dependency claim examiners use the information from these forms to determine the degree of benefits. The requirement to provide the information decreased the possibility of monetary allowances being approved on behalf of ineligible dependents.

Affected Public: Individuals or Households.

Annual Burden Hours: 13,477.5.

Number of Respondents: 14,975.

Responses per Respondent: 1.

Annual Responses: 14,975.

Average Burden per Response: 54 minutes.

Frequency: On occasion.

Dated: December 30, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–29209 Filed 1–5–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2020–OS–0105]

Privacy Act of 1974; System of Records

AGENCY: Department of Defense (DoD).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the DoD is modifying and reissuing a current system of records titled, ''Defense Repository for Common Enterprise Data (DRCED),'' DUSDC 01. This system of records was originally established by the Office of the Under Secretary of Defense (Comptroller) to collect and maintain records on various individuals, including active and retired Military Service personnel, their dependents, DoD civilian personnel, and other DoD-affiliated individuals, to support the DoD's defense business enterprise by using technology to synchronize and normalize data to improve affordability, performance, reporting, and mission readiness. This system of records notice (SORN) is being updated to support additional information systems being established within the DoD using the same categories of data for the same purposes. The system number is changing from DUSDC 01 to DoD 0004, to reflect its status as a DoD-wide system of records. The DoD is also modifying the system location, system managers, authority for maintenance of the system, purpose of the system, individuals covered by the system, record source categories, and notification procedures. Additionally, the DoD is issuing a Notice of Proposed Rulemaking proposing to exempt this system of records from certain provisions of the Privacy Act, in today's issue of the **Federal Register**.

DATES: This system of records modification is effective upon publication; however, comments on the Routine Uses will be accepted on or before February 5, 2021. The Routine Uses are effective at the close of the comment period.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal Rulemaking Portal: https://www.regulations.gov.*

Follow the instructions for submitting comments.

- *Mail:* The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *https://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Ms. Lyn Kirby, Chief, Defense Privacy, Civil Liberties, and Transparency Division, Directorate for Oversight and Compliance, Department of Defense, 4800 Mark Center Drive, Mailbox #24, Suite 08D09, Alexandria, VA 22350–1700; *OSD.DPCLTD@mail.mil;* (703) 571–0070.

SUPPLEMENTARY INFORMATION: The DRCED system of records is being updated to clarify that it serves as a DoD-wide system of records and to support new information systems being established within the DoD using the same categories of data for the same purposes. The original system of records was established to support a single information system with the Office of the Undersecretary of Defense (Comptroller) as the system manager. The expanded system of records will support multiple information systems that provide DoD-wide and component-level enterprise solutions for integrating and analyzing targeted data from existing DoD systems to develop timely, actionable, and insightful conclusions in support of national strategies.

These information systems may also create and use predictive analytic models based upon specific data streams to equip decision makers with critical data necessary for execution of fiscal and operational requirements. These systems automate financial and business transactions, perform cost-management analysis, produce oversight and audit reports, and provide critical data expected to improve performance of mission objectives, providing a significant benefit to the DoD.

This SORN is modifying the system number from DUSDC 01 to DoD 0004, to reflect its status as a DoD-wide system of records. The remaining modifications principally change the SORN to reflect the broad intended use of this system of records to cover data stored in multiple information systems. The other modifications are (1) to the System Location section to reflect the various locations in which these information systems may reside; (2) to the System Manager section to include system managers for the additional information systems expected to operate under this system of records; (3) to the Authority for Maintenance of the System section to update citations, add additional authorities, and cite the authorities in the appropriate order; (4) to the Purpose of the System section to list the functions of the system with additional clarity; (5) to the Categories of Individuals covered by the system to add examples of Department affiliation; (6) to the Record Source Categories section to remove systems and update system names; (7) to the Record Access Procedures section to reflect the need for individuals to identify the appropriate DoD office or component to which their request should be directed; (8) to the Notification Procedures section to include additional system managers; and (9) to the Exemptions Promulgated for the System section to claim exemptions from certain provisions of the Privacy Act for classified information in this system of records.

A Notice of Proposed Rulemaking is being published in today's issue of the **Federal Register** for public comment on the proposal to exempt this system of records from certain provisions of the Privacy Act.

The DoD notices for systems of records subject to the Privacy Act of 1974, as amended, have been published in the **Federal Register** and are available from the address in **FOR FURTHER INFORMATION CONTACT** or at the Defense Privacy, Civil Liberties, and Transparency Division website at *https://dpcld.defense.gov.*

In accordance with 5 U.S.C. 552a(r) and OMB Circular No. A–108, the DoD has provided a report of this system of records to the Office of Management and Budget and to Congress.

Dated: December 22, 2020.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

SYSTEM NAME AND NUMBER:

Defense Repository for Common Enterprise Data (DRCED), DoD 0004.

SECURITY CLASSIFICATION:

Unclassified and Classified.

SYSTEM LOCATION:

Department of Defense (DoD), located at 1000 Defense Pentagon, Washington, DC 20301–1000, and other Department installations, offices, or mission locations. Information may also be stored within a government-certified cloud, implemented and overseen by the Department's Chief Information Officer (CIO), 6000 Defense Pentagon, Washington, DC 20301–6000.

SYSTEM MANAGER(S):

The system managers are as follows:

A. Chief Data Officer, Department of Defense, 6000 Defense Pentagon, Washington, DC 20301–6000; *osd.pentagon.dod-cio.list.cdo@mail.mil;* (571) 372–4666.

B. Director, CFO Data Transformation Office, Office of the Undersecretary for Defense (Comptroller), 1100 Defense Pentagon, Washington, DC 20301–1100; *osd.pentagon.ousd-c.mbx.audit-helpdesk@mail.mil;* (703) 614–8575.

C. Chief Data Officer, Department of the Air Force, 1600 Air Force Pentagon, Room 5E811, Washington, DC 20330; *usaf.pentagon.saf-co.mbx.chief-data-office-workflow@mail.mil;* (703) 692–9850.

D. Chief Data Officer, Department of the Navy, 1000 Navy Pentagon, Room 4E623, Washington, DC 20350; *don_data@navy.mil;* (703) 695–3979.

E. Chief Data Officer, Army CIO/G–6 Director, Cybersecurity, 5850 23rd Street, Fort Belvoir, VA 22060; *cio-g6.pia.inbox@mail.mil;* (703) 545–1688.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Public Law 113–101, Digital Accountability and Transparency Act of 2006, as amended in 2014; Public Law 113–291, Federal Information Technology Acquisition Reform, 2015; 10 U.S.C. 2222, Defense Business Systems: Business Process Reengineering; Enterprise Architecture; Management; 10 U.S.C. 117, Readiness Reporting System; 10 U.S.C. 482, Readiness Reports; 31 U.S.C. 902, Authority and Functions of Agency Chief Financial Officers, as amended; 31 U.S.C. 3512(b), Executive Agency Accounting and Other Financial Management Reports and Plans; DoD Directive 7045.14, The Planning, Programming, Budgeting, and Execution (PPBE) Process; DoD Directive 7730.65, Department of Defense Readiness Reporting System; DoD Instruction 8320.02, Sharing Data, Information, and Information Technology (IT) Services in the Department of Defense; DoD Instruction 8320.07, Implementing the Sharing of Data, Information, and Information Technology (IT) Services in the Department of Defense; and E.O. 9397, Numbering Systems for Federal Accounts Relating to Individual Persons, as amended.

PURPOSE(S) OF THE SYSTEM:

A. To improve data quality, data automation, and data linking of common enterprise data across the DoD for financial, business, and mission readiness reporting.

B. To implement shared internal compliance controls for data governance including enhanced auditing capabilities across the enterprise.

C. To provide a platform for shared service and business system optimization analytics across the enterprise, to include predictive models used to measure the effectiveness of combat units and operational readiness.

D. To make data more easily accessible, standardized, efficiently processed, and useful across the DoD.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All Military Services personnel, including National Guard and Reserve components; former members and retirees of the Military Services; dependent family members of Military Services members; DoD ''affiliated'' individuals (*e.g.,* non-appropriated fund employees working on military installations, Red Cross volunteers assisting at military hospitals, United Services Organization (USO) staff providing services on military installations, Congressional staff members visiting military installations, etc.); DoD presidential appointees; and DoD civilian employees, contractors, or individuals (and their surviving beneficiaries) accorded benefits, rights, privileges, or immunities associated with DoD as provided by U.S. law.

CATEGORIES OF RECORDS IN THE SYSTEM:

A. Personal Information: Name; DoD ID number; Social Security Number (SSN); address; email address(es); date of birth; gender; branch of service; citizenship; Defense Enrollment Eligibility Reporting System benefit number; sponsorship and beneficiary information; race and ethnic origin.

B. Employment Information: Employment status; duty position; leave balances and history; work schedules; individual personnel records; time and attendance records; retirement records, sponsor duty location, unit of assignment; occupation; rank; skill specialty; security clearance information.

C. Personal Financial Information: Pay, wage, earnings information; separation information; financial benefit records; income tax withholding records; accounting records.

D. Medical Readiness and Deployment Information: Inpatient and outpatient medical records; pharmacy records; immunization records; Medical and Physical Evaluation Board records; neuropsychological functioning and cognitive testing data; periodic and deployment-related health assessments.

RECORD SOURCE CATEGORIES:

Records and information stored in this system of records are obtained from:

A. Individuals.

B. All DoD databases flowing into or accessed through the following integrated data systems, environments, applications, and tools: Defense Finance and Accounting Services financial business feeder systems, Procurement Integrated Enterprise Environment, Defense Manpower Data Center including the Defense Eligibility Enrollment System, Defense Readiness Reporting System (DRRS) enterprise (including DRRS-Strategic and DRRS-Army Database), Defense Medical Logistics—Enterprise Solution, Digital Training Management System, Defense Occupational and Environmental Health Readiness System, Global Force Management Data Initiative, Medical Operational Data System, Force Risk Reduction, Medical Readiness Reporting System, Medical Health System Data Repository, Army National Guard Human/Personnel, Resource, and Manpower Systems, and commensurate data from National Guard Bureau Systems.

C. The following standalone DoD systems and datasets: Drug and Alcohol Management Information System; Physical Disability Case Processing System; TRANSCOM Patient Regulating Command & Control Evaluation System; DoD Suicide Event Report System; Army National Guard Unit Risk Inventory; Global Assessment Tool; Defense Organizational Climate Survey; Learning Management System; Total Human Resource Managers Information System; Navy Manpower Program and Budget System; and Army Training Requirements and Resources System.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, as amended, all or a portion of the records or information contained herein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

A. To contractors, grantees, experts, consultants, students, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the federal government when necessary to accomplish an agency function related to this system of records.

B. To the appropriate Federal, State, local, territorial, tribal, foreign, or international law enforcement authority or other appropriate entity where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law, whether criminal, civil, or regulatory in nature.

C. To any component of the Department of Justice for the purpose of representing the DoD, or its components, officers, employees, or members in pending or potential litigation to which the record is pertinent.

D. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body or official, when the DoD or other Agency representing the DoD determines the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

E. To the National Archives and Records Administration for the purpose of records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

F. To a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of, and at the request of, the individual who is the subject of the record.

G. To appropriate agencies, entities, and persons when (1) the DoD suspects or confirms a breach of the system of records; (2) the DoD determines as a result of the suspected or confirmed breach there is a risk of harm to individuals, the DoD (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the DoD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

H. To another Federal agency or Federal entity, when the DoD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored on electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

In instances where records are retrieved by a personal identifier, they will typically be retrieved by an individual's full name and/or DoD ID number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of in accordance with the applicable records schedule for the systems from which they were collected.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Multifactor log-in authentication including CAC authentication and password; SIPR token as required. Access controls enforce need-to-know policies so only authorized users have access to PII. Additionally, security audit and accountability policies and procedures directly support privacy and accountability procedures. Network encryption protects data transmitted over the network while disk encryption secures the disks storing data. Key management services safeguards encryption keys. Sensitive data is identified and masked as practicable. All individuals granted access to this system of records must complete requisite training to include Information Assurance and Privacy Act training. Sensitive data will be identified, properly marked with access by only those with a need to know, and safeguarded as appropriate. Physical access to servers are controlled at building access points utilizing detection systems other electronic alert systems. Electronic intrusion detection systems are installed within the facilities to monitor, detect, and automatically alert appropriate personnel of security incidents. Access to server rooms are secured with devices that require each individual to provide multi-factor authentication before granting entry or exit.

RECORD ACCESS PROCEDURES:

Individuals seeking access to their records should address written inquiries to the DoD office with oversight of the records. The public may identify the appropriate DoD office through the following website: *www.FOIA.gov.* Signed written requests should contain the name and number of this system of records notice along with the full name, identifier (*i.e.,* DoD ID Number or Defense Benefits Number), date of birth, current address, and telephone number of the individual. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the appropriate format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

CONTESTING RECORD PROCEDURES:

The DoD rules for accessing records, contesting contents, and appealing initial agency determinations are contained in 32 CFR part 310, or may be obtained from the system manager.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the appropriate system mangers(s). Signed written requests should contain the full name, identifier (*i.e.* DoD ID Number or DoD Benefits Number), date of birth, and current address and telephone number of the individual. In addition, the requester must provide either a notarized statement or an unsworn declaration made in accordance with 28 U.S.C. 1746, in the appropriate format:

If executed outside the United States: ''I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature).''

If executed within the United States, its territories, possessions, or commonwealths: ''I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature).''

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The DoD has exempted records maintained in this system from 5 U.S.C. 552a(c)(3), (d)(1), (2), (3), and (4) of the Privacy Act, pursuant to 5 U.S.C. 552a(k)(1). In addition, when exempt records received from other systems of records become part of this system, the DoD also claims the same exemptions for those records that are claimed for the original primary systems of records from which they originated and claims any additional exemptions set forth here. An exemption rule for this system has been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c), and published in 32 CFR part 310.

HISTORY:

March 17, 2020, 85 FR 15150.

[FR Doc. 2020–28792 Filed 1–5–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2020–OS–0109]

Proposed Collection; Comment Request

AGENCY: The Office of the Under Secretary of Defense Comptroller, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Service announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 1, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Kellen Stout, 8899 E 56th St, Indianapolis, IN 46249 or call (317) 212–1801.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Defense and Retired Annuitant System; DD Forms 2866, 2868, 2892, 2894; DFAS Form 9415; DFAS–CL Forms 1800/97, 1800/100, 1059; OMB Control Number 0730–XXXX.

Needs and Uses: Information is collected to maintain pay and personnel information for use in the computation of military retired pay, survivor annuity pay, and to make payments to spouses, and former spouses and beneficiaries of unpaid retired pay.

Affected Public: Individuals and households.

Annual Burden Hours: 7,233.1.

Number of Respondents: 40,371.

Responses per Respondent: 1.

Annual Responses: 40,371.

Average Burden per Response: 10.75 minutes.

Frequency: On occasion.

Dated: December 30, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–29208 Filed 1–5–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

[Docket ID: DoD–2020–OS–0089]

Submission for OMB Review; Comment Request

AGENCY: Office of the Under Secretary of Defense for Acquisition and Sustainment, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by February 5, 2020.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Pre-Embarkation Certificate of Disinsection; DD 3044; OMB Control Number 0704–0568.

Type of Request: Extension.

Number of Respondents: 1,000.

Responses per Respondent: 1.

Annual Responses: 1,000.

Average Burden per Response: 10 minutes.

Annual Burden Hours: 167.

Needs and Uses: The information collection requirement is necessary to provide proof of aircraft disinsection to foreign countries that require it, before cargo and aircrew will be allowed to dis-embark in those countries. This standardized form that is used across the DoD satisfies the documentation requirements of disinsection for all 14 countries that currently require it.

Affected Public: Individuals or Households.

Frequency: On occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: December 30, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–29192 Filed 1–5–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2020–OS–0108]

Proposed Collection; Comment Request

AGENCY: Washington Headquarters Services, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Washington Headquarters Services announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 1, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Washington Headquarters Services, 1155 Defense Pentagon BF739, Washington, DC ATTN: Ms. Julia Shmirkin, 703–697–2245.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Workplace Environment Changes and Safety Questionnaire; OMB Control Number 0704–0593.

Needs and Uses: Washington Headquarters Services (WHS) is a services provider to the Pentagon, Mark Center, and other leased facilities within the National Capital Region. In response to the Coronavirus Pandemic (COVID–19), WHS implemented new policies within the buildings to provide a safe

workplace environment for those working in the buildings. This collection of information will provide WHS an understanding of the effectiveness of these new policies in making the tenants feel safer in working inside the building, what additional assistance WHS can provide to further improve tenants' safety, to assure accurate and continuous communication efforts, and telework experience.

Affected Public: Individuals and Households.

Annual Burden Hours: 20 hours.

Number of Respondents: 240.

Responses per Respondent: 1.

Annual Responses: 240.

Average Burden per Response: 5 minutes.

Frequency: Annually.

Dated: December 30, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–29193 Filed 1–5–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DOD–2020–OS–0107]

Proposed Collection; Comment Request

AGENCY: Defense Finance Accounting Service, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Defense Finance and Accounting Service announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by April 1, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Defense Finance and Accounting Services, Kellen Stout, 8899 E 56th St, Indianapolis, IN 46249 or call (317) 212–1801.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Claim Certification and Voucher for Death Gratuity Payment; DD Form 397; OMB Control Number 0730–0017.

Needs and Uses: The information collection requirement allows the government to collect the signatures and information needed to pay a death gratuity. Pursuant to 10 U.S.C. 1475–1480, a designated beneficiary(ies) or next-of-kin can receive a death gratuity payment for a deceased service member. This form serves as a record of the disbursement. The DoD Financial Management Regulation (FMR), Volume 7A, Chapter 36, defines the eligible beneficiaries and procedures for payment. To provide internal controls for this benefit, and to comply with the above-cited statutes, the information requested is needed to substantiate the receipt of the benefit.

Affected Public: Individuals or Households.

Annual Burden Hours: 250 Hours.

Number of Respondents: 500.

Responses per Respondent: 1.

Annual Responses: 500.

Average Burden per Response: 30 minutes.

Frequency: On occasion.

Dated: December 30, 2020.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2020–29210 Filed 1–5–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Clarification on Reopening the Application Period for Certain Applicants Under the Higher Education Emergency Relief Fund (HEERF), Sections 18004(a)(1), 18004(a)(2), and 18004(a)(3); Coronavirus Aid, Relief, and Economic Security (CARES) Act

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice; clarification.

SUMMARY: The Secretary is providing notice that the newly-enacted Consolidated Appropriations Act, 2021 (the 2021 Appropriations Act) supersedes the Department of Education's (Department's) notice published in the **Federal Register** on December 23, 2020, that reopened the HEERF grant program application period for certain limited applicants (Reopening Notice). The 2021 Appropriations Act prevents the Department from accepting or processing any applications for new awards under section 18004(a)(1) of the CARES Act (*i.e.,* the ''Student Aid Portion'' program (Catalog of Federal Domestic Assistance Number (CFDA) 84.425E) and the ''Institutional Portion'' program (CFDA 84.425F)).

FOR FURTHER INFORMATION CONTACT: Karen Epps, U.S. Department of Education, 400 Maryland Avenue SW, Room 250–64, Washington, DC 20202. Email: *HEERF@ed.gov.* Telephone: (202) 453–6337. Please also visit our HEERF website: *www2.ed.gov/about/offices/list/ope/caresact.html.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On December 23, 2020 (85 FR 83917), the Department published the Reopening Notice, which reopened the HEERF application period for applicants that met one of the five conditions described in the Reopening Notice and that we verified previously had attempted to apply through *grants.gov* for a specific HEERF funding opportunity.

The 2021 Appropriations Act (H.R. 133) was signed into law by President Donald Trump on December 27, 2020. It supersedes, in part, the Reopening Notice and requires that any unobligated CARES Act section 18004(a)(1) funds be used by the Department to carry out section 314(a)(1) of the 2021 Appropriations Act, which allocates funds to certain institutions of higher education under a new formula. Therefore, there are no

remaining funds to award to institutions under the CARES Act ''Student Aid Portion'' program (CFDA 84.425E) and the ''Institutional Portion'' program (CFDA 84.425F), and the Department cannot accept or process applications for these funds under the Reopening Notice, including applications received prior to December 27, 2020 in response to the Reopening Notice.

Note: While the Department cannot accept or process any applications for CARES Act section 18004(a)(1) program funds, we are still able to accept applications for our section 18004(a)(2) and (a)(3) HEERF programs (CFDAs 84.425J, 84.425K, 84.425L, 84.425M, 84.425N) from applicants that meet one of the five conditions described in the Reopening Notice and that we verified previously have attempted to apply through *grants.gov* for one of these HEERF grant opportunities. Applicants for those funds must follow the requirements specified in the Reopening Notice and submit their revised or corrected applications no later than January 11, 2021.

Note: The requirements described in this notice apply only to CARES Act section 18004(a)(1) HEERF funds not yet awarded by the Department to institutions. They do not apply to funds that were awarded to institutions by the Department prior to the enactment of the 2021 Appropriations Act, but that have not yet been spent by institutions. Institutions that received awards under section 18004(a)(1) of the CARES Act continue to have one calendar year from the date of their award to expend funds under their grant period of performance.

Note: The Department intends to issue guidance at a future date regarding the grant opportunities created by section 314 of the 2021 Appropriations Act, including the circumstances under which institutions that did not receive funds under section 18004(a)(1) of the CARES Act can apply for funding under the 2021 Appropriations Act.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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Robert L. King,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2020–29298 Filed 1–5–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity

AGENCY: U.S. Department of Education, National Advisory Committee on Institutional Quality and Integrity (NACIQI).

ACTION: Notice of membership.

SUMMARY: This notice lists the members of the National Advisory Committee on Institutional Quality and Integrity (NACIQI). This notice is required under Section 114(e)(1) of the Higher Education Act of 1965, as amended (HEA).

ADDRESSES: U.S. Department of Education, Office of Postsecondary Education, 400 Maryland Ave. SW, Room 2C159, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: George Alan Smith, Executive Director/ Designated Federal Official, NACIQI, U.S. Department of Education, 400 Maryland Ave. SW, Room 2C159, Washington, DC 20202, telephone: (202) 453–7757, or email *george.alan.smith@ed.gov.*

SUPPLEMENTARY INFORMATION:

NACIQI's Statutory Authority and Functions

The NACIQI is established under Section 114 of the HEA, and is composed of 18 members appointed—

(A) On the basis of the individuals' experience, integrity, impartiality, and good judgment;

(B) From among individuals who are representatives of, or knowledgeable concerning, education and training beyond secondary education, representing all sectors and types of institutions of higher education; and,

(C) On the basis of the individuals' technical qualifications, professional standing, and demonstrated knowledge in the fields of accreditation and administration of higher education.

The NACIQI meets at least twice a year and advises the Secretary of Education with respect to:

- The establishment and enforcement of the standards of accrediting agencies or associations under subpart 2 of part H of Title IV of the HEA;
- The recognition of specific accrediting agencies or associations;
- The preparation and publication of the list of nationally recognized accrediting agencies and associations;
- The eligibility and certification process for institutions of higher education under Title IV of the HEA, together with recommendations for improvements in such process;
- The relationship between (1) accreditation of institutions of higher education and the certification and eligibility of such institutions, and (2) State licensing responsibilities with respect to such institutions; and
- Any other advisory functions relating to accreditation and institutional eligibility that the Secretary of Education may prescribe by regulation.

What are the terms of office for the committee members?

The term of office of each member is six years. Any member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed shall be appointed for the remainder of such term.

Who are the current members of the committee?

The current members of the NACIQI are:

Members Appointed by the Secretary of Education, Betsy DeVos, With Terms Expiring September 30, 2025:

- Ronnie L. Booth, Ph.D., President Emeritus, Tri-County Technical College, Anderson, South Carolina.
- Wallace E. Boston, Ph.D., President Emeritus, American Public University System, Inc., Charles Town, West Virginia.
- Amanda Delekta, Student, Michigan State University College of Law, East Lansing, Michigan.
- David A. Eubanks, Ph.D., Assistant Vice President for Assessment and Institutional Effectiveness, Furman University, Greenville, South Carolina.
- D. Michael Lindsay, Ph.D., President, Gordon College, Wenham, Massachusetts.
- Mary Ellen Petrisko, Ph.D., Former President, WASC Senior College and University Commission, Pittsburgh, Pennsylvania.

Members Appointed by the Speaker of the House of Representatives, Nancy Pelosi, With Terms Expiring September 30, 2026:

- Kathleen Sullivan Alioto, Ed.D., Strategic Advisor, Fundraiser, and Consultant, New York, New York, San Francisco, California, and Boston, Massachusetts.
- Roslyn Clark Artis, Ed.D., President, Benedict College, Columbia, South Carolina.
- Jennifer Blum, J.D., Principal, Blum Higher Education Advising, PLLC, Washington, DC.
- Arthur E. Keiser, Ph.D., Chancellor, Keiser University, Fort Lauderdale, Florida.
- Robert Mayes, Jr., CEO, Columbia Southern Education Group, Elberta, Alabama.
- Robert Shireman, Director of Higher Education Excellence and Senior Fellow, The Century Foundation, Berkeley, California.

Members Appointed by the President Pro Tempore of the Senate at the Time, Orrin Hatch, With Terms Expiring September 30, 2022:

- Jill Derby, Ph.D., Senior Consultant, Association of Governing Boards of Universities and Colleges, Gardnerville, Nevada.
- Paul J. LeBlanc, Ph.D., President, Southern New Hampshire University, Manchester, New Hampshire.
- Anne D. Neal, J.D., President, National Association for Olmsted Parks, Washington, DC.
- Richard F. O'Donnell, Founder and CEO, Skills Fund, Austin, Texas.
- Claude O. Pressnell Jr., Ed.D., President, Tennessee Independent Colleges and Universities Association, Nashville, Tennessee.
- Steven Van Ausdle, Ph.D., President Emeritus, Walla Walla Community College, Walla Walla, Washington.

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Authority: 20 U.S.C. 1011c.

Betsy DeVos,

Secretary of Education.

[FR Doc. 2020–29236 Filed 1–5–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Prohibition Order Securing Critical Defense Facilities

AGENCY: Office of Electricity, Department of Energy.

ACTION: Prohibition Order.

SUMMARY: The U.S. Department of Energy (Department or DOE) gives notice of this Prohibition Order prohibiting the acquisition, importation, transfer, or installation of specified bulk-power system (BPS) electric equipment that directly serves Critical Defense Facilities (CDFs), pursuant to Executive Order 13920.

DATES: The effective date of this Prohibition Order (Effective Date) is January 16, 2021. This Prohibition Order shall apply to any Prohibited Transaction initiated on or after the Effective Date. The Department shall notify each Responsible Utility of the applicability of this Prohibition Order no later than five (5) business days after the issuance of this Prohibition Order. Notice under this section shall be deemed made when personally delivered or when mailed, three (3) calendar days after deposit in the U.S. Mail, first class postage prepaid and addressed to the Responsible Utility at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Kosak, Deputy Assistant Secretary, Energy Resilience Division, U.S. Department of Energy, Office of Electricity, Mailstop OE–20, Room 8G–042, 1000 Independence Avenue SW, Washington, DC 20585; (202) 586–2036; or *bulkpowersystemEO@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Rationale for the Order: Executive Order No. 13920 of May 1, 2020, *Securing the United States Bulk-Power System* (85 FR 26595 (May 4, 2020)) (E.O. 13920) declares that threats by foreign adversaries [1] to the security of the BPS constitute a national emergency. A current list of such adversaries is provided in a Request for Information (RFI), issued by the Department of Energy (Department or DOE) on July 8, 2020,[2] seeking public input to aid in its implementation of E.O. 13920. The Department has reason to believe, as detailed below, that the government of the People's Republic of China (PRC or China), one of the listed adversaries, is equipped and actively planning to undermine the BPS. The Department has thus determined that certain BPS electric equipment or programmable components subject to China's ownership, control, or influence, constitute undue risk to the security of the BPS and to U.S. national security. The purpose of this Order is to prohibit the acquisition, importation, transfer, or subsequent installation of such BPS electric equipment or programmable components in certain sections of the BPS.

The PRC has a military rationale for its disruption capabilities. Broadly speaking, it is targeting operational systems that can be undermined as a way to degrade an opponent's capabilities or to coerce an opponent's decision-making or political will. China calls this ''system destruction warfare''—a way to cripple an opponent at the outset of conflict, by deploying sophisticated electronic warfare, counter-space, and cyber-capabilities to disrupt what are known as C4ISR networks (command, control, communications, computers, intelligence, surveillance, and reconnaissance), thereby disrupting U.S. military logistics required to defend the homeland, support Allies and partners, and protect key U.S. national security interests.[3]

Such attacks are most likely during crises abroad where Chinese military planning envisions early cyberattacks against the electric power grids around CDFs in the U.S. to prevent the deployment of military forces and to incur domestic turmoil. Underscoring this, the Department of Defense's *2018 National Defense Strategy* assessment is that the homeland is no longer a sanctuary and that malicious cyber activity against personal, commercial, or government infrastructure is growing

[1] Section 4(d) of E.O. 13920 defines ''foreign adversary'' to mean ''any foreign government or foreign non-government person engaged in a long-term pattern of serious instances of conduct significantly adverse to the national security of the United States or its allies or the security and safety of United States persons.''

[2] 85 FR 41023, *https://www.govinfo.gov/content/pkg/FR-2020-07-08/pdf/2020-14668.pdf.*

[3] Chairman of the Joint Chiefs of Staff Instruction, Responsibilities for the Joint Tactical Operations Interface Training Program (Aug. 13, 2012), *https://www.jcs.mil/Portals/36/Documents/Library/Instructions/6240_01.pdf.*

significantly, ''while increasing digital connectivity of all aspects of life, business, government, and military creates significant vulnerabilities.'' [4]

U.S. intelligence analyses validate this growing threat from China, concluding that ''China presents a persistent cyber espionage threat and a growing attack threat to our core military and critical infrastructure systems,'' and ''has the ability to launch cyberattacks that cause localized, temporary disruptive effects on critical infrastructure—such as disruption of a natural gas pipeline for days to weeks—in the United States.'' [5] Indeed, according to the Department of Homeland Security's Cybersecurity and Infrastructure Security Agency, open-source reporting indicates that ''offensive cyber operations attributed to the Chinese government targeted, and continue to target, a variety of industries and organizations in the United States,'' including energy firms.[6] The National Security Agency has determined that ''one of the greatest threats to U.S. National Security Systems, the U.S. Defense Industrial Base, and Department of Defense information networks is Chinese state-sponsored malicious cyber activity.'' [7]

Furthermore, China's laws, specifically the National Intelligence Law and the National Cybersecurity Law, authorize government officials to exercise control over individuals and companies to conduct national intelligence work and access private company data, which provide opportunities for China to identify and exploit vulnerabilities in Chinese-manufactured or supplied equipment that are used in U.S. critical infrastructure that rely on these sources.

For example, the National Intelligence Law compels individuals and organizations to comply with and assist PRC officials in carrying out intelligence and national security objectives. Specifically, Article 7 requires organizations and citizens to support, assist, and cooperate with the state intelligence work in accordance with the law and to keep confidential the national intelligence work known to them. Article 14 gives authority to state intelligence agencies to require citizens and organizations to support, assist, and cooperate in intelligence work. Article 16 authorizes government officials to ''enter the relevant areas and places that restrict access,'' where they can examine and retrieve files, materials, and articles related to intelligence work, potentially including sensitive information. Finally, Article 17 allows Chinese intelligence agencies to assume control over an individual or organization's means of transport, communication tools, sites, and buildings and to set up workplaces and equipment in those facilities. In sum, Chinese entities providing goods in critical supply chains may be compelled to conduct intelligence work on behalf of the PRC and provide sensitive information to PRC officials related to the security of U.S. critical infrastructure that rely on these sources.

In addition, the National Cybersecurity Law requires cybersecurity protection measures for critical information infrastructure and compels companies to report and provide assistance to the PRC state security and intelligence services. Article 31 identifies power and water resources, among other sectors, as critical information infrastructure. Article 38 requires critical information infrastructure operators to conduct an inspection and assessment of their networks' security and risks that might exist and submit a cybersecurity report on the circumstances. Additionally, Article 39 requires state cybersecurity and information departments to conduct spot testing of critical information infrastructure security risks and promote cybersecurity information sharing among relevant departments, critical information infrastructure operators, and also relevant research institutions and cybersecurity services organizations. Finally, Article 28 requires network operators to provide ''technical support and assistance to public security organs and national security organs that are safeguarding national security and investigating criminal activities in accordance with the law.'' Thus, provisions within this law provide PRC officials access to information on cyber vulnerabilities across a number of sectors and thus the opportunity to obtain data potentially impacting the security of U.S. critical infrastructure companies.

Authority and Determinations

Order of the Secretary

Under authority delegated to the Secretary of the U.S. Department of Energy by the President in E.O. 13920, I adopt the findings in this Prohibition Order and order and direct the following:

Prohibited Transactions

A Responsible Utility under this Prohibition Order is an electric utility that owns or operates Defense Critical Electric Infrastructure (DCEI), as defined by section 215A(a)(4) of the Federal Power Act (FPA), that actively serves a CDF, as designated by the Secretary under section 215A(c) of the FPA. Each Responsible Utility is hereby prohibited from acquiring, importing, transferring, or installing BPS electric equipment identified in Attachment 1 (Regulated Equipment) that (i) has been manufactured or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC, and (ii) is for use by the Responsible Utility as a component of its DCEI serving the CDF at a service voltage level of 69 kV or higher, from the point of electrical interconnection (at a service voltage level of 69 kV of higher) with the CDF up to and including the next ''upstream'' transmission substation. A transaction that meets the conditions set forth in the preceding sentence is referred to herein as a Prohibited Transaction.

The term Regulated Equipment includes software, firmware and digital components that control the operation of Regulated Equipment and are manufactured or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of the PRC.

Priority Loads, Load Shedding, and System Restoration Plans

By this Prohibition Order, each Responsible Utility shall work with DOE to assist in the identification of DCEI and any load shedding and system restoration contingency planning required to assure the energy and missions of CDFs.

Each Responsible Utility is hereby directed to designate (or to take all action reasonably available to it to cause the relevant regional entity to designate) each CDF as a priority load in the applicable load shedding and system restoration plans. The term ''regional entity'' is defined at section 215(a)(7) of the FPA.

Effective Date

The effective date of this Prohibition Order (Effective Date) is January 16,

[4] U.S. Dep't of Defense, Summary of the 2018 National Defense Strategy of the United States of America, at 3, *https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.*

[5] Coats, Daniel R., *Statement for the Record, Worldwide Threat Assessment of the U.S. Intelligence Community, at 5 (Jan. 29, 2019), https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR---SSCI.pdf.*

[6] U.S. Dep't of Homeland Security, Cybersecurity and Infrastructure Security Agency, ''Potential for China Cyber Response to Heightened U.S.-China Tensions,'' Alert AA20–275A (Oct. 20, 2020), *available at https://us-cert.cisa.gov/ncas/alerts/aa20-275a.*

[7] U.S. Dep't of Defense, National Security Agency, Cybersecurity Advisory: ''Chinese State-Sponsored Actors Exploit Publicly Known Vulnerabilities'' (Oct. 20, 2020), *https://media.defense.gov/2020/Oct/20/2002519884/-1/-1/0/CSA_CHINESE_EXPLOIT_VULNERABILITIES_UOO179811.PDF.*

2021. This Prohibition Order shall apply to any Prohibited Transaction initiated on or after the Effective Date. The Department shall notify each Responsible Utility of the applicability of this Prohibition Order no later than five (5) business days after the date of issuance of this Prohibition Order. Notice under this section shall be deemed made when personally delivered or when mailed, three (3) calendar days after deposit in the U.S. Mail, first class postage prepaid and addressed to the Responsible Utility at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice occurred, regardless of the method of service.

Executive Order 13920

On May 1, 2020, the President issued E.O. 13920. Actions authorized under E.O. 13920 are rooted in its finding that ''unrestricted acquisition or use in the United States of bulk-power system electric equipment designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of foreign adversaries augments the ability of foreign adversaries to create and exploit vulnerabilities in bulk-power system electric equipment,'' and that ''the unrestricted foreign supply of bulk-power system electric equipment [therefore] constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.'' By declaring a ''national emergency with respect to the threat to the United States bulk-power system'' in the E.O. and under the National Emergencies Act, E.O. 13920 invokes the President's authority under the International Emergency Economic Powers Act (IEEPA) to direct responsive measures.

Section 1 of E.O. 13920 authorizes the Secretary of Energy (Secretary) to prohibit any transaction by any person, or with respect to any property, subject to the jurisdiction of the United States, where the transaction involves any property in which any foreign country or a national thereof has any interest (including through an interest in a contract for the provision of the equipment), where the transaction was initiated after May 1, 2020, and where the Secretary, in coordination with the Director of the Office of Management and Budget and in consultation with the Secretary of Defense, the Secretary of Homeland Security, the Director of National Intelligence, and, as appropriate, the heads of other relevant agencies, has determined that:

(a) The transaction involves BPS electric equipment designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and

(b) The transaction:

(i) Poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of the BPS in the United States;

(ii) Poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the economy of the United States; or

(iii) Otherwise poses an unacceptable risk to the national security of the United States or the security and safety of United States persons.

Section 2(a) of E.O. 13920 authorizes the Secretary ''to take such actions, including directing the timing and manner of the cessation of pending and future transactions prohibited pursuant to section 1 of this order.'' Section 2(a) of E.O. 13920 also authorizes the Secretary to ''adopt appropriate rules and regulations'' to implement E.O. 13920, and DOE has initiated rulemaking proceedings. Notwithstanding the pendency of such a rulemaking or the adoption of any such regulations, the Secretary has the authority at any time to prohibit transactions in order to effectuate the purposes of E.O. 13920.

For the reasons noted above, the Secretary has determined that this Prohibition Order is reasonably necessary to address the threat posed to the BPS by the PRC as a foreign adversary within the meaning of E.O. 13920. Because the equipment identified in this Prohibition Order as Regulated Equipment could serve as instruments or tools to threaten the BPS and the national security of the U.S., the Secretary is taking the protective action set forth herein to prevent Prohibited Transactions.

This Prohibition Order is in addition to other action that the Secretary may undertake pursuant to E.O. 13920, including, but not limited to, rulemaking and further orders of the Secretary.

BPS Electric Equipment Subject to This Prohibition Order

This order addresses a subset of E.O. 13920 BPS electric equipment (listed in Attachment 1) identified by the North American Electric Reliability Corporation (NERC) in its Recommendation to Industry.[8] The Regulated Equipment falls within the definition of ''bulk-power system electric equipment'' set forth in Section 4(b) of E.O. 13920:

> Items used in bulk-power system substations, control rooms, or power generating stations, including reactors, capacitors, substation transformers, current coupling capacitors, large generators, backup generators, substation voltage regulators, shunt capacitor equipment, automatic circuit reclosers, instrument transformers, coupling capacitor potential devices [expressed in the E.O. as current coupling capacitors and coupling capacity voltage transformers], protective relaying, metering equipment, high voltage circuit breakers, generation turbines, industrial control systems, distributed control systems, and safety instrumented systems. Items not included in the preceding list and that have broader application of use beyond the bulk-power system are outside the scope of [E.O. 13920].

Section 4(a) of E.O. 13920 defines ''bulk-power system'' as

> (i) Facilities and control systems necessary for operating an interconnected electric energy transmission network (or any portion thereof); and
>
> (ii) Electric energy from generation facilities needed to maintain transmission reliability. For purposes of [E.O. 13920], this definition includes transmission lines rated at 69,000 volts (69 kV) or more, but does not include facilities used in the local distribution of electric energy.

Certification by Responsible Utility

Not later than March 17, 2021 and once every three years thereafter for as long as this Prohibition Order is in effect, each Responsible Utility shall file a certification with the Department, under penalty of perjury, that since the Effective Date:

(a) It has not entered into a Prohibited Transaction; and

(b) It has established an internal monitoring process to accurately track future compliance with this Prohibition Order.

Not later than February 15, 2021, each Responsible Utility shall file a certification with the Department, under penalty of perjury, that since the Effective Date:

> (a) It has designated (or taken all action reasonably available to it to cause the relevant regional entity to designate) each CDF as a priority load in the applicable system load shedding and restoration plans.

Certifications may be delivered to: Charles Kosak, Deputy Assistant Secretary, Energy Resilience Division, U.S. Department of Energy, Office of Electricity, Mailstop OE–20, Room 8G–042, 1000 Independence Avenue SW, Washington, DC 20585; (202) 586–2036; or *bulkpowersystemEO@hq.doe.gov.*

[8] NERC Alert ID R–2020–07–08–01 (July 8, 2020) (NERC Alert).

Individual Waiver

The Secretary may waive any term of this Prohibition Order with respect to a Responsible Utility for good cause shown.

Penalties

(a) *Penalties.*

(1) *Civil Penalty.* A civil penalty not to exceed the amount set forth in Section 206(b) of IEEPA may be imposed on any person who violates, attempts to violate, conspires to violate, or causes any knowing violation of this Order. IEEPA provides for a maximum civil penalty not to exceed the greater of $250,000 (subject to adjustment under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended) or an amount that is twice the amount of the transaction that is the basis of the violation with respect to which the penalty is imposed.

Notice of the penalty, including a written explanation of the penalized conduct and the amount of the proposed penalty, and notifying the recipient of a right to make a written petition within thirty (30) calendar days as to why a penalty should not be imposed, shall be served on the party or parties that the Secretary has determined to be in violation hereunder.

The Secretary shall review any presentation and issue a final administrative decision within thirty (30) calendar days of receipt of the petition.

(2) *Criminal Penalty.* A person who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids and abets in the commission of a violation of this Order—and thereby a violation of IEEPA—shall, upon conviction thereof, be fined not more than $1,000,000, or if a natural person, may be imprisoned for not more than twenty (20) years, or both.

(b) *Adjustments to penalty amounts.*

(1) The civil penalties provided in IEEPA are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, as amended, 28 U.S.C. 2461 note).

(2) The criminal penalties provided in IEEPA are subject to adjustment pursuant to 18 U.S.C. 3571.

(c) The penalties available under this section are without prejudice to other penalties, civil or criminal, available under law. Attention is directed to 18 U.S.C. 1001, which provides that whoever, in any matter within the jurisdiction of any department or agency in the U.S., knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined under title 18, U.S. Code, or imprisoned not more than five (5) years, or both.

Rehearing

Any person aggrieved by this Prohibition Order may petition the Secretary for a rehearing no later than March 2, 2021. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application, the Secretary shall have power to grant or deny rehearing or to abrogate or modify this Prohibition Order without further hearing. Unless the Secretary acts upon the application for rehearing within thirty (30) calendar days after it is filed, such application may be deemed to be denied. Until the record in a proceeding seeking rehearing of this Prohibition Order shall have been filed for judicial review in a court of competent jurisdiction, the Secretary may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any findings or this Prohibition Order.

Signing Authority

This document of the Department of Energy was signed on December 17, 2020, by Dan Brouillette, Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on December 22, 2020.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

Attachment 1—Regulated Equipment

1. Power transformers with low-side voltage rating of 69 thousand volts (kV) or higher and associated control and protection systems like load tap changer, cooling system, and Sudden Pressure relay.

2. Generator step up (GSU) transformers with high-side voltage rating of 69 kV or higher and associated control and protection systems like load tap changer, cooling system, and Sudden Pressure relay.

3. Circuit breakers operating at 69 kV or higher.

4. Reactive power equipment (Reactors and Capacitors) 69 kV or higher.

5. Associated software and firmware installed in any equipment or used in the operation of items listed in 1 through 4.

[FR Doc. 2020–28773 Filed 1–5–21; 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: ER10–1276–013; ER10–1292–012; ER10–1287–012; ER10–1303–012; ER10–1319–014; ER10–1353–014; ER18–1183–005; ER18–1184–005.

Applicants: Consumers Energy Company, CMS Energy Resource Management Company, Grayling Generation Station Limited Partnership, Genesee Power Station Limited Partnership, CMS Generation Michigan Power, LLC, Dearborn Industrial Generation, L.L.C., Delta Solar Power I, LLC, Delta Solar Power II, LLC.

Description: Triennial Market Power Analysis for Central Region of Consumer Energy Company, et al.

Filed Date: 12/29/20.

Accession Number: 20201229–5384.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER10–2211–007.

Applicants: Vandolah Power Company, L.L.C.

Description: Triennial Market Power Analysis for Southeast Region of Vandolah Power Company, L.L.C.

Filed Date: 12/30/20.

Accession Number: 20201230–5178.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER10–2570–036.

Applicants: Shady Hills Power Company, L.L.C.

Description: Triennial Market Power Analysis for Southeast Region of Shady Hills Power Company, L.L.C.

Filed Date: 12/29/20.

Accession Number: 20201229–5366.

Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER11–2508–026; ER19–1415–002; ER19–1416–001; ER19–1414–002.

Applicants: GenOn Energy Management, LLC, GenOn California South, LP, GenOn Florida, LP, GenOn REMA, LLC.
Description: Triennial Market Power Analysis for Southeast Region of GenOn Southeast MBR Sellers.
Filed Date: 12/29/20.
Accession Number: 20201229–5381.
Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER14–1818–021.
Applicants: Boston Energy Trading and Marketing LLC.
Description: Triennial Market Power Analysis for Southeast Region of Boston Energy Trading and Marketing LLC.
Filed Date: 12/29/20.
Accession Number: 20201229–5293.
Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER17–1742–003; ER20–2510–001; ER13–2490–007; ER19–2671–002; ER19–2672–002; ER20–2512–001; ER20–2515–001; ER19–2595–002; ER19–2670–002; ER19–53–001; ER20–2663–001; ER17–311–003; ER20–1073–001.
Applicants: Hattiesburg Farm, LLC, Odom Solar LLC, Simon Solar Farm LLC, SR Arlington II, LLC, SR Arlington II MT, LLC, SR Baxley, LLC, SR Georgia Portfolio I MT, LLC, SR Hazlehurst III, LLC, SR Meridian III, LLC, SR Millington, LLC, SR Snipesville, LLC, SR South Loving LLC, SR Terrell, LLC.
Description: Triennial Market Power Analysis for Southeast Region and Notice of Non-Material Change in Status of Hattiesburg Farm, LLC, et al.
Filed Date: 12/29/20.
Accession Number: 20201229–5306.
Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER18–920–006.
Applicants: Marco DM Holdings, L.L.C.
Description: Triennial Market Power Analysis for Southeast Region of Marco DM Holdings, L.L.C.
Filed Date: 12/30/20.
Accession Number: 20201230–5179.
Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER19–381–002.
Applicants: Power Holding LLC.
Description: Triennial Market Power Analysis for Southeast Region of Power Holding LLC.
Filed Date: 12/29/20.
Accession Number: 20201229–5372.
Comments Due: 5 p.m. ET 3/1/21.

Docket Numbers: ER19–2373–002; ER10–1841–019; ER10–1845–019; ER10–1852–044; ER10–1905–019; ER10–1907–018; ER10–1918–019; ER10–1925–019; ER10–1927–019; ER10–1950–019; ER10–1951–026; ER10–1970–018; ER10–1972–018; ER10–2005–019; ER10–2006–019; ER10–2078–019; ER11–26–019; ER11–4462–047; ER12–1660–018; ER13–2458–013; ER13–2461–013; ER16–1872–009; ER16–2506–010; ER17–2270–010; ER17–838–022; ER18–1771–008; ER18–2224–008; ER18–2246–007; ER19–1003–006; ER19–1393–006; ER19–1394–006; ER19–2373–002; ER19–2382–002; ER19–2398–003; ER19–2437–002; ER19–2461–002; ER19–987–006; ER20–122–002; ER20–975–001.
Applicants: NextEra Resources Entities.
Description: Supplement to the November 5, 2020 Notification of Change in Status of NextEra Resources Entities.
Filed Date: 12/29/20.
Accession Number: 20201229–5374.
Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER20–280–002.
Applicants: Skookumchuck Wind Energy Project, LLC.
Description: Notice of Change in Status of Skookumchuck Wind Energy Project, LLC.
Filed Date: 12/28/20.
Accession Number: 20201228–5577.
Comments Due: 5 p.m. ET 1/19/21.
Docket Numbers: ER20–547–003; ER12–1911–004; ER12–1912–004; ER12–1913–004; ER12–1915–004; ER12–1916–004; ER12–1917–004; ER14–41–004; ER14–42–004; ER16–498–003; ER16–499–003; ER16–500–003; ER19–2463–002.
Applicants: Goldman Sachs Renewable Power Marketing, RE McKenzie 1 LLC, RE McKenzie 2 LLC, RE McKenzie 3 LLC, RE McKenzie 4 LLC, RE McKenzie 5 LLC, RE McKenzie 6 LLC, RE Rosamond One LLC, RE Rosamond Two LLC, RE Mustang LLC, RE Mustang 3 LLC, RE Mustang 4 LLC, Utah Red Hills Renewable Park, LLC.
Description: Supplement to the May 28, 2020 Notice of Non-Material Change in Status of Goldman Sachs Renewable Power Marketing LLC, et al.
Filed Date: 12/29/20.
Accession Number: 20201229–5394.
Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–258–001.
Applicants: Todd Solar LLC.
Description: Tariff Amendment: Supplement to Market-Based Rate Application and Response to Deficiency Letter to be effective 1/22/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5162.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–292–002.
Applicants: Oakland Power Company LLC.
Description: Tariff Amendment: Errata to Annual Reliability Must Run Agreement and Schedule F Info Filings to be effective 12/31/9998.
Filed Date: 12/29/20.
Accession Number: 20201229–5295.
Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: ER21–511–001.
Applicants: Safe Harbor Water Power Corporation.
Description: Tariff Amendment: Amendment to Revised Reactive Service Tariff Filing to be effective 1/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5156.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–627–001.
Applicants: Dry Lake Solar Holdings LLC.
Description: Tariff Amendment: Supplement to December 11, 2020 Market-Based Rate Application to be effective 3/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5144.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–628–001.
Applicants: Harry Allen Solar Energy LLC.
Description: Tariff Amendment: Supplement to December 11, 2020 Market-Based Rate Application to be effective 3/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5142.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–757–000.
Applicants: Georgia-Pacific Brewton LLC, Brunswick Cellulose LLC, Georgia-Pacific Cedar Springs LLC, Georgia-Pacific Consumer Operations LLC, Palatka, Georgia-Pacific Consumer Operations LLC, Naheola, Georgia-Pacific Consumer Operations LLC, Savannah.
Description: Request for Waiver to File Updated Market Power Analysis for Southeast Region of Brunswick Cellulose LLC, et al.
Filed Date: 12/23/20.
Accession Number: 20201223–5425.
Comments Due: 5 p.m. ET 1/13/21.

Docket Numbers: ER21–760–000.
Applicants: MATL LLP.
Description: § 205(d) Rate Filing: Amendments to Change Contacts to be effective 12/31/2020.
Filed Date: 12/30/20.
Accession Number: 20201230–5000.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–761–000.
Applicants: New England Power Pool Participants Committee.
Description: § 205(d) Rate Filing: January 2021 Membership Filing to be effective 12/1/2020.
Filed Date: 12/30/20.
Accession Number: 20201230–5002.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–762–000.
Applicants: Bishop Hill Energy II LLC.
Description: Baseline eTariff Filing: Reactive Power Compensation Filing to be effective 2/28/2021.

Filed Date: 12/30/20.
Accession Number: 20201230–5010.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–763–000.
Applicants: NorthWestern Corporation.
Description: § 205(d) Rate Filing: RS 37–SD 1st Rev—Emergency Service Agreement with East River Electric Co-op to be effective 1/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5013.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–764–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 607R39 Evergy Kansas Central, Inc. NITSA NOA to be effective 12/1/2020.
Filed Date: 12/30/20.
Accession Number: 20201230–5032.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–765–000.
Applicants: Southwest Power Pool, Inc.
Description: § 205(d) Rate Filing: 1313R14 Oklahoma Gas and Electric Company NITSA and NOA to be effective 12/1/2020.
Filed Date: 12/30/20.
Accession Number: 20201230–5049.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–766–000.
Applicants: Duke Energy Indiana, LLC.
Description: § 205(d) Rate Filing: DEI-Hoosier RS No. 270—Amended Facilities Agreement to be effective 3/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5053.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–767–000.
Applicants: Duke Energy Carolinas, LLC.
Description: § 205(d) Rate Filing: Revisions to Rate Schedule No. 336 to be effective 1/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5061.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–768–000.
Applicants: Basin Electric Power Cooperative.
Description: § 205(d) Rate Filing: Submission of Revised Wholesale Power Contract FERC Rate Schedule No. 8 to be effective 1/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5069.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–769–000.
Applicants: Central Maine Power Company.
Description: § 205(d) Rate Filing: Large Generator Interconnection Agreement to be effective 12/21/2020.
Filed Date: 12/30/20.
Accession Number: 20201230–5073.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–770–000.
Applicants: Sierra Pacific Power Company.
Description: § 205(d) Rate Filing: Service Agreement No. 20–00049 SPPC AMOR IX_13MW to Gonder to be effective 3/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5102.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–771–000.
Applicants: Sierra Pacific Power Company.
Description: § 205(d) Rate Filing: Service Agreement No. 20–00050 SPPC AMOR IX_7MW to Gonder to be effective 3/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5103.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–772–000.
Applicants: Resi Station, LLC.
Description: Baseline eTariff Filing: Baseline new to be effective 12/31/2020.
Filed Date: 12/30/20.
Accession Number: 20201230–5159.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–773–000.
Applicants: Liberty Utilities (Granite State Electric) Corp.
Description: § 205(d) Rate Filing: Borderline Sales Rate Sheet Update December 2020 to be effective 11/1/2020.
Filed Date: 12/30/20.
Accession Number: 20201230–5161.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: ER21–774–000.
Applicants: Dynegy Marketing and Trade, LLC.
Description: § 205(d) Rate Filing: Normal filing ISO–NE Schedule 17 Cost Recovery to be effective 3/1/2021.
Filed Date: 12/30/20.
Accession Number: 20201230–5190.
Comments Due: 5 p.m. ET 1/21/21.

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 30, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29247 Filed 1–5–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–37–000]

Michigan Public Power Agency; Notice of Filing

Take notice that on December 23, 2020, Michigan Public Power Agency submitted the annual revenue requirement for the provision of Reactive Supply and Voltage Control from Generation or Other Sources from the reactive power production capability of the Belle River generating station, Units 1 and 2, in the above captioned proceeding.

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 13, 2021.

Dated: December 30, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29249 Filed 1–5–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL21–33–000; QF86–381–002]

Citrus World, Inc.; Notice of Petition for Declaratory Order

Take notice that on December 21, 2020, pursuant to Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207, Citrus World, Inc. (Petitioner), filed a petition for declaratory order (Petition) requesting that the Commission issue a declaratory order granting partial waiver of Commission regulations applicable to cogeneration qualifying facilities (excepting sections 205 and 206 of the Federal Power Act) and accepting refund report, as more fully explained in the petition.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. Anyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://ferc.gov*) using the eLibrary link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFiling link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Comment Date: 5:00 p.m. Eastern time on January 11, 2021.

Dated: December 30, 2020.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2020–29248 Filed 1–5–21; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than February 5, 2021.

A. Federal Reserve Bank of Cleveland (Mary S. Johnson, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566. Comments can also be sent electronically to *Comments.applications@clev.frb.org:*

1. *PNC Financial Services Group, Inc., Pittsburgh, Pennsylvania, and PNC Bancorp, Inc., Wilmington, Delaware;* to acquire BBVA USA Bancshares, Inc., Houston, Texas, and thereby indirectly acquire BBVA USA, Birmingham, Alabama.

Board of Governors of the Federal Reserve System, December 30, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–29205 Filed 1–5–21; 8:45 am]

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FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than January 21, 2021.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *The MCH EMH 2020 Trust fbo Elizabeth M. Hewitt, MCH LNH 2020 Trust fbo Lauren N. Hewitt, and the MCH RAM 2020 Trust fbo Rachel A. Maletta, Mark C. Hewitt, as trustee of all trusts, all of Mason City, Iowa;* to acquire voting shares of Arneson Bancshares, Inc., and thereby indirectly acquire voting shares of Clear Lake Bank & Trust, both of Clear Lake, Iowa.

In addition, the Mark C. Hewitt 2014 Trust and the Amy J. Hewitt By-Pass Trust fbo Mark C. Hewitt, Mark C. Hewitt, as trustee of both trusts, all of Mason City, Iowa, and the Ray V. Hewitt 2008 Trust, Ray V. Hewitt, as trustee, both of Clear Lake, Iowa, together with Carrie Hewitt-Nichols, Iowa City, Iowa, to form the Hewitt Family Control Group, a group acting in concert, to retain voting shares of Arneson Bancshares, Inc., and thereby indirectly acquire voting shares of Clear Lake Bank & Trust.

Board of Governors of the Federal Reserve System, December 30, 2020.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2020–29206 Filed 1–5–21; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–21–21CA; Docket No. CDC–2020–0127]

Proposed Data Collection Submitted for Public Comment and Recommendations

AGENCY: Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Notice with comment period.

SUMMARY: The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled ''Temporary Halt In Residential Evictions To Prevent The Further Spread Of Covid–19'' The information collection originally pertained to the September 4, 2020 CDC order of the same name that temporarily halts residential evictions of covered persons for nonpayment of rent during September 4, 2020, through December 31, 2020. The Consolidated Appropriations Act, 2021, statutorily extended CDC's order until January 31, 2021. The declaration in this information collection request will serve as an attestation by a tenant, lessee, or resident that they meet the criteria therein to prevent an eviction proceeding per the order issued by the CDC.

DATES: CDC must receive written comments on or before March 8, 2021.

ADDRESSES: You may submit comments, identified by Docket No. CDC–2020–0127 by any of the following methods:

- *Federal eRulemaking Portal: Regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Jeffrey M. Zirger, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329.

Instructions: All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov.*

Please note: *Submit all comments through the Federal eRulemaking portal (regulations.gov) or by U.S. mail to the address listed above.*

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Jeffrey M. Zirger, of the Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE, MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov.*

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.
5. Assess information collection costs.

Proposed Project

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID–19—NEW—National Center for Emerging Zoonotic and Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Recent CDC actions in response to COVID included a temporary eviction moratorium published on September 4, 2020 and effective through December 31, 2020. The conditions that originally necessitated the original Order continue to exist and, in many jurisdictions, have significantly worsened. As of December 22, 2020, 17,790,000 cases have been identified in the United States, with new cases reported daily, and over 316,000 deaths due to the disease. On December 22, 2020, 197,616 COVID–19 cases in the U.S. were reported to CDC.

To qualify for the order's protections, tenants, lessees, or residents of residential properties must provide a copy of the declaration to the landlord, owner of the residential property, or other person who has a right to have the individual evicted or removed. The declaration provides notification and attestation on behalf of the submitting party that they have met the required

criteria to keep from being evicted; it should be given to the landlord, owner of the residential property, or other person who has a right to have the individual evicted or removed. The information collected will be limited to the signature of the tenant, lessee, or resident. The information will not be collected by CDC.

As stated in the Supporting Statement for OMB Control Number 0920–1303, under the request for an emergency clearance, OIRA has waived the 60-day comment period. Because this collection is exceeding 60 days, CDC is seeking additional notice and comment.

Estimated annual burden for Tenants, Lessees, or Residents who make a maximum of $99,000 annually is estimated to be 2,916,667 hours. There will be no anticipated costs to respondents other than time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Tenants, Lessees, or Residents.	DECLARATION UNDER PENALTY OF PERJURY FOR THE CENTERS FOR DISEASE CONTROL AND PREVENTION'S TEMPORARY HALT IN EVICTIONS TO PREVENT FURTHER SPREAD OF COVID–19.	35,000,000	1	5/60	2,916,667
Total					2,916,667

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2020–29232 Filed 1–5–21; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; OPRE Data Collection for the Next Generation of Enhanced Employment Strategies Project (Revision of a Currently Approved Collection—OMB #0970–0545)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Office of Planning, Research, and Evaluation (OPRE) within the Administration for Children and Families (ACF) is proposing revisions to data collection activities conducted for the Next Generation of Enhanced Employment Strategies (NextGen) Project, which is rigorously evaluating innovative interventions designed to promote employment and economic security among low-income individuals with complex challenges to employment. The project includes an experimental impact study, descriptive study, and cost study. The project is seeking clearance for changes to the previously approved Phase 1 instruments, updates to the previously approved consent form, and clearance for a parent/guardian consent form and a youth assent form for use in evaluations of programs for youth. The project also seeks approval to use a subset of Phase 2 instruments with programs selected for inclusion in the project with some changes made to those instruments. The requested changes do not change the previously submitted burden estimates.

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

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 NextGen Project will identify and test up to 10 innovative, promising employment interventions designed to help individuals facing complex challenges secure a pathway toward economic independence. In April 2020, OMB approved the new information collection request (ICR) for Phase 1 data collection instruments for the project (for more information, see materials at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202012-0970-003*). The first ICR included drafts of Phase 2 data collection instruments and associated burden estimates for initial review, information purposes, and public comment. We indicated that if a Phase 2 instrument required revisions to tailor to specific programs selected for evaluation, we will submit as either a non-substantive change request or a revision with abbreviated public comment time, dependent on the level of changes and guidance provided by OMB.

As the NextGen Project has engaged in assessing promising programs for inclusion in the study, we have gained knowledge that suggests necessary refinements to the Phase 1 instruments. In response to this knowledge and the 2019 novel coronavirus disease (COVID–19) pandemic, we are seeking changes to the Phase 1 data collection instruments and the study's informed consent form. We also seek clearance for a parent/guardian consent form and a youth assent form for use in evaluations of programs that serve youth, and approval to use two of the Phase 2 instruments with minor revisions. Below are additional details regarding these requests and further information regarding the changes requested is available (Appendix Q). The requested changes do not change the previously submitted burden estimates.

Informed Consent Form (Appendix A)

We propose revisions to the study's consent form to reflect recent study design changes, specifically to allow programs to share additional information about study participants (mental health diagnoses, referral

source, and contact information) to allow for a fuller description of the participants and to facilitate locating them for later data collections; to cover collecting administrative data for up to 20 years after study enrollment, rather than 10 years, to allow for estimation of longer-term impacts on participants; to change the date through when SSA can conduct research on study participants, from 2028 to 2040, to account for study schedule delays due to COVID–19; and to include consent for recording of study interviews. We also made minor revisions requested by the project's institutional review board. Lastly, we developed two additional consent forms (Appendix A.1) by adapting the study consent form—one to collect consent from parents/guardians of youth and one to collect assent from youth.

Baseline Survey (Instrument 1)

We propose changes to the baseline survey based on the study team's ongoing assessment of promising programs. Changes include:

- Minor revisions to the wording of some items, for clarity, and to skip patterns.
- Modifications to the items about emergency support (B18 and B19) to ask how many people someone can turn to for help, to better measure social support outcomes.
- Addition of items to collect information on social trust (B20, B21, and B22).
- Revisions to current items and addition of a few items to collect data on variables that may predict employment outcomes for respondents that were recently released from jail or prison, specifically:
  - Revision to the item asking whether the respondent was ever convicted (C9) to collect number of convictions and addition of an item (C9a) to collect the number of felony convictions.
  - Revisions to collect more detail about parole or probation (C10).
  - Addition of an item (C10a) to collect the type of crime committed and an item to collect time spent in last incarceration (C12a).
- Addition of items (C4b, C5a, C6e1, C6e2, C6r, C6s, D1a) to collect information on whether COVID–19 posed specific challenges to employment for study participants and to ask if participants have been vaccinated against COVID–19 (D1a), as this is likely to be associated with employment outcomes.

Identifying and Contact Information (Instrument 2)

We propose changes to the identifying and contact information collection. Changes include:

- Addition of the Center for Epidemiologic Studies Depression Scale Revised (CESD–R, added as item B2) for use by one program under consideration for evaluation that uses the scale as a programmatic eligibility screening tool. The CESD–R will only display for this program to facilitate program intake; other programs will skip these items. The study team will maintain CESD–R scores for those who are eligible for the program and also consent to participate in the study (as noted in the consent form).
- Addition of items (in item B3 and B4) that will only display for programs that work with school districts and/or youth to ask if a study applicant is in a prefilled school district, and obtain consent for being recorded, if such consent is required by the district.
- Addition of a question (item B9) about the likelihood that the study participant will be assigned to a career navigator for programs that use this intervention.

Service Receipt Tracking (Instrument 5)

We request approval to use the Phase 2 service receipt tracking instrument to collect information from most programs selected for the NextGen Project, with the following proposed changes: Inclusion of additional modes of service delivery; addition of in-person service locations; allowance of program-specific responses to how services were terminated; and tailoring for certain items' response options to ensure service receipt data collection captures program-specific services.

Semi-Structured Employer Discussion Guide (Instrument 9)

We request approval to use the Phase 2 employer discussion guide to collect information from all programs selected for the NextGen Project. We propose minor revisions to the instrument to add probes about changes to the employer's relationship with the program as a result of the pandemic.

Respondents: Program staff, program partners, employer staff, and individuals enrolled in the NextGen Project. Program staff and partners may include case managers, health professionals, workshop instructors, job developers, supervisors, managers, and administrators. Employers may include administrators, human resources staff, and worksite supervisors.

Annual Burden Estimates

The annual burden estimates for the instruments included in this request are presented below. All currently approved materials under OMB #0970–0545 and the associated burden can be found at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202012-0970-003.*

Instrument	Total number of respondents	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Annual burden hours
PHASE 1					
Baseline survey & identifying and contact information—participants	10,000	3,333	1	0.42	1,400
Baseline survey & identifying and contact information—staff	200	67	50	0.42	1,400
Estimated Total Annual Burden Hours, Phase 1:					2,800
PHASE 2 ESTIMATES					
Service receipt tracking—staff	200	67	250	0.08	1,340
Semi-structured employer interviews—employers	50	17	1	1.0	17
Estimated Total Annual Burden Hours, Phase 2:					1,357

Authority: Section 413 of the Social Security Act, as amended by the FY 2017 Consolidated Appropriations Act, 2017 (Pub. L. 115–31).

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–29234 Filed 1–5–21; 8:45 am]

BILLING CODE 4184–09–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Variations in Implementation of Quality Interventions (VIQI) Project (OMB #0970–0508)

AGENCY: Office of Planning, Research, and Evaluation, Administration for Children and Families, HHS.

ACTION: Request for public comment.

SUMMARY: The Office of Planning, Research, and Evaluation (OPRE), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is requesting a 3-year extension with changes to continue collecting data for the study Variations in Implementation of Quality Interventions (VIQI). In addition to extending data collection, OPRE proposes to update burden estimates to accommodate a different sample size of centers, administrators, teachers, and coaches; to revise data collection instruments and activities for the impact evaluation and process study in line with lessons learned during the pilot study; to add a second timepoint of data collection for the teacher reports to questions about children; to provide one new instrument to collect parent report of children's skills and behaviors; and to provide one new instrument in anticipation of COVID–19 necessitating further information gathering to contextualize findings from the impact evaluation and process study.

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: Through the VIQI Project, OPRE aims to inform policymakers, practitioners, and stakeholders about effective ways to support the quality and effectiveness of early care and education (ECE) centers for promoting young children's learning and development. The VIQI Project completed a pilot study in about 40 centers in three metropolitan areas in 2018–2019 that is informing a year-long impact evaluation and process study that involves testing the effectiveness of two curricular and professional development models aiming to strengthen the quality of classroom processes and children's outcomes. The impact evaluation and process study is expected to begin in the fall of 2021 and will include about 140 community-based and Head Start ECE centers spread across about 12 different metropolitan areas in the United States.

The VIQI Project will consist of a 3-group experimental design where the initial quality and other characteristics of ECE centers are measured. For details about the study design, see the Supporting Statements at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202008-0970-009.*

In anticipation of changes to center characteristics due to COVID–19, annual burden estimates and instruments have been updated to accommodate a different sample size of centers, administrators, teachers, and coaches for the impact evaluation and process study.

The previously approved data collection instruments for the impact evaluation and process study include the following:

(1) Instruments for Screening and Recruitment of ECE Centers. We do not propose any changes to these materials;

(2) Baseline Instruments. Modifications made to surveys remove items that showed little variation in the pilot study, edit item wording to increase clarity and ease of understanding, and add a few new items to capture new constructs of interest based upon the insights gained from the pilot study. The child assessment and classroom observation instruments have been updated to reflect the selected assessments and observations. We added an additional time point of data collection (baseline) for teacher reports on questions about children in the classroom and have added in questions about children's academic skills. Parent/guardian reports to questions about children have been added to gather information about children's skills at the beginning of the impact evaluation and process study. Administrator/teacher COVID–19 supplemental survey questions have been added to gather information about how the pandemic has changed typical center and classroom programming and functioning, if there is a need to contextualize findings from the impact evaluation and process study due to circumstances surrounding the COVID–19 pandemic at the time of data collection;

(3) Follow-Up Instruments. Modifications made to surveys remove items that showed little variation in the pilot study, edit item wording to increase clarity and ease of understanding, and add a few new items to capture new constructs of interest based upon insights gained from the pilot study. The child assessment and classroom observation instruments have been updated to reflect the selected assessments and observations. We added in questions about children's academic skills to the teacher reports on questions about children in the classroom. Parent/guardian reports to questions about children have been added to gather information about children's skills at the end of the impact evaluation and process study; and

(4) Fidelity of Implementation Instruments. Modifications to the Coach Log have been made to remove or consolidate items that showed little variation or proved less useful in the pilot study and to edit item wording to increase clarity and ease of understanding.

Respondents: Staff members working in Head Start grantee and community-based child care oversight agencies, staff members working in about 140 ECE centers in about 12 metropolitan areas across the United States, and parents and children being served in these centers.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents (total over request period)	Number of responses per respondent (total over request period)	Average burden per response (in hours)	Total burden (in hours)	Annual burden (in hours)
Instruments for Screening and Recruitment of ECE Centers for the Impact Evaluation and Process Study					
Landscaping protocol with stakeholder agencies (staff burden in Head Start (HS) *grantee* and community-based child care *agencies*)	120	1	1.50	180	60
Screening protocol for phone calls (staff burden in HS *grantees* and community-based child care *agencies*)	132	1	2.0	264	88
Screening protocol for phone calls (HS and community-based child care *center* staff burden)	336	1	1.2	403	134
Protocol for follow-up calls/in-person visits for screening and recruitment activities (staff burden in HS *grantees* and community-based child care *agencies*)	610	1	1.5	915	305
Protocol for follow-up calls/in-person visits for screening and recruitment activities (HS and community-based child care *center* staff burden)	950	1	1.2	1,140	380
Baseline Instruments for the Impact Evaluation and Process Study					
Baseline administrator survey	175	1	0.6	105	35
Baseline coach survey	59	1	0.6	35	12
Baseline teacher/assistant teacher survey	1,050	1	0.6	630	210
Baseline parent/guardian information form	6,300	1	0.1	630	210
Baseline classroom observation protocol (teacher burden)	420	1	0.3	126	42
Baseline protocol for child assessments (child burden)	4,200	1	0.5	2,100	700
Parent/guardian reports to questions about children (administered as part of the baseline parent/guardian information form)	6,300	1	0.1	630	210
Teacher reports to questions about children in classroom (administered as part of the baseline teacher survey)	420	10	0.17	714	238
Administrator/teacher COVID–19 supplemental survey questions (administered as part of or in addition to administrator and/or teacher survey, to contextualize findings from impact evaluation and process study due to circumstances surrounding COVID–19 at the time of data collection)	980	1	0.25	245	82
Follow-Up Instruments for Impact Evaluation and Process Study					
Follow-up administrator survey	140	1	0.5	70	23
Follow-up coach survey	47	1	0.5	24	8
Follow-up teacher/assistant teacher survey	840	1	0.75	630	210
Parent/guardian reports to questions about children	6,300	1	0.1	630	210
Teacher reports to questions about children in classroom (administered as part of the follow-up teacher survey)	420	10	0.17	714	238
Follow-up classroom observation protocol (teacher burden)	420	3	0.3	378	126
Follow-up protocol for child assessments (child burden)	4,200	1	0.9	3,780	1,260
Fidelity of Implementation Instruments for the Process Study					
Coach log	47	108	0.25	1,269	423
Teacher/assistant teacher log	840	36	0.25	7,560	2,520
Implementation fidelity observation protocol (teacher burden)	80	1	0.3	24	8
Interview/Focus group protocol (administrator, teacher/assistant teacher and coach burden)	236	1	1.5	354	118

Estimated Total Annual Burden Hours: 7,850.

Comments: The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

(Authority: 42 U.S.C. 9858(a)(5); 42 U.S.C. 9835; and 42 U.S.C. 9844)

Mary B. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2020–29230 Filed 1–5–21; 8:45 am]

BILLING CODE 4184–23–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Administration and Oversight of the Unaccompanied Alien Children Program (OMB #0970–0547)

AGENCY: Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.

ACTION: Request for public comment.

SUMMARY: The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS), is inviting public comments on revisions to an approved information collection. The request consists of several forms that allow the Unaccompanied Alien Children (UAC) Program to monitor care provider facility compliance with federal laws and regulations, legal agreements, and ORR policies and procedures; and perform other administrative tasks.

DATES: *Comments due within 60 days of publication.* In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, ACF is soliciting public comment on the specific aspects of the information collection described above.

ADDRESSES: Copies of the proposed collection of information can be obtained and comments may be forwarded by emailing *infocollection@acf.hhs.gov.* Alternatively, copies can also be obtained by writing to the Administration for Children and Families, Office of Planning, Research, and Evaluation (OPRE), 330 C Street SW, Washington, DC 20201, Attn: ACF Reports Clearance Officer. All requests, emailed or written, should be identified by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: ORR plans to revise six of the eight instruments currently approved under OMB #0970–0547. Four of the revised instruments will be incorporated into ORR's new case management system, UAC Path. The other two revised instruments are and will remain PDF instruments. In addition, ORR plans to add two new instruments to this collection, both of which will be incorporated into UAC Path. Finally, ORR plans to remove one currently approved instrument from this collection.

1. Care Provider Facility Tour Request (Form A–1A): This instrument is used by advocacy groups, faith-based organizations, researchers, government officials, and other stakeholders to request tours of ORR care provider facilities. After the request is received, ORR documents its decision and details regarding date and location of the tour, if applicable, and provides the completed form to the requester. No revisions are currently requested; ORR plans to continue use of this form as-is.

2. Notice to UAC for Flores Visits (Forms A–4 & A–4s): This instrument is used by care provider facilities to notify UAC of upcoming visits by *Flores* counsel (lawyers and volunteers from the organization that originally participated in the creation of the Flores Settlement Agreement) and allow UAC to add their name to a sign-up sheet if they are willing to speak with *Flores* counsel. ORR updated the Spanish translation of this PDF instrument.

3. Authorization for Release of Records (Form A–5): This instrument is used by attorneys, legal service providers, government agencies, and other stakeholders to request UAC case file records. In most cases, requesters are required to obtain the signature of the subject of the record request (UAC or their parent/legal guardian or sponsor) and a witness. ORR made the following revisions:

- Added a section in which ORR-funded legal service providers are required to certify their representation of the child.
- Added a separate area where sponsors may authorize the release of their records.
- Updated the required supporting documentation for a representative of a federal/state government agency or the National Center for Missing and Exploited Children to further require that the requester specify the scope of their investigation and provide a case reference number.
- Clarified in the instructions that ORR will not release any records that are clearly outside of the scope of a government agency's investigation absent a court-issued subpoena or order.

4. Notification of Concern (Form A–7): This instrument is used by home study and post-release service caseworkers, care provider case managers, and the ORR National Call Center to notify ORR of certain concerns that arise after a UAC is released from ORR custody. This is a new instrument that ORR plans to add to this collection.

5. Event (Form A–9): This instrument is used by ORR care provider programs to document high-level information about situations that must be reported to ORR. Creating an *Event* is the first step in creating any type of incident report (see forms A–10A to A–10C below), *PLE Report* (see form A–10D below) or *Notification of Concern* (see form A–7 above). After an *Event* is created, an incident report or *Notification of Concern* is created for each UAC involved in the incident and linked to the *Event.* For program-level events, one *PLE Report* is created and linked to the *Event. Event* information is visible in each individual report/notification report. This instrument was previously approved as part of ORR's various incident reports (Forms A–10A to A–10D). ORR is listing it separately, as a new instrument, to better align instruments in this collection with how data will be entered in UAC Path. Some fields that were previously entered in each incident report have been moved into this instrument so that they only need to be entered once. The form also contains several new fields that capture additional information about the location and timeframe of the event. Please note that internal form number A–9 was previously assigned to the Program-Level Event Report.

6. Emergency Significant Incident Report (SIR) and Addendum (Form A–10A): This instrument is used by ORR care provider programs to inform ORR of urgent situations in which there is an immediate threat to a child's safety and well-being that require instantaneous action. In some cases, an Emergency SIR Addendum may be required to provide additional information obtained after the initial report. ORR made the following revisions:

- Revised the available options for the category and subcategory fields.
- Added a question asking whether the incident is related to gang/cartel crimes, activities, or affiliation.
- Added fields to capture additional detail on individuals involved in the incident, actions taken, and video footage.
- Added fields to capture additional information related to reporting of incidents to child protective services, state licensing agencies, and local law enforcement.
- Added a disposition field to indicate whether the incident is closed or if the incident is open and further action is required.
- Updated functionality for the list of individuals who need to be notified of the incident so that it is auto-populated

and notification emails can be sent from within the UAC Path system.

○ Updated internal form numbering so that reports and addendums are fall under the same form number.

7. Significant Incident Report (SIR) and Addendum (Form A–10B): This instrument is used by ORR care provider programs to inform ORR of situations that affect, but do not immediately threaten, the safety and well-being of a child. In some cases, an SIR Addendum may be required to provide additional information obtained after the initial report. ORR made the following revisions:

○ Revised the available options for the category and subcategory fields.

○ Added a question asking whether the incident is related to gang/cartel crimes, activities, or affiliation.

○ Added fields to capture additional detail on individuals involved in the incident, actions taken, and video footage.

○ Added fields to capture additional information related to reporting of incidents to child protective services, state licensing agencies, and local law enforcement.

○ Added a disposition field to indicate whether the incident is closed or if the incident is open and further action is required.

○ Updated functionality for the list of individuals who need to be notified of the incident so that it is auto-populated and notification emails can be sent from within the UAC Path system.

○ Updated internal form numbering so that reports and addendums are fall under the same form number.

8. Sexual Abuse Significant Incident Report (SA/SIR) and Addendum (Form A–10C): This instrument is used by ORR care provider programs to inform ORR of allegations of sexual harassment, sexual abuse, and inappropriate sexual behavior that occurred while the UAC was in ORR custody. In some cases, an SA/SIR Addendum may be required to provide additional information obtained after the initial report. ORR made the following revisions:

○ Revised the available options for the category and subcategory fields.

○ Added a question asking whether the incident is related to gang/cartel crimes, activities, or affiliation.

○ Added fields to capture additional detail on individuals involved in the incident, actions taken, and video footage.

○ Added fields to capture additional information related to reporting of incidents to child protective services, state licensing agencies, and local law enforcement.

○ Added a disposition field to indicate whether the incident is closed or if the incident is open and further action is required.

○ Updated functionality for the list of individuals who need to be notified of the incident so that it is auto-populated and notification emails can be sent from within the UAC Path system.

○ Updated internal form numbering so that reports and addendums are fall under the same form number.

9. Program-Level Event (PLE) Report and Addendum (Form A–10D): This instrument is used by ORR care provider programs to inform ORR of events that may affect the entire care provider facility, such as an active shooter or natural disaster. An updated PLE Report is required for events that occur over multiple days or if the situation changes regarding the event. ORR made the following revisions:

○ Revised the available options for the category and subcategory fields.

○ Added a question asking whether the incident is related to gang/cartel crimes, activities, or affiliation.

○ Added fields to capture additional detail on individuals involved in the incident, actions taken, and video footage.

○ Added fields to capture additional information related to reporting of incidents to child protective services, state licensing agencies, and local law enforcement.

○ Added a disposition field to indicate whether the incident is closed or if the incident is open and further action is required.

○ Updated functionality for the list of individuals who need to be notified of the incident so that it is auto-populated and notification emails can be sent from within the UAC Path system.

○ Updated internal form numbering so that reports and addendums are fall under the same form number.

10. Hotline Alert (Form A–12): ORR is discontinuing this instrument. In UAC Path, the ORR National Call Center will use the Notification of Concern instead of the Hotline Alert.

Respondents: ORR grantee and contractor staff; advocacy groups, faith-based organizations, researchers, and government officials; attorneys, legal service providers, child advocates, and government agencies; and other stakeholders.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Annual number of responses per respondent	Average burden *minutes* per response	Annual total burden *hours*
Care Provider Facility Tour Request (Form A–1A)	200	1	10	33
Notice to UAC for Flores Visits (Forms A–4 & A–4s)	20	1	15	5
Authorization for Release of Records (Form A–5)	4,000	1	15	1,000
Notification of Concern (Form A–7)	60	75	15	1,125
Event (Form A–9)	276	160	10	7,360
Emergency Significant Incident Report and Addendum (Form A–10A)	216	14	60	3,024
Significant Incident Report and Addendum (Form A–10B)	216	491	60	106,056
Sexual Abuse Significant Incident Report and Addendum (Form A–10C)	216	47	60	10,152
Program Level Event (Form A–10D)	216	7	60	1,512
Estimated Annual Burden Hours Total				130,267

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. 2020–29276 Filed 1–5–21; 8:45 am]

BILLING CODE 4184–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–D–4048]

Safer Technologies Program for Medical 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 ''Safer Technologies Program for Medical Devices.'' This final guidance describes a new, voluntary program for certain medical devices and device-led combination products that are reasonably expected to significantly improve the safety of currently available treatments or diagnostics that target an underlying disease or condition associated with morbidities and mortalities less serious than those eligible for the Breakthrough Devices Program. Devices and device-led combination products are eligible for this program if they are subject to review under a premarket approval application (PMA), De Novo classification request (''De Novo request''), or premarket notification (510(k)), taking into account the specific eligibility factors described in this guidance. Consistent with the Agency's statutory mission to protect and promote public health, FDA believes that this ''Safer Technologies Program'' or ''STeP'' will help patients have more timely access to these medical devices and device-led combination products by expediting their development, assessment, and review, while preserving the statutory standards for premarket approval, De Novo marketing authorization, and 510(k) clearance.

DATES: The announcement of the guidance is published in the **Federal Register** on January 6, 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–4048 for ''Safer Technologies Program for Medical 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 ''Safer Technologies Program for Medical 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 or the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Christina Savisaar, Center for Devices

and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. G221, Silver Spring, MD 20993–0002, 301–796–6404 or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is introducing a new, voluntary program for certain medical devices and device-led combination products that are reasonably expected to significantly improve the safety of currently available treatments or diagnostics that target an underlying disease or condition associated with morbidities and mortalities less serious than those eligible for the Breakthrough Devices Program; for example, this may include devices treating or diagnosing non-life-threatening or reasonably reversible conditions. Devices and device-led combination products are eligible for this program if they are subject to review under a premarket approval application (PMA), De Novo classification request (''De Novo request''), or premarket notification (510(k)), taking into account the specific eligibility factors described in this guidance. Consistent with the Agency's statutory mission to protect and promote public health, FDA believes that this ''Safer Technologies Program'' or ''STeP'' will help patients have more timely access to these medical devices and device-led combination products by expediting their development, assessment, and review, while preserving the statutory standards for premarket approval, De Novo marketing authorization, and 510(k) clearance. FDA has modeled STeP on the key principles and features of FDA's Breakthrough Devices Program as mandated in section 515B of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 360e-3) and further described in the FDA guidance document entitled ''Breakthrough Devices Program'' (*https://www.fda.gov/regulatory-information/search-fda-guidance-documents/breakthrough-devices-program*). As resources permit, FDA intends for STeP to incorporate similar features offered under the Breakthrough Devices Program, such as interactive and timely communications, early engagement on Data Development Plans, sprint discussions, and senior management engagement.

FDA recognizes and anticipates that the Agency may need up to 60 days to perform activities to operationalize STeP following issuance of the final guidance. FDA does not intend to accept requests for inclusion in STeP within this time period.

A notice of availability of the draft guidance appeared in the **Federal Register** of September 19, 2019 (84 FR 49306). FDA considered comments received and revised the guidance as appropriate in response to the comments, including revisions related to program scope, such as providing additional examples of devices that may be eligible for the program, and revisions to clarify the review time clock. The guidance was also revised to further emphasize that participation in STeP does not change or impact the statutory requirements for marketing authorization applicable to a medical device nor does it affect the application of least burdensome policies and approaches.

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 Safer Technologies Program for Medical 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, https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances,* and *https://www.fda.gov/regulatory-information/search-fda-guidance-documents.* Persons unable to download an electronic copy of ''Safer Technologies Program for Medical 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 19001 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 and guidance have been approved by OMB as listed in the following table:

21 CFR part or guidance	Topic	OMB Control No.
807, subpart E	Premarket notification	0910–0120
814, subparts A through E	Premarket approval	0910–0231
812	Investigational Device Exemption	0910–0078
820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation.	0910–0073
''De Novo Classification Process (Evaluation of Automatic Class III Designation)''.	De Novo classification process	0910–0844
''Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program''.	Q-submissions	0910–0756

Dated: December 29, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–29158 Filed 1–5–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–D–2101]

Human Gene Therapy for Neurodegenerative Diseases; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a draft document entitled ''Human Gene Therapy for Neurodegenerative Diseases; Draft Guidance for Industry.'' Neurodegenerative diseases are a heterogeneous group of disorders characterized by progressive degeneration of the structure and function of the central nervous system or peripheral nervous system. The draft guidance document provides recommendations to sponsors developing a human gene therapy (GT) product for neurodegenerative diseases affecting adult and pediatric patients. The guidance focuses on considerations for product development, preclinical testing, and clinical trial design.

DATES: Submit either electronic or written comments on the draft guidance by April 6, 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 Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2020–D–2101 for ''Human Gene Therapy for Neurodegenerative Diseases; Draft Guidance for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the guidance to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Shruti Modi, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft document entitled ''Human Gene Therapy for Neurodegenerative Diseases; Draft Guidance for Industry.'' Neurodegenerative diseases are a heterogeneous group of disorders characterized by progressive degeneration of the structure and function of the central nervous system or peripheral nervous system. The draft guidance document provides recommendations to sponsors developing a GT product for neurodegenerative diseases affecting adult and pediatric patients. This guidance focuses on considerations for product development, preclinical testing, and clinical trial design.

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 recommendations for sponsors developing human GT products for neurodegenerative disorders affecting adult and pediatric patients. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Paperwork Reduction Act of 1995

While this guidance contains no collection of information, it does refer to previously approved FDA collections of information. Therefore, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in 21 CFR part 50 have been approved under OMB control number 0910–0755; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338; and the collections of information in the guidance entitled ''Expedited Programs for Serious Conditions—Drugs and Biologics'' have been approved under OMB control number 0910–0765.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances* or *https://www.regulations.gov.*

Dated: December 22, 2020.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2020–29238 Filed 1–5–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–2246]

Withdrawal of FDA Notice Regarding Fee Rates Under the Over-the-Counter Monograph Drug User Fee Program for Fiscal Year 2021

AGENCY: Department of Health and Human Services (HHS), Food and Drug Administration (FDA).

ACTION: Notice; withdrawal.

SUMMARY: The Department of Health and Human Services is issuing this Notice to withdraw FDA's December 29, 2020 **Federal Register** Notice entitled *Fee Rates Under the Over-the-Counter Monograph User Fee Program for Fiscal Year 2021* because FDA lacked the delegated authority to issue the Notice. The Department is further informing the public that FDA has been ordered to cease further collection efforts related to the Over-the-Counter Drug Monograph User Fee Program until further action is announced in the **Federal Register**.

DATES: The Notice, published in the **Federal Register** on December 29, 2020 (85 FR 85646), is withdrawn as of January 6, 2021.

FOR FURTHER INFORMATION CONTACT: David Haas, Office of Financial Management, Food and Drug Administration, 4041 Powder Mill Rd., Rm. 61075, Beltsville, MD 20705–4304, 240–402 4585.

SUPPLEMENTARY INFORMATION: On December 29, 2020, FDA published a Notice in the **Federal Register** entitled *Fee Rates Under the Over-the-Counter Monograph User Fee Program for Fiscal Year 2021.* 85 FR 85646. The Notice purports to implement certain user fee provisions contained in the Coronavirus Aid, Relief, and Economic Security Act (''CARES Act''), Public Law 116–136, 134 Stat. 281 (March 27, 2020). The Notice was issued without approval of the Secretary. For this reason, the Notice, Docket No. FDA–2020–N–2246, as published in the **Federal Register** on December 29, 2020, (85 FR 85646), is hereby withdrawn.

FDA has also been ordered to cease collections activities related to the Over-the-Counter Monograph User Fee Program (''OMUFA'') until, with the approval of the Secretary, the Department issues further direction concerning FDA's administration of OMUFA which provides the public with notice and opportunity for comment.

Dated: December 31, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2021–00030 Filed 1–4–21; 4:15 pm]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Physician-Focused Payment Model Technical Advisory Committee; Meetings

ACTION: Notice of meetings.

SUMMARY: This notice announces the 2021 meetings of the Physician-Focused Payment Model Technical Advisory Committee (PTAC). These meetings include deliberation and voting on proposals for physician-focused payment models (PFPMs) submitted by individuals and stakeholder entities and may include discussions on topics related to current or previously submitted PFPMs. All meetings are open to the public.

DATES: The 2021 PTAC meetings will occur on the following dates:

- Thursday–Friday, June 10–11, 2021, from 9:00 a.m. to 5:00 p.m. ET
- Monday–Tuesday, September 27–28, 2021, from 9:00 a.m. to 5:00 p.m. ET
- Thursday–Friday, December 16–17, 2021, from 9:00 a.m. to 5:00 p.m. ET

Please note that times are subject to change. If the times change, the ASPE PTAC website will be updated (*https://aspe.hhs.gov/ptac-physician-focused-payment-model-technical-advisory-committee*) and registrants will be notified directly via email.

ADDRESSES: All PTAC meetings will be held virtually or in the Great Hall of the Hubert H. Humphrey Building, 200 Independence Avenue SW, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Stella Mandl, Designated Federal Officer at *stella.mandl@hhs.gov* (202) 690–6870.

SUPPLEMENTARY INFORMATION:

Agenda and Comments. PTAC will hear presentations on proposed PFPMs that have been submitted by individuals and stakeholder entities and/or discussion on topics related to current or previously submitted PFPMs. Regarding proposed PFPMs, following each presentation, PTAC will deliberate on the proposed PFPM. If PTAC completes its deliberation, PTAC will vote on the extent to which the proposed PFPM meets criteria established by the Secretary of Health and Human Services and on an overall

recommendation to the Secretary. Time will be allocated for public comments. The agenda and other documents will be posted on the PTAC section of the ASPE website, *https://aspe.hhs.gov/ptac-physician-focused-payment-model-technical-advisory-committee,* prior to the meeting. The agenda is subject to change. If the agenda does change, registrants will be notified directly via email, the website will be updated, and notification will be sent out through the PTAC email listserv (*https://list.nih.gov/cgi-bin/wa.exe?A0=PTAC* to subscribe).

Meeting Attendance. These meetings are open to the public and may be hosted in-person or virtually. We intend that in-person meetings will be held in the Great Hall of the Hubert H. Humphrey Building. The public may attend in person, when feasible, via conference call, or view the meeting via livestream at *www.hhs.gov/live.* The conference call dial-in information will be sent to registrants prior to the meeting. Space may be limited, and registration is preferred. For meetings that are held virtually, the public may attend via WebEx link (including a dial-in only option) or view the meeting via livestream at *www.hhs.gov/live.* Registration may be completed online at *http://www.cvent.com/d/gbq2tg.* Name, organization name, and email address are submitted when registering. Registrants will receive a confirmation email shortly after completing the registration process.

Special Accommodations. If sign language interpretation or other reasonable accommodation for a disability is needed, please contact ASPE PTAC staff, no later than two weeks prior to the scheduled meeting. Please submit your requests by email to *PTAC@hhs.gov.*

Authority. 42 U.S.C 1395(ee); Section 101(e)(1) of the Medicare Access and CHIP Reauthorization Act of 2015; Section 51003(b) of the Bipartisan Budget Act of 2018.

PTAC is governed by provisions of the Federal Advisory Committee Act, as amended (5 U.S.C App.), which sets forth standards for the formation and use of federal advisory committees.

Dated: December 30, 2020.

Brenda Destro,

Deputy Assistant Secretary for Planning and Evaluation (HSP).

[FR Doc. 2020–29223 Filed 1–5–21; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; A Solicitation of the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC) for Small Business Innovation Research (SBIR) Contract Proposals (N01), Topic 098.

Date: January 27, 2021.

Time: 2:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Soheyla Saadi, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20852, 301–435–0903, *saadisoh@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 30, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29267 Filed 1–5–21; 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: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Behavioral Neuroendocrinology, Neuroimmunology, Rhythms, and Sleep Study Section.

Date: February 4–5, 2021.

Time: 8:00 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: Michael Selmanoff, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5164, MSC 7844, Bethesda, MD 20892, 301–435–1119, *selmanom@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Biochemistry and Biophysics of Membranes Study Section.

Date: February 4–5, 2021.

Time: 8:30 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: Nuria E Assa-Munt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4164, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@csr.nih.gov.*

Name of Committee: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Sensory-Motor Neuroscience Study Section.

Date: February 4–5, 2021.

Time: 9:00 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: John Bishop, Ph.D., Scientific Review Officer, Center for

Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Intercellular Interactions Study Section.

Date: February 4, 2021.

Time: 9:00 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: Thomas Y. Cho, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–402–4179, *thomas.cho@nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Therapeutic Approaches to Genetic Diseases Study Section.

Date: February 4–5, 2021.

Time: 9:00 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: Methode Bacanamwo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2200, Bethesda, MD 20892, 301–827–7088, *methode.bacanamwo@nih.gov.*

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Biodata Management and Analysis Study Section.

Date: February 4–5, 2021.

Time: 9:30 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: Wenchi Liang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3150, MSC 7770, Bethesda, MD 20892, 301–435–0681, *liangw3@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Interventions to Prevent and Treat Addictions Study Section.

Date: February 4–5, 2021.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Miriam Mintzer, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3108, Bethesda, MD 20892, (301) 523–0646, *mintzermz@csr.nih.gov.*

Name of Committee: Population Sciences and Epidemiology Integrated Review Group; Social Sciences and Population Studies A Study Section.

Date: February 4–5, 2021.

Time: 10:00 a.m. to 4:00 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: Suzanne Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *ryansj@csr.nih.gov.*

Name of Committee: Oncology 1-Basic Translational Integrated Review Group; Tumor Cell Biology Study Section.

Date: February 4–5, 2021.

Time: 10:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Charles Morrow, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6202, MSC 7804, Bethesda, MD 20892, 301–408–9850, *morrowcs@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 30, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29265 Filed 1–5–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; A Solicitation of the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC) for Small Business Innovation Research (SBIR) Contract Proposals (N01), Topic 099 Phase I.

Date: January 28–29, 2021.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Soheyla Saadi, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20852, 301–435–0903, *saadisoh@niaid.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; A Solicitation of the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC) for Small Business Innovation Research (SBIR) Contract Proposals (N01), Topic 099 Phase II.

Date: January 28–29, 2021.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20892 (Virtual Meeting).

Contact Person: Soheyla Saadi, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3E70A, Rockville, MD 20852, 301–435–0903, *saadisoh@niaid.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: December 30, 2020.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29263 Filed 1–5–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Board of Scientific Counselors, National Institute of Mental Health, January 19, 2021, 3:00 p.m. to January 22, 2021, 6:00 p.m., PORTER NEUROSCIENCE RESEARCH CENTER, Building 35A, 35 Convent Drive, Bethesda, MD 20892 which was

published in the **Federal Register** on December 23, 2020, 85 FR 83981.

This notice is being amended to update the dates of the meeting. The meeting will now be held on January 21–22, 2021 only. The format remains virtual. The meeting is closed to the public.

Dated: December 30, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29203 Filed 1–5–21; 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: Center for Scientific Review Special Emphasis Panel; Membrane Biology and Protein Processing.

Date: February 3, 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: Maqsood A Wani, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2114, MSC 7814, Bethesda, MD 20892, 301–435–2270, *wanimaqs@csr.nih.gov.*

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Psychosocial Development, Risk and Prevention Study Section.

Date: February 4–5, 2021.

Time: 9:00 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: Anna L Riley, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Cellular and Molecular Biology of Glia Study Section.

Date: February 4–5, 2021.

Time: 9:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Linda MacArthur, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4187, Bethesda, MD 20892, 301–537–9986, *macarthurlh@csr.nih.gov.*

Name of Committee: Biobehavioral and Behavioral Processes Integrated Review Group; Language and Communication Study Section.

Date: February 4–5, 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: Andrea B Kelly, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7770, Bethesda, MD 20892, (301) 455–1761, *kellya2@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 31, 2020.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–29264 Filed 1–5–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4472–DR; Docket ID FEMA–2020–0001]

New York; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New York (FEMA–4472–DR), dated December 19, 2019, and related determinations.

DATES: This change occurred on December 3, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Lai Sun Yee, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Seamus K. Leary as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29293 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4447–DR; [Docket ID FEMA–2020–0001]

Ohio; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Ohio (FEMA–4447–DR), dated June 18, 2019, and related determinations.

DATES: This change occurred on December 28, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and

Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Joseph Cirone, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Steven W. Johnson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29291 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4488–DR; Docket ID FEMA–2020–0001]

New Jersey; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New Jersey (FEMA–4488–DR), dated March 25, 2020, and related determinations.

DATES: This change occurred on December 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, David Maurstad, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Thomas Von Essen as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29295 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4553–DR; Docket ID FEMA–2020–0001]

North Dakota; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of North Dakota (FEMA–4553–DR), dated July 9, 2020, and related determinations.

DATES: This amendment was issued December 18, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of North Dakota is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of July 9, 2020.

Kidder and Wells Counties for Public Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29279 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4493–DR; Docket ID FEMA–2020–0001]

Puerto Rico; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Puerto Rico (FEMA–4493–DR), dated March 27, 2020, and related determinations.

DATES: This change occurred on December 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, David Maurstad, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Thomas Von Essen as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29296 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4513–DR; Docket ID FEMA–2020–0001]

Virgin Islands; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the territory of the U.S. Virgin Islands (FEMA–4513–DR), dated Aril 2, 2020, and related determinations.

DATES: This change occurred on December 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, David Maurstad, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Thomas Von Essen as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29297 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4480–DR; Docket ID FEMA–2020–0001]

New York; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of New York (FEMA–4480–DR), dated March 20, 2020, and related determinations.

DATES: This change occurred on December 13, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, David Maurstad, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Thomas Von Essen as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29294 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3551–EM; Docket ID FEMA–2020–0001]

Florida; Amendment No. 1 to Notice of an Emergency Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of Florida (FEMA–3551–EM), dated November 11, 2020, and related determinations.

DATES: This amendment was issued December 9, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective November 12, 2020.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29289 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4424–DR; Docket ID FEMA–2020–0001]

Ohio; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Ohio (FEMA–4424–DR), dated April 8, 2019, and related determinations.

DATES: This change occurred on December 28, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Joseph Cirone, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Steven W. Johnson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29290 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4570–DR; Docket ID FEMA–2020–0001]

Louisiana; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–4570–DR), dated October 16, 2020, and related determinations.

DATES: This amendment was issued December 23, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Louisiana is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of October 16, 2020.

Allen and Iberia Parishes for Individual Assistance (already designated for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

Caldwell Parish for debris removal and emergency protective measures [Categories A and B] (already designated for emergency protective measures [Category B], limited to direct federal assistance, under the Public Assistance program).

Beauregard Parish for debris removal [Category A] and permanent work [Categories C–G] (already designated for Individual Assistance and emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

East Baton Rouge, Point Coupee, St. Mary, West Baton Rouge, and Winn Parishes for debris removal [Category A] and permanent work [Categories C–G] (already designated for emergency protective measures [Category B], including direct federal assistance, under the Public Assistance program).

Calcasieu, Lafayette, Rapides, St. Landry, St. Martin, and Vermilion Parishes for permanent work [Categories C–G] (already designated for Individual Assistance and debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

Allen, Iberia, and Grant Parishes for permanent work [Categories C–G] (already designated for debris removal and emergency protective measures [Categories A and B], including direct federal assistance, under the Public Assistance program).

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29280 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4572–DR; Docket ID FEMA–2020–0001]

Texas; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Texas (FEMA–4572–DR), dated December 9, 2020, and related determinations.

DATES: The declaration was issued December 9, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 9, 2020, the President issued a major disaster declaration under the

authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Texas resulting from Hurricane Laura during the period of August 23 to August 27, 2020, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Texas.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Jerry S. Thomas, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Texas have been designated as adversely affected by this major disaster:

Galveston, Jasper, Jefferson, Newton, and Orange Counties for Public Assistance.

All areas within the State of Texas are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29281 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3551–EM; Docket ID FEMA–2020–0001]

Florida; Emergency and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of an emergency for the State of Florida (FEMA–3551–EM), dated November 11, 2020, and related determinations.

DATES: The declaration was issued November 11, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated November 11, 2020, the President issued an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the emergency conditions in certain areas of the State of Florida resulting from Hurricane Eta beginning on November 7, 2020, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (''the Stafford Act''). Therefore, I declare that such an emergency exists in the State of Florida.

You are authorized to provide appropriate assistance for required emergency measures, authorized under title V of the Stafford Act, to save lives and to protect property and public health and safety, and to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide assistance for emergency protective measures (Category B), limited to direct Federal assistance and reimbursement for mass care including evacuation and shelter support.

Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal emergency assistance and administrative expenses.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Jeffrey L. Coleman, of FEMA is appointed to act as the Federal Coordinating Officer for this declared emergency.

The following areas of the State of Florida have been designated as adversely affected by this declared emergency:

Alachua, Citrus, Dixie, Gilchrist, Hernando, Hillsborough, Levy, Manatee, Marion, Pasco, Pinellas, Sarasota, and Sumter Counties for emergency protective measures (Category B), limited to direct Federal assistance and reimbursement for mass care including evacuation and shelter support.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29288 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4461–DR; Docket ID FEMA–2020–0001]

Illinois; Amendment No. 3 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Illinois (FEMA–4461–DR), dated September 19, 2019, and related determinations.

DATES: This change occurred on December 28, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency

Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Brian Schiller, of FEMA is appointed to act as the Federal Coordinating Officer for this disaster.

This action terminates the appointment of Steven W. Johnson as Federal Coordinating Officer for this disaster.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29292 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4575–DR; Docket ID FEMA–2020–0001]

Oklahoma; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–4575–DR), dated December 21, 2020, and related determinations.

DATES: The declaration was issued December 21, 2020.

FOR FURTHER INFORMATION CONTACT: Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated December 21, 2020, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''), as follows:

I have determined that the damage in certain areas of the State of Oklahoma resulting from a severe winter storm during the period of October 26 to October 29, 2020, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the ''Stafford Act''). Therefore, I declare that such a major disaster exists in the State of Oklahoma.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance and Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, Traci L. Brasher, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of Oklahoma have been designated as adversely affected by this major disaster:

Caddo, Canadian, Cleveland, Dewey, Grady, Kingfisher, Kiowa, Logan, Noble, Oklahoma, Payne, Pottawatomie, and Roger Mills Counties for Public Assistance.

All areas within the State of Oklahoma are eligible for assistance under the Hazard Mitigation Grant Program.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–29282 Filed 1–5–21; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6191–N–04]

Section 8 Housing Choice Vouchers: Implementation of the Housing Choice Voucher Mobility Demonstration, Restrictions on Participating in the Mobility Demonstration and the Moving to Work Demonstration Expansion

AGENCY: Office of the Assistant Secretary for Public and Indian Housing (PIH), Department of Housing and Urban Development (HUD).

ACTION: Notice of restrictions.

SUMMARY: On July 15, 2020, HUD published a notice (''HCV Mobility Demonstration Notice'') implementing the Housing Choice Voucher (HCV) mobility demonstration (''HCV mobility demonstration'') authorized by the Consolidated Appropriations Act, 2019. Through that Notice, HUD is making available up to $50,000,000 to participating Public Housing Agencies (''PHAs'') throughout the country to implement housing mobility programs by offering mobility-related services to increase the number of voucher families with children living in opportunity areas. HUD now supplements the July 15, 2020 notice to partially restrict participation in both the HCV mobility demonstration program and the Moving to Work demonstration expansion (''MTW expansion'') program. These restrictions are necessary to ensure the integrity of the Congressionally-mandated evaluations of both demonstrations. This notice also provides two minor technical corrections to definitions provided in the July 15, 2020, HCV Mobility Demonstration Notice.

FOR FURTHER INFORMATION CONTACT: Rebecca Primeaux, Director, Housing Voucher Management and Operations Division, Department of Housing and Urban Development, 451 Seventh Street SW, Room 4214, Washington, DC 20410, telephone number (202) 708–1112. (This is not a toll-free number.) Individuals with hearing or speech impediments may access this number via TTY by calling the Federal Relay during working hours at 800–877–8339. (This

is a toll-free number). HUD encourages submission of questions about the demonstration be sent to: *HCVmobilitydemonstration@hud.gov.*

SUPPLEMENTARY INFORMATION

Additional Requirements

On July 15, 2020, HUD published its HCV Mobility Demonstration Notice in the **Federal Register** (85 FR 42890), implementing the HCV mobility demonstration. Through that Notice, HUD is making available approximately $50,000,000 for grants to Public Housing Authorities (PHAs) under a demonstration program authorized by statute. HUD has been directed by Congress to evaluate the demonstration.

On August 28, 2020, HUD published the ''Operations Notice for the Expansion of the Moving to Work Program'' (''MTW Operations Notice'') in the **Federal Register** (85 FR 53444). HUD intends to designate 100 PHAs for the expansion of the MTW demonstration in five separate and distinct cohorts. For each cohort of the MTW expansion, HUD will conduct a rigorous evaluation of a specific policy change.

HUD issued PIH Notices for the first two of the five cohorts to solicit applications from eligible PHAs for participation in the MTW expansion. The PIH Notices describe specific application submission requirements, evaluation criteria, and the process HUD will use when selecting PHAs for cohorts one and two of the MTW expansion. PIH Notices for the remaining three cohorts will be issued at a later date.

The evaluation of the first cohort, MTW flexibility on small PHAs, will evaluate the overall impact of MTW flexibilities on PHAs with less than 1,000 units. The evaluation of the second cohort, rent reform, will evaluate the impacts of different rent structures. The third cohort will focus on work requirements and the fourth cohort will examine landlord incentives. The fifth cohort, MTW flexibility on PHAs with fewer than 27,000 units, will be similar to the first cohort.

After careful consideration, HUD's office of Policy Development and Research (PD&R), which has been directed by Congress to evaluate both the HCV mobility demonstration and the MTW expansion, has determined that the Congressionally mandated rigorous evaluation of the demonstrations create significant barriers for PHAs to participate fully in both programs. More specifically, without these reasonable and tailored restrictions of MTW participation, the evaluations could become so skewed that it would defeat the legislative mandate to conduct an objective analysis of the mobility demonstration. This is because MTW agencies already have flexibility to engage in their own directed mobility programs that non-MTW PHAs are currently unlikely to be able to implement with their existing federal funds. Therefore, HUD is establishing additional requirements for participation in the HCV mobility demonstration.

Restrictions on Participation in the MTW Expansion and the HCV Mobility Demonstration

PHAs may apply to all cohorts the MTW expansion and also apply to the HCV mobility demonstration. However, HUD will restrict participation for PHAs selected for both the MTW expansion and the HCV mobility demonstration programs as follows:

- PHAs selected for cohorts one and five (MTW flexibilities) may participate in both the HCV mobility demonstration and the MTW expansion. However, they must agree to limit the adoption of certain MTW flexibilities, for the HCV program only, during the term of HCV mobility demonstration participation described in the initial HCV Mobility Demonstration Notice. HUD will document these limitations in the HCV mobility demonstration memorandum of understanding (''MOU'') to be executed between the PHA and HUD. There will be no restriction on the public housing activities the PHA may undertake.
- PHAs may not participate in both the HCV mobility demonstration and cohorts two (rent reform), three (work requirements) or four (landlord incentives) of the MTW expansion.
  - Applications for cohort two (rent reform) are due on January 8, 2021. If a PHA is selected for both cohort two (rent reform) and the HCV mobility demonstration, the PHA must choose which demonstration to participate in and withdraw from the other demonstration within 21 calendar days after notifications of selection have been made for both programs.
  - For cohorts three and four, if a PHA has already been selected for the HCV mobility demonstration, it may not apply for cohort three (work requirements) or cohort four (landlord incentives) of the MTW expansion. In the unlikely event that selection notifications for the HCV mobility demonstration have not been made by the application due date for cohorts three and four, PHAs may submit an application for those MTW expansion cohorts. If a PHA is selected for either cohort three (work requirements) or cohort four (landlord incentives) and the HCV mobility demonstration, the PHA must choose which demonstration to participate in and withdraw from the other demonstration within 21 calendar days after notifications of selection have been made for both programs.

Restrictions on MTW Expansion Cohorts One and Five (MTW Flexibilities)

PHAs participating in cohorts one and five of the MTW expansion are allowed to adopt MTW flexibilities as outlined in the MTW Operations Notice. HUD is restricting certain MTW flexibilities for PHAs participating in both the HCV mobility demonstration and cohorts one and five (MTW flexibilities) of the MTW expansion for three primary reasons:

- Potential for offering additional services to families in the HCV mobility demonstration treatment and control groups that would result in a noncomparable intervention when compared to other HCV mobility demonstration sites;
- Potential to influence residential locational choices for families based on unit rents and required family rent share; and
- Potential for interfering with the PHA being able to meet the minimum enrollment requirements for the HCV mobility demonstration treatment and control groups.

For PHAs participating in MTW expansion cohorts one and five and in the HCV mobility demonstration, the following MTW flexibilities may not be implemented without the express written permission of HUD: Work requirements, vacancy loss, damage claims, other landlord incentives, pre-qualifying unit inspections, and reasonable penalty payments for landlords may not be implemented due to the potential for the offering of additional services to families and landlords in the HCV mobility demonstration treatment and control groups that would result in noncomparable intervention when compared to other HCV mobility demonstration sites.

Additionally, PHAs may not make Family Self-Sufficiency (''FSS'') programs mandatory under ''alternative family selection procedures'' for MTW self-sufficiency programs or FSS programs with MTW flexibility for similar reasons. PHAs that operate a mandatory FSS program also will not be allowed to waive operating the FSS program for the HCV program. However, service provision under local non-traditional activities could potentially be implemented with prior approval by HUD.

PHAs participating in the HCV mobility demonstration and the MTW expansion cohort one or cohort five may not implement the following MTW flexibilities without the express written permission of HUD: Term limits, tenant payment as a modified percentage of income, fixed subsidy, initial rent burden, and imputed income activities. This is due to the potential to influence residential locational choices for families based on unit rents and required family rent share. HUD has not fully determined whether PHAs would be able to limit portability for project-based voucher (''PBV'') units and will work with the research team to make a final determination.

MTW flexibilities related to short term assistance and increasing the PBV program cap may be implemented as long as HUD provides prior approval. These activities may be restricted due to the potential for interfering with the PHA being able to meet the minimum enrollment requirements for the HCV mobility demonstration.

Restrictions on Cohorts Two (Rent Reform), Three (Work Requirements), and Four (Landlord Incentives)

PHAs may not participate in cohorts two (rent reform), three (work requirements), or four (landlord incentives) of the MTW expansion and the HCV mobility demonstration. The evaluation in cohorts two (rent reform) and three (work requirements) will require family level randomization, which will create significant conflicts for the integrity of the HCV mobility demonstration evaluation, which also requires family level randomization.

Inclusion of PHAs in the MTW expansion cohort four (landlord incentives) and the mobility demonstration would also create significant research complications, due to the HCV mobility demonstration requiring a standard set of landlord incentives which would likely differ from the landlord incentive research requirements of the MTW expansion.

New Policy Changes for PHAs After Selection in the HCV Mobility Demonstration

After selection, and for the duration of participation in the HCV mobility demonstration, PHAs that participate in cohorts one and five of the MTW expansion, legacy MTW PHAs, and all non-MTW PHAs, must also work closely with HUD and the evaluator before any new policy changes can be implemented. The process and terms for adoption of new policy changes will be described in the HCV mobility demonstration MOU executed between HUD and the PHA. This is consistent with the initial HCV Mobility Demonstration Notice, which asked PHAs to identify any potential conflicts between their programs and the HCV mobility demonstration. The initial HCV Mobility Demonstration Notice states, ''After the program and research design is finalized, HUD will draft a memorandum of understanding (MOU) that outlines roles, responsibilities, the program and research design, services to be offered, and descriptions of administrative policies, among other things. HUD also will draft a performance standards agreement that outlines programmatic goals, recapture and reallocation terms, a budget, and a payment schedule for mobility-related services.''

In other words, and similar to other evaluations conducted by HUD, PHAs that participate in the HCV mobility demonstration will not be permitted to adopt any policy changes during the duration of their participation that conflict with the HCV mobility demonstration implementation and research.

Selection for MTW Expansion Cohorts One (MTW Flexibilities) and Two (Rent Reform)

HUD anticipates that the announcement of the selection of PHAs for the HCV mobility demonstration and the first and second cohorts of the MTW expansion will happen around the same time in early 2021. PHAs that are selected for the HCV mobility demonstration and cohort one of the MTW expansion will be required to limit certain MTW flexibilities in order to participate in both programs. HUD will document these limitations in the HCV mobility demonstration memorandum of understanding to be executed between the PHA and HUD. PHAs selected for cohort two (rent reform) of the MTW expansion and the HCV mobility demonstration will be asked to decide which program the PHA will participate in and withdraw from the other program. The PHA must choose which demonstration to participate in and withdraw from the other demonstration within 21 calendar days after notifications of selection have been made for both programs.

If a PHA applied as a single PHA or as part of a joint application to the HCV mobility demonstration and decides to participate in cohort two (rent reform) of MTW expansion, the application to the HCV mobility demonstration will be withdrawn. Given the extensive nature of both applications, HUD strongly encourages PHAs that are part of a joint HCV mobility demonstration application to discuss whether any of the PHAs intend to participate in the MTW expansion.

However, PHAs submitting a joint application to the HCV mobility demonstration with a PHA that also is applying for cohort two (rent reform) of the MTW expansion may submit a second application for the HCV mobility demonstration if they otherwise qualify under one of the statutory eligibility categories. HUD will score second applications along with the rest of the applications, but would only consider the score of the second application (which may be different than the score of the first application) if a PHA as part of a joint application chooses to participate in cohort two (rent reform) of the MTW expansion rather than the HCV mobility demonstration. No applications will be considered after the application deadline.

Technical Corrections

In FR Notice 6191–N–01, published in the **Federal Register** on July 15, 2020 (85 FR 42890) Section VII Application Format, Part K, Category A of the HCV Mobility Demonstration Notice, HUD inadvertently defined ''an adequate number of moderately priced rental units in high-opportunity areas'' incorrectly. The correct definition is ''a selected service area where at least 20 percent of the standard-quality rental stock within that service area is located in [zip code tabulated areas] ZCTAs where the [small area fair market rent] SAFMR is more than 110 percent of the Metropolitan Area FMR.'' The data tool provided by HUD to calculate this for PHAs is correct and has been using this correct definition.

In FR Notice 6191–N–01, Section VII Application Format, Part 3, Capacity of the Organization of the Mobility Demonstration Notice, HUD requested PHAs to submit, ''Number of recertifications completed for families with children between January 1, 2010 and December 31, 2019.'' PHAs should submit the number of recertifications completed for families with children between January 1, 2019 and December 31, 2019.

R. Hunter Kurtz,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2020–29266 Filed 1–5–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6239–N–01]

Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees (CDBG Mitigation)

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice allocates over $186 million in Community Development Block Grant Mitigation (CDBG–MIT) funds to grantees recovering from qualifying 2018 disasters. Funds allocated by this notice were made available by the Additional Supplemental Appropriations for Disaster Relief Act, 2019. This notice describes grant requirements and procedures, including waivers and alternative requirements, applicable to CDBG–MIT funds only. Funds allocated pursuant to this notice shall be subject only to the provisions of this notice and the applicable prior notices, unless otherwise provided herein. This notice also clarifies the applicability of certain previous waivers and alternative requirements provided for CDBG–MIT grantees.

DATES: *Applicability Date:* January 11, 2021.

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street SW, Room 7282, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Facsimile inquiries may be sent to Ms. Kome at 202–708–0033. (Except for the ''800'' number, these telephone numbers are not toll-free). Email inquiries may be sent to *disaster_recovery@hud.gov.*

SUPPLEMENTARY INFORMATION:

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I. Allocations

The Additional Supplemental Appropriations for Disaster Relief Act, 2019 (Pub. L. 116–20, approved June 6, 2019) (Appropriations Act) made $2,431,000,000 in Community Development Block Grant disaster recovery (CDBG–DR) funds available for major disasters occurring in 2017, 2018, or 2019, of which $431,000,000 was for grantees that received funds in response to disasters occurring in 2017. On January 27, 2020, HUD allocated $2,153,928,000 in CDBG–DR funds in accordance with the Appropriations Act, to address unmet disaster recovery needs through activities authorized under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) (HCDA) related to disaster relief, long term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation in the ''most impacted and distressed'' (MID) areas resulting from a qualifying major disaster in 2018 and 2019, which included the $431,000,000 for unmet infrastructure needs for 2017 disasters. In a notice published concurrently with this notice, HUD has allocated an additional $85,291,000 of CDBG–DR funds from the Appropriations Act for remaining unmet needs for disasters occurring in 2018 and 2019. Of amounts made available for 2018 and 2019 disasters, the Appropriations Act requires that HUD first allocate funds to address unmet disaster recovery needs for 2018 and 2019 disasters. Any funds remaining after addressing unmet disaster recovery needs for 2018 and 2019 disasters must be allocated for mitigation activities in the MID areas resulting from a major disaster that occurred in 2018, in an amount proportional to the amount of funds each grantee received from all CDBG–DR allocations for 2018 disasters (including allocations of funds made available by Pub. L. 115–254).

HUD has determined that its CDBG–DR allocations pursuant to the Appropriations Act are sufficient to address unmet disaster recovery needs in MID areas arising from 2018 and 2019 disasters. Therefore, this notice allocates the remaining $186,781,000 in funds made available in the Appropriations Act as CDBG–MIT funds to grantees recovering from qualifying 2018 disasters.

HUD described the grant requirements and procedures, including waivers and alternative requirements applicable to CDBG–MIT funds, for CDBG–MIT grantees in the following **Federal Register** notices (collectively, the ''Prior Notices''):

- 84 FR 45838, published August 30, 2019 (the ''Main CDBG–MIT Notice''); and
- 85 FR 60821, published September 28, 2020 (the ''2020 Omni Notice'').

CDBG–MIT funds allocated in the Prior Notices are made available by the Further Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2018 (Pub. L. 115–123). Pursuant to that appropriation, HUD allocated $6.875 billion in CDBG–MIT funds in the Main CDBG–MIT Notice to grantees recovering from a qualifying 2015, 2016, and 2017 disaster for mitigation activities.

In the Main CDBG–MIT Notice, HUD recognized that CDBG–MIT funds are to be used for distinctly different purposes than CDBG–DR funds. In that notice, HUD defined ''mitigation activities'' to mean those activities that increase resilience to disasters and reduce or eliminate the long-term risk of loss of life, injury, damage to and loss of property, and suffering and hardship, by lessening the impact of future disasters.

The nature of programs and projects that are likely to be funded require all CDBG–MIT grantees and their subrecipients to strengthen their program management capacity, financial management, and internal controls. The Main CDBG–MIT Notice also states the Department's intent to establish special grant conditions for individual CDBG–MIT grants based upon the risks posed by the grantee, including risks related to the grantee's capacity to carry out the specific programs and projects proposed in its action plan. These conditions are designed to provide additional assurances that oversight of CDBG–MIT funds addresses grantee-specific risks, such as the potential for waste, fraud, and abuse, or the potential failure to effectively operate and maintain mitigation projects.

This notice imposes the requirements of the Prior Notices as amended by provisions in this notice or by subsequent notices, to the CDBG–MIT grants allocated by this notice.[1] The requirements of the Appropriations Act apply in lieu of the requirements of Public Law 115–123, which is referenced in the Prior Notices. The amount of CDBG–MIT funding grantees must expend to mitigate risks within the HUD-identified MID areas is listed in

[1] This notice is only applicable to grantees receiving a CDBG–MIT grant under Public Law 116–20 in response to a 2018 disaster.

Table 1 (below). In accordance with the Appropriations Act, HUD's allocation of CDBG–MIT funds in Table 1 is based on each grantee's proportional share of total CDBG–DR funds allocated for all eligible disasters in 2018. Table 2 contains the total mitigation allocations for 2015 through 2018 disasters under Public Laws 115–123 and 116–20.

TABLE 1—TOTAL ALLOCATION FOR MITIGATION ACTIVITIES UNDER PUBLIC LAW 116–20

Disaster No.	Grantee	Total allocation for CDBG–MIT for 2018 disasters under Public Law 116–20	Minimum amount that must be expended in the HUD-identified "most impacted and distressed" areas listed herein	HUD-identified "most impacted and distressed" areas
4413	State of Alaska	$2,288,000	$1,144,000	Anchorage, Borough.
4357	American Samoa	1,470,000	1,470,000	All components of American Samoa.
4407; 4382	State of California	64,907,000	32,453,500	Butte, Lake, Los Angeles, and Shasta Counties.
4399	State of Florida	46,926,000	23,463,000	Bay, Calhoun, Gulf and Jackson Counties; 32321 (Liberty), 32327 (Wakulla), 32328 (Franklin), 32346 (Wakulla and Franklin), 32351 (Gadsden), and 32428 (Washington) Zip Codes.
4400	State of Georgia	2,669,000	1,334,500	39845 (Seminole) Zip Code.
4366	Hawaii County, HI	6,862,000	6,862,000	Hawaii County.
4365	Kauai County, HI	585,000	292,500	96714 (Kauai) Zip Code.
4393	State of North Carolina.	34,619,000	17,309,500	Brunswick, Carteret, Columbus, Craven, Duplin, Jones, New Hanover, Onslow, Plender, and Robeson Counties; 28352 (Scotland), 28390 (Cumberland), 28433 (Bladen), and 28571 (Pamlico) Zip Codes.
4396 & 4404	The Commonwealth of the Northern Mariana Islands.	16,225,000	8,112,500	Saipan and Tinian Municipalities.
4394	State of South Carolina.	4,598,000	2,299,000	Horry and Marion Counties; 29536 (Dillion) Zip Code.
4377	State of Texas	4,652,000	2,326,000	Hidalgo County.
4402	State of Wisconsin	980,000	490,000	53560 (Dane) Zip Code.
Total		186,781,000	97,556,500	

** This table is intended to reflect 2018 CDBG–MIT awards. To view previous CDBG–MIT grantees, see Table 2.*

TABLE 2—TOTAL ALLOCATIONS FOR MITIGATION ACTIVITIES FOR 2015 THROUGH 2018 DISASTERS UNDER PUBLIC LAWS 115–123 AND 116–20

Disasters	2015, 2016, and 2017 disasters	2015, 2016, and 2017 disasters	2015, 2016, and 2017 disasters	2018 disasters	
Appropriations Act	Public Law 115–123	Public Law 115–123	Public Law 115–123	Public Law 116–20.	
Date of Enactment	February 09, 2018	February 09, 2018	February 09, 2018	June 06, 2019.	
Date of Applicable **Federal Register** Notice.	August 30, 2019	September 10, 2019	January 27, 2020.		
Federal Register Notice Reference Number.	85 FR 45838	84 FR 47528	85 FR 4676.		
Mitigation grantees					Totals
State of Alaska	$0	$0	$0	$2,288,000	$2,288,000
American Samoa	0	0	0	1,470,000	1,470,000
State of California	88,219,000	0	0	64,907,000	153,126,000
State of Florida	633,485,000	0	0	46,926,000	680,411,000
State of Georgia	26,961,000	0	0	2,669,000	29,630,000
Hawaii County, HI	0	0	0	6,862,000	6,862,000
Kauai County, HI	0	0	0	585,000	585,000
State of Louisiana	1,213,917,000	0	0	0	1,213,917,000
State of Missouri	41,592,000	0	0	0	41,592,000
State of North Carolina	168,067,000	0	0	34,619,000	202,686,000
State of South Carolina	157,590,000	0	0	4,598,000	162,188,000
Columbia, SC	18,585,000	0	0	0	18,585,000
Lexington County, SC (Urban County)	15,185,000	0	0	0	15,185,000
Richland County, SC (Urban County)	21,864,000	0	0	0	21,864,000
State of Texas	4,297,189,000	0	0	4,652,000	4,301,841,000
Houston, TX	61,884,000	0	0	0	61,884,000
San Marcos, TX	24,012,000	0	0	0	24,012,000
The Commonwealth of the Northern Mariana Islands.	0	0	0	16,225,000	16,225,000
The Commonwealth of Puerto Rico	0	0	8,285,284,000	0	8,285,284,000
State of West Virginia	106,494,000	0	0	0	106,494,000
State of Wisconsin	0	0	0	980,000	980,000
U.S. Virgin Islands	0	774,188,000	0	0	774,188,000
Totals	6,875,044,000	774,188,000	8,285,284,000	186,781,000	16,121,297,000

II. Use of CDBG–MIT Funds

Funds allocated under this notice are subject to the requirements of the Prior Notices, as amended by this notice or subsequent notices. This notice outlines additional requirements imposed by the Appropriations Act that apply to funds allocated under this notice.

HUD recognizes that grantees receiving an allocation of CDBG–MIT funds of less than $5,000,000 may realize meaningful mitigation outcomes and minimize associated administrative costs by using these funds for a limited number of targeted mitigation activities and projects. HUD will provide technical assistance, when appropriate, for grantees receiving an allocation of less than $5 million in CDBG–MIT funds and who adopt this targeted approach. Like all uses of CDBG–MIT funds, use of funds for a targeted number of activities must mitigate specific current and future risks identified in the grantee's Mitigation Needs Assessment and benefit MID areas. All grantees should also maximize the impact of available funds by encouraging leverage, private-public partnerships, and coordination with other Federal programs.

II.A. Action Plan, Substantial Amendments, and Amendments for Covered Projects

Action plan. Before the Secretary obligates CDBG–MIT funds to a grantee, the Appropriations Act requires the grantee to submit a plan to HUD for approval detailing the proposed use of all funds. The plan must include the required elements of the action plan described in section V.A.2. of the Main CDBG–MIT Notice. For example, the plan must include a risk-based Mitigation Needs Assessment that identifies and analyzes all significant current and future disaster risks and provide a substantive basis for the activities proposed, pursuant to this notice and section V.A.2.a.(1) of the Main CDBG–MIT Notice (84 FR 45847). The action plan must describe how funded activities satisfy the requirements of the Main CDBG–MIT Notice, including how all proposed activities meet the definition of mitigation activities as defined in section II.A. of the Main CDBG–MIT Notice. As described in section II.B. of the Main CDBG–MIT Notice, grantees must describe in their action plan how they have coordinated and will continue to coordinate with other partners who manage FEMA and USACE funds and describe the actions that they have taken to align proposed activities with other federal, state, and local mitigation projects and planning processes.

Covered Projects. To allow for a more detailed review of larger projects, the Main CDBG–MIT Notice requires that infrastructure projects that also meet the definition of a Covered Project be included in an action plan or a substantial action plan amendment. The Main CDBG–MIT Notice defines a Covered Project as an infrastructure project having a total project cost of $100 million or more, with at least $50 million of CDBG funds (regardless of source (CDBG–DR, CDBG-National Disaster Resilience (NDR), CDBG–MIT, or CDBG)). Covered Projects proposed by a grantee receiving funds pursuant to this notice are subject to the requirements for Covered Projects, which are primarily located in sections V.A.2.h. and V.A.13.b. of the Main CDBG–MIT Notice.

Amendments. A grantee must amend its action plan to update its Mitigation Needs Assessment, modify or create new activities, or reprogram funds, as appropriate. Each amendment must be highlighted, or otherwise identified within the context of the entire action plan. The beginning of every substantial amendment must include a: (1) Section that identifies exactly what content is being added, deleted, or changed; (2) chart or table that clearly illustrates where funds are coming from and where they are moving to; (3) revised budget allocation table that reflects the entirety of all funds, as amended; and (4) a description of how the amendment is consistent with the grantee's Mitigation Needs Assessment. A grantee must amend its action plan in accordance with section V.A.2.g. of the Main CDBG–MIT Notice, as amended by the 2020 Omni Notice, as further modified by this notice. In the 2020 Omni Notice, HUD clarified that a substantial amendment is not subject to the public hearing requirements for the initial action plan that are described in section V.A.3.a. of the Main CDBG–MIT Notice.

As discussed in section III.B. of this notice, grantees that received a CDBG–MIT allocation pursuant to Public Law 115–123 must submit a substantial amendment to its approved CDBG–MIT action plan.

II.B. Most Impacted and Distressed Areas

The Appropriations Act made CDBG–MIT funds available for eligible activities related to the mitigation of risks within the MID areas resulting from 2018 disasters. Table 1 identifies the HUD-identified MID areas for CDBG–MIT funds under this notice only. The amount of funding grantees must expend to mitigate risks within the HUD-identified MID areas under this notice is also listed in Table 1. In some instances, HUD has identified the entire jurisdiction of a grantee as the HUD-identified MID area. For all other CDBG–MIT grantees, HUD is requiring that at least 50 percent of all CDBG–MIT funds must be used for mitigation activities that address identified risks within the HUD-identified MID areas.

Note that if HUD designates a ZIP Code for 2018 disasters as a MID area for purposes of allocating funds, the grantee may expand program operations to the whole county (county is indicated in parentheses next to the ZIP Code) as a MID area. For CDBG–MIT funds under this notice only, a grantee should indicate its decision to expand eligibility to the whole county in its action plan.

A grantee may use up to 5 percent of the total grant award (plus 5 percent of program income generated by the grant) for grant administration and no more than 15 percent of its total grant amount on planning costs. HUD will include 50 percent of a grantee's expenditures for grant administration in its determination that 50 percent of the total award has been expended in the HUD-identified MID areas. Additionally, expenditures for planning activities may be counted towards a grantee's 50 percent MID expenditure requirement, provided that the grantee describes in its action plan how those planning activities benefit the HUD-identified MID areas.

HUD may approve a grantee's request to add other areas to the HUD-identified MID areas based upon the grantee's submission of a data-driven analysis that illustrates the basis for designating the additional area as most impacted and distressed as a result of the qualifying 2018 disaster. A grantee seeking to amend its HUD-identified MID area for purposes of its CDBG–MIT grant for 2018 disasters must also amend the HUD-identified MID area for its corresponding CDBG–DR grant(s) for 2018 disasters. Grantees proposing to add to the HUD-identified MID area for their existing CDBG–DR grant do so through a substantial amendment that includes a consideration of unmet housing recovery needs. The grantee must also undertake a substantial amendment to its CDBG–MIT action plan so that the HUD-identified MID areas are the same across both grants. The grantee may submit the substantial amendments for both grants simultaneously.

Grantees may determine where to use the remaining 50 percent of the CDBG–MIT grant (*i.e.,* the grantee-identified MID areas for 2018 disasters), but that portion of the grant must be used for mitigation activities that address identified risks within those areas that the grantee determines are most impacted and distressed resulting from the major disasters identified by the disaster numbers listed in Table 1. The grantee-identified MID areas must be

determined through the use of quantifiable and verifiable data.

Grantee expenditures for eligible mitigation activities outside of the HUD-identified or grantee-identified MID areas for 2018 disasters may be counted toward the MID area expenditure requirements provided that the grantee can demonstrate how the expenditure of CDBG–MIT funds outside of this area will measurably mitigate risks identified within the HUD-identified or grantee-identified MID area for 2018 disasters (*e.g.,* upstream water retention projects to reduce downstream flooding in the HUD-identified MID area).

III. Overview of Grant Process

III.A. Action Plan Process for New CDBG–MIT Grantees Under the Appropriations Act (Pub. L. 116–20)

Grantees that have not received a previous CDBG–MIT allocation (Alaska, American Samoa, Hawaii County, Kauai County, the Commonwealth of the Northern Mariana Islands, and Wisconsin) must submit an action plan pursuant to the requirements in section V.A.2 of the Main CDBG–MIT Notice, as superseded by section IV.A.3.b. of this notice (*i.e.,* within 270 days after the applicability date of this notice). Since March 2020, HUD has authorized extensions for action plan submissions for CDBG–DR and CDBG–MIT grants due to the coronavirus (COVID–19) pandemic. The ongoing challenges of the pandemic continue to warrant longer submission time frames for grants allocated under this notice. Therefore, the deadlines for submitting an action plan in the Main CDBG–MIT Notice are superseded by the extended submission time frame in section IV.A.3.b. of this notice.

Grantees that received allocations under the January 2020 Notice for 2018 and 2019 disasters submitted information described in section VI.A.1. of the February 9, 2018 notice (as amended and updated by section IV.B.1. of the January 27, 2020 notice). These submissions supported the Secretary's evaluation of grantee capacity and the Secretary's certification of proficient financial controls and procurement processes and adequate procedures for proper grant management required by the Appropriations Act. Rather than resubmit the same information for allocations under this notice, grantees are required to update those submissions to reflect any material changes. This includes updates to the information required by section VI.A.1.a. of the February 9, 2018 notice (83 FR 5847), paragraphs (1)–(6), as updated and amended by section IV.B.1. of the January 2020 Notice (85 FR 4686). HUD will consider these updates before granting funds allocated by this notice. The submission deadlines in the notices referenced in the previous two paragraphs are superseded by deadlines set by this notice. HUD will direct grantees to checklists for submitting information required by this paragraph.

Grantees must also submit additional information that the Main CDBG–MIT Notice requires of grantees that do not apply to CDBG–DR grants. The required information must be submitted by completing the checklist on HUD's website titled ''CDBG–MIT Certification Addendum C to the Public Law 116–20 and 115–254 CDBG–DR Financial Management and Grant Compliance Certification Checklist.'' In the checklist, a CDBG–MIT grantee must: Indicate how it will strengthen its internal audit function; specify the criteria for subrecipient selection and its plans to increase subrecipient monitoring, and establish a process for promptly identifying and addressing conflicts under the grantee's conflict of interest policy.

If the CDBG–MIT grant is to be administered by an agency that does not administer a grantee's corresponding CDBG–DR grant, the administering agency for the CDBG–MIT grant must submit the documentation for the certification of financial controls and procurement processes, and adequate procedures for proper grant management as described in section V.A.1.a. of the Main CDBG–MIT Notice.

To begin expending CDBG–MIT funds, the following steps are necessary:

- Grantee develops or amends its citizen participation plan for disaster recovery per the requirements in section V.A.3 of the Main CDBG–MIT Notice.
- Grantee consults with stakeholders, including required consultation with affected local governments, Indian Tribes, and public housing authorities (as required by section V.A.7 of the Main CDBG–MIT Notice).
- Within 210 days of the applicability date of this notice, the grantee must submit material updates to documentation for the certification of financial controls and procurement processes, and adequate procedures for grant management and the Addendum C added to Public Law 116–20 and 115–254 CDBG–DR Financial Management and Grant Compliance Certification Checklist, as described above.
- Grantee publishes its action plan for mitigation on the grantee's required public website for no less than 45 calendar days to solicit public comment and convenes the required number of public hearings on the proposed plan as required by the Main CDBG–MIT Notice. The grantee may convene virtual hearings in lieu of in-person hearings, pursuant to the authorization provided below in section IV.A.3.d. of this notice.
- Within 270 days of the applicability date of this notice, the grantee responds to public comment and submits its action plan (which includes Standard Form 424 (SF–424) and certifications), its implementation plan and capacity assessment submissions in accordance with the requirements in section V.A.1.b. and V.A.2. of the Main CDBG–MIT Notice, and projection of expenditures and outcomes to HUD as described in section IV.A.3.b. and IV.A.3.c. of this notice.
- Grantee requests and receives Disaster Recovery Grant Reporting (DRGR) system access and may enter activities into the DRGR system before or after submission of the action plan to HUD. Any activities that are changed as a result of HUD's review must be updated once HUD approves the action plan.
- HUD reviews (within 60 days from date of receipt) the action plan according to criteria identified for CDBG–MIT funds, and either approves or disapproves the plan as described in section IV.A.2 of this notice.
- If the action plan is not approved, HUD will notify the grantee of the deficiencies. The grantee must then resubmit the action plan within 45 days of the notification.
- After the action plan is approved, HUD sends an action plan approval letter.
- Prior to transmittal of the grant agreement, HUD notifies grantees of its certification of the grantee's financial controls, procurement processes and grant management procedures and its acceptance of the implementation plan and capacity assessment.
- HUD sends the grant agreement to the grantee.
- Grantee signs and returns the grant agreement to HUD.
- HUD will sign the grant agreement and establish the grantee's line of credit to reflect the amount of available funds.
- Grantee posts the final HUD approved action plan on its official website.
- Grantee enters the activities from its approved action plan into the DRGR system if it has not previously done so and submits its DRGR action plan to HUD (funds can be drawn from the line of credit only for activities that are established in the DRGR system).
- The grantee must publish (on its website) policies for programs and activities implemented by the grantee with CDBG–MIT funds.

• The grantee may draw down funds from the line of credit, consistent with the applicable draw down requirements, after the Responsible Entity completes applicable environmental review(s) pursuant to 24 CFR part 58 or as authorized by the Appropriations Act and, as applicable, receives from HUD or the state the Authority to Use Grant Funds (AUGF) form and certification.

• Substantial amendments are subject to a 30-day public comment period, including posting to the grantee's website, followed by a 60-day review period for HUD.

III.B. Substantial Action Plan Amendment Process for Existing Grantees Under Prior Appropriations (Pub. L. 115–123)

A single CDBG–MIT action plan will be used to describe the uses of both the existing CDBG–MIT grant under Public Law 115–123 and the new CDBG–MIT grant under Public Law 116–20. While each grant remains separate, with separate purposes, financial controls, and some other distinctions, this combined administrative approach should ease grantee burden. Each grantee that previously received a CDBG–MIT allocation under the Main CDBG–MIT Notice pursuant to Public Law 115–123 (California, Florida, Georgia, North and South Carolina, and Texas) is required to submit a substantial amendment to its approved CDBG–MIT action plan. The substantial amendment must be submitted not later than 180 days after HUD's full or partial approval of the Public Law 115–123 CDBG–MIT action plan or not later than 180 days after the applicability date of this notice, whichever is later, unless the grantee has requested, and HUD has approved an extension of this submission deadline. The substantial amendment must include the CDBG–MIT funds allocated under this notice and address the requirements of the Prior Notices and this notice.

Grantees that received a CDBG–MIT allocation under the Main CDBG–MIT Notice have submitted documentation for the certification of financial controls and procurement processes, and adequate procedures for grant management in section V.A.1.a of the Main CDBG–MIT Notice entitled, ''Certification of financial controls and procurement processes, and adequate procedures for proper grant management.'' A grantee may request that HUD rely on this CDBG–MIT Financial Management and Grant Compliance Certification Checklist and supporting documentation for the purposes of this mitigation allocation, provided, however, that the grantee must update its submissions as described in section V.A.1.a. (1)–(6) of the Main CDBG–MIT Notice to reflect any material changes in the submissions.

Additionally, each grantee that received an allocation under the Main CDBG–MIT Notice must meet the following requirements to amend its approved CDBG–MIT action plan. These steps are only applicable to the substantial amendment process to add the CDBG–MIT funds allocated under this notice.

• Grantee must consult with stakeholders, including required consultation with affected local governments, Indian Tribes, and public housing authorities to update its Mitigation Needs Assessment as required by section V.A.7. of the Main CDBG–MIT Notice.

• Within 120 days of the applicability date of this notice, the grantee updates its submissions for the certification of financial controls and procurement processes, and adequate procedures for grant management described in section V.A.1.a. of the Main CDBG–MIT Notice to reflect any material changes in the submissions.

• Grantee must amend its CDBG–MIT action plan to update its Mitigation Needs Assessment in accordance with the requirements described in section IV.A.3.a. of this notice. At a minimum, this must include the HUD-identified MID areas under this notice in addition to those identified in the Main CDBG–MIT Notice and to add in the new grant funds allocated by this notice. The grantee may also modify or create new activities from its existing CDBG–MIT grant.

• Grantee must publish the substantial amendment to its current approved CDBG–MIT action plan on the grantee's required public website in a manner that affords citizens, affected local governments, Indian Tribes, public housing authorities, and other interested parties a reasonable opportunity to examine the amendment's contents and provide feedback. The manner of publication must include, at a minimum, prominent posting on the grantee's official website for no less than 30 calendar days to solicit public comment and convene one public hearing on the proposed amendment. Each grantee must ensure that mitigation program information is available in the appropriate languages for the geographic areas to be served (see HUD's LEP Guidance, 72 FR 2732 (2007)) and take appropriate steps to ensure effective communications with persons with disabilities under Section 504 (see, 24 CFR 8.6) and the Americans with Disabilities Act (see 28 CFR 35.106).

• Grantee must respond to public comment and submit its substantial amendment to HUD (together with SF–424 and the certifications in paragraph VI.1. of the Main CDBG–MIT Notice) no later than 180 days after the applicability date of this notice.

• HUD will review the substantial amendment within 60 days from date of receipt as described in section of IV.A.2. of this notice and determine whether to approve the substantial amendment per criteria identified in this notice and the Prior Notices.

• HUD will send a substantial amendment approval letter, and a new grant agreement to the grantee. If the substantial amendment is not approved, a letter will be sent identifying its deficiencies and the grantee must then re-submit the substantial amendment within 45 days of the notification letter.

• Grantee may enter activities into the DRGR system before or after submission of the substantial amendment to HUD. Note that, while the action plan is consolidated, the DRGR system will maintain the necessary and appropriate separations between the two distinct CDBG–MIT grants. Any activities that are changed as a result of HUD's review must be updated once HUD approves the substantial amendment.

• Grantee must ensure that the HUD-approved substantial amendment and currently approved CDBG–MIT action plan are posted prominently on its official website. Each grantee's current version of its entire action plan must be accessible for viewing as a single document at any given point in time, rather than the public or HUD having to view and cross-reference changes among multiple amendments.

• Grantee must enter the activities from its published substantial amendment into the Disaster Recovery Grant Reporting (DRGR) system and submit the updated DRGR action plan (revised to reflect the substantial amendment) to HUD within the DRGR system.

• Grantee must sign and return the grant agreement to HUD.

• HUD will sign the grant agreement and will establish the grantee's line of credit to reflect the amount of funds made available under Public Law 116–20.

• The grantee may draw down funds from the line of credit, consistent with the applicable draw down requirements, after the Responsible Entity completes applicable environmental review(s) pursuant to 24 CFR part 58 or as authorized by the Appropriations Act and, as applicable, receives from HUD

or the state the Authority to Use Grant Funds (AUGF) form and certification.

• Grantee must amend and submit its projection of CDBG–MIT expenditures and performance outcomes with the substantial amendment.

IV. Applicable Rules, Statutes, Waivers, and Alternative Requirements

This section of the notice describes rules, statutes, waivers, and alternative requirements that apply to each grantee receiving an allocation under this notice. The Secretary has determined that good cause exists to apply each waiver and alternative requirement established in the Prior Notices, as amended by this notice, to the use of funds under this notice and that such waivers and alternative requirements are not inconsistent with the overall purpose of title I of the HCDA. The Appropriations Act authorizes the Secretary to waive or specify alternative requirements for any provision of any statute or regulation that the Secretary administers in connection with HUD's obligation or use by the recipient of these funds (except for requirements related to fair housing, nondiscrimination, labor standards, and the environment). Regulatory waiver authority is also provided by 24 CFR 5.110, 91.600, and 570.5.

Grantees may request additional waivers and alternative requirements from the Department as needed to address specific needs related to their mitigation activities. Grantee requests for waivers and alternative requirements must be accompanied by relevant data to support the request and must demonstrate to the satisfaction of the Department that there is good cause for the waiver or alternative requirement. Grantees must work with the assigned CPD representative to request any additional waivers or alternative requirements from HUD headquarters.

The following requirements apply only to the CDBG–MIT funds appropriated under the Appropriations Act (unless otherwise noted) and not to funds provided under the annual formula State or Entitlement CDBG programs, the Indian Community Development Block Grant program, or those provided under any other component of the CDBG program, such as the Section 108 Loan Guarantee Program, or any previous CDBG–MIT appropriations, unless otherwise noted. Pursuant to the requirements of the Appropriations Acts, waivers and alternative requirements are effective five days after they are published in the **Federal Register**.

Except as described in this notice or the Prior Notices, statutory and regulatory provisions governing the State CDBG program shall apply to State grantees receiving a CDBG–MIT grant and statutory and regulatory provisions governing the entitlement CDBG program shall apply to any local government receiving a CDBG–MIT grant. The provisions of 24 CFR part 570, subpart F are waived to authorize American Samoa and the Commonwealth of the Northern Mariana Islands to administer its CDBG–MIT allocation in accordance with the regulatory and statutory provisions governing the State CDBG program, as modified by rules, statutes, waivers, and alternative requirements made applicable by **Federal Register** notices. This includes the requirement that the aggregate total for administrative and technical assistance expenditures by the Commonwealth of the Northern Mariana Islands must not exceed 5 percent of any CDBG–MIT grant made pursuant to the Appropriations Act, plus 5 percent of program income generated by the grant. The Department has determined that good cause exists for a waiver and that such waiver is not inconsistent with the overall purposes of title I of the HCDA. State and Entitlement CDBG regulations can be found at 24 CFR part 570. References to the action plan in these regulations shall refer to the action plan that covers the use of the CDBG–MIT grants allocated by this notice that is required by section V.A. of the Main CDBG–MIT Notice (as made applicable by this notice). All references in this notice pertaining to timelines and/or deadlines are in terms of calendar days unless otherwise noted. The date of this notice shall mean the applicability date of this notice unless otherwise noted.

IV.A. Grant Administration and Action Plan Requirements

IV.A.1. Applicability of waivers, alternative requirements, and other requirements. The Prior Notices establish the waivers and alternative requirements applicable to grantees receiving funds under this notice. For convenience, some of these rules, waivers, and alternative requirements are described below in Table 3. In addition, this notice extends the waivers and alternative requirements in the Prior Notices to Hawaii County and Kauai County, which are subject to requirements imposed in 24 CFR part 570, subpart F. However, because the Prior Notices do not include waivers and alternative requirements to the provisions in 24 CFR part 570, subpart F, this notice amends the Prior Notices by also waiving 24 CFR 570.420(c), 24 CFR 570.431(a), and 24 CFR 570.431(b). The Department has determined that good cause exists for a waiver and that such waiver is not inconsistent with the overall purposes of title I of the HCDA.

TABLE 3—RULES, WAIVERS, AND ALTERNATIVE REQUIREMENTS ESTABLISHED IN THE PRIOR NOTICES

Citation	Rules, waivers, and alternative requirement
The Main CDBG–MIT Notice	
84 FR 45844	Pre-award evaluation of management and oversight of funds.
84 FR 45846	CDBG–MIT Action Plan waiver and alternative requirement.
84 FR 45852	Citizen participation waiver and alternative requirement.
84 FR 45853	HUD performance review authorities and grantee reporting requirements in the Disaster Recovery Grant Reporting (DRGR) System.
84 FR 45854	Direct grant administration and means of carrying out eligible activities-applicable to State grantees only.
84 FR 45855	Consolidated plan waiver.
84 FR 45855	Requirement for consultation during plan preparation.
84 FR 45855	Grant administration responsibilities, combined technical assistance and administration expenditures cap.
84 FR 45855	Operation and maintenance waiver for CDBG–MIT program income.
84 FR 45856	Planning-only activities applicable to State grantees only.
84 FR 45856	Overall benefit requirement.
84 FR 45856	Use of the "upper quartile" or "exception criteria" for low- and moderate-income area benefit activities.
84 FR 45856	National objective waivers and alternative requirements applicable to CDBG–MIT funds.
84 FR 45857	Waiver and alternative requirement for distribution to CDBG metropolitan cities and urban counties applicable to State grantees only.

TABLE 3—RULES, WAIVERS, AND ALTERNATIVE REQUIREMENTS ESTABLISHED IN THE PRIOR NOTICES—Continued

Citation	Rules, waivers, and alternative requirement
84 FR 45857	Use of subrecipients-applicable to State grantees only.
84 FR 45857	Recordkeeping.
84 FR 45858	Change of use of real property, applicable to State grantees only.
84 FR 45858	Responsibility for review and handling of noncompliance-applicable to State grantees only.
84 FR 45858	Program income alternative requirement.
84 FR 45859	Limitation on reimbursement.
84 FR 45859	Prohibition on forced mortgage payoff.
84 FR 45859	One-for-one replacement housing, relocation, and real property acquisition Requirements.
84 FR 45860	Environmental requirements.
84 FR 45861	Duplication of benefits.
84 FR 45862	Procurement.
84 FR 45862	Timely distribution of funds.
84 FR 45862	Review of continuing capacity to carry out CDBG-funded activities in a timely manner.
84 FR 45862	Corrective and remedial actions.
84 FR 45863	Noncompliance and grant conditions.
84 FR 45863	Reduction, withdrawal, or adjustment of a grant, or other appropriate action.
84 FR 45863	Federal accessibility requirements.
84 FR 45863	Housing-related eligibility waivers.
84 FR 45864	Housing incentives in at-risk communities.
84 FR 45864	Limitation on emergency grant payments—interim mortgage assistance.
84 FR 45864	Acquisition of real property; flood and other buyouts.
84 FR 45866	Additional LMI national objective criteria for buyouts and housing incentives.
84 FR 45867	Alternative requirement for housing rehabilitation—assistance for second homes.
84 FR 45867	Flood insurance.
84 FR 45867	Elevation of nonresidential structures.
84 FR 45868	Requirements for flood control structure.
84 FR 45868	Waiver and alternative requirement to permit certain improvements on private lands.
84 FR 45868	National objective documentation for economic development activities.
84 FR 45868	Public benefit for certain economic development activities.
84 FR 45869	Clarifying note on Section 3 resident eligibility and documentation requirements.
84 FR 45869	Waiver and modification of the job relocation clause to permit assistance to help a business return.
84 FR 45869	Prioritizing small businesses.
84 FR 45869	Underwriting.
84 FR 45869	Limitation on use of funds for eminent domain.
The 2020 Omni Notice	
85 FR 60822	Waiver and Alternative Requirements for Use of FEMA-Approved Elevation Standards for Nonresidential Structures.
85 FR 60825	Substantial Action Plan Amendment Requirements for CDBG–MIT Grants.
85 FR 60827	Financial Certification Requirements under Public Laws 115–254 and 116–20.

IV.A.2. Waiver of 45-day Review Period for CDBG–MIT Action Plan and Substantial Action Plan Amendments. The unique qualities and requirements of CDBG–MIT are well established in the Main CDBG–MIT Notice. CDBG–MIT funds represent an opportunity for grantees to use this assistance in areas impacted by recent disasters to carry out strategic and high-impact activities to mitigate disaster risk and reduce future losses.

HUD may disapprove an action plan or substantial action plan amendment if it is incomplete. HUD works with grantees to resolve or provide additional information during the review period to avoid the need to disapprove an action plan or substantial action plan amendments. There are several issues related to the action plan or substantial action plan amendments as submitted that can be fully resolved via further discussion and revision during an extended review period, rather than through HUD disapproval of the amendments which in turn would require grantees to take additional time to revise and resubmit their respective amendments. As such, the Secretary has determined that good cause exists to waive 24 CFR 91.500(a) to extend HUD's action plan review period from 45 days to 60 days.

IV.A.3. Additional requirements and modifications of requirements in the Main CDBG–MIT Notice. The following clarifications or modifications apply to all grantees receiving an allocation under this notice:

IV.A.3.a. Substantial amendments for grantees receiving an allocation of funds under the Main CDBG–MIT Notice. Grantees that received a CDBG–MIT allocation under the Main CDBG–MIT Notice (California, Florida, Georgia, North and South Carolina, and Texas) must submit a substantial amendment to its CDBG–MIT action plan, including an updated Mitigation Needs Assessment, per the requirements outlined in this notice, in addition to meeting the requirements for substantial amendments under the Main CDBG–MIT Notice and the 2020 Omni Notice (85 FR 60825). In particular, the substantial amendment must update the risk-based Mitigation Needs Assessment to:

(1) Identify and analyze the significant current and future disaster risks in the MID areas for 2018 disasters and provide a substantive basis for the activities proposed in those MID areas. HUD notes that a grantee's action plan and Mitigation Needs Assessment in response to the Main CDBG–MIT Notice may already include MID areas for 2018 disasters (if those areas overlap with previous disasters). In that case, the grantee must update its needs assessment. Mitigation needs evolve over time and grantees are to amend the Mitigation Needs Assessment and action plan as conditions change, additional mitigation needs are identified, and additional resources become available.

As a reminder, the agency administering the CDBG–MIT funds must consult with other jurisdictions, the private sector and other government agencies, as identified above in section III.A. and III.B. of this notice. For more information on the consultation requirements, a grantee should refer to section V.A.7. of the Main CDBG–MIT Notice.

As required by section III.A., the grantee must update its submissions for the certification of financial controls and procurement processes, and adequate procedures for grant management as described in section V.A.1.a. of the Main CDBG–MIT Notice to reflect any material changes in the submissions within 120 days of the applicability date of this notice.

IV.A.3.b. Action plans and other submission requirements for grantees receiving their first CDBG–MIT allocation under this notice. Grantees receiving their first allocation of CDBG–MIT funds (Alaska, American Samoa, Hawaii County, Kauai County, the Commonwealth of the Northern Mariana Islands, and Wisconsin) shall be subject to the deadlines for submission of implementation plans and capacity assessments, projection of expenditures and outcomes, and action plans, as established by this paragraph and paragraph IV.A.3.c. (which supersede the deadlines in the Main CDBG–MIT Notice). These grantees must submit projection of expenditures and outcomes and an action plan not later than 270 days after the applicability date of this notice. As required by section III.A. of this notice, the grantee must submit material updates to documentation for the certification of financial controls and procurement processes, and adequate procedures for grant management and the Addendum C added to Public Law 116–20 and 115–254 CDBG–DR Financial Management and Grant Compliance Certification Checklist, within 210 days of the applicability date of this notice.

IV.A.3.c. Implementation plan and capacity assessment. Grantees receiving their first allocation of CDBG–MIT funds under this notice (Alaska, American Samoa, Hawaii County, Kauai County, the Commonwealth of the Northern Mariana Islands, and Wisconsin) must submit the Implementation Plan and Capacity Assessment pursuant to section V.A.1.b., including the criteria in V.A.1.b.(1) and V.A.1.b.(2), of the Main CDBG–MIT Notice within 270 days of the applicability date of this notice.

IV.A.3.d. Public Hearing Clarification. On March 20, 2020 and in response to the COVID–19 pandemic, HUD clarified its requirements for public hearings as provided in the Main CDBG–MIT Notice, to include virtual public hearings (alone, or in concert with an in-person hearing) if the virtual hearings allow questions in real time, with answers coming directly from the elected representatives to all ''attendees.'' HUD is extending this flexibility to grantees receiving CDBG–MIT funds pursuant to this notice to facilitate social distancing during the public health emergency. CDBG–MIT grantees subject to this notice may hold virtual hearings in lieu of in-person public hearings to fulfill the public hearing requirements required by section V.A.3.a. of the Main CDBG–MIT Notice. Grantees that hold virtual hearings must update their citizen participation plans to describe procedures for virtual hearings, including how it shall take appropriate steps to ensure effective communication as required by 24 CFR 8.6 and provide meaningful access for individuals with limited English proficiency.

For each virtual hearing, the grantee shall provide reasonable notification and access for citizens in accordance with the grantee's certifications, timely responses to all citizen questions and issues, and public access to all questions and responses.

IV.A.3.e. Consolidated Plan Waiver. The Main CDBG–MIT Notice imposes a deadline for grantees to update their consolidated plans. To allow grantees receiving allocations under Public Law 116–20 a similar extension to revise their consolidated plans for consistency with their CDBG–MIT action plans, the following language is added to the waiver and alternative requirement provided in section V.A.6. of the Main CDBG–MIT Notice to include the CDBG–MIT funds allocated under this notice: ''This timeframe to update the consolidated plan shall not apply to grantees receiving CDBG–MIT funds under Public Law 116–20 for 2018 disasters. For a grantee allocated CDBG–MIT funds under Public Law 116–20, this waiver applies only until a grantee submits its next full (3–5 year) consolidated plan, or no later than its Fiscal Year 2022.''

IV.A.3.f. Use of funds in response to Hurricane Matthew and Hurricane Florence (State of North Carolina and South Carolina only). The Appropriations Act provides that grantees that received an allocation for mitigation activities in response to Hurricane Florence may use the CDBG–MIT funds for the same activities, consistent with the requirements of the CDBG–MIT grant, in the most impacted and distressed areas related to Hurricane Matthew. Additionally, as explained in the Main CDBG–MIT Notice in paragraph V.A.5.b., grantees that received an allocation for mitigation funding provided by Public Law 115–123 in response to Hurricane Matthew may use the CDBG–MIT funds for the same activities, consistent with the requirements of the CDBG–MIT grant, in the most impacted and distressed areas related to Hurricane Florence. Expenditures in the HUD-identified MID areas for both Hurricanes Matthew and Florence may count toward the 50 percent expenditure requirement for HUD-identified MID areas outlined in Table 1 of this notice. In total, South Carolina and North Carolina must expend 50 percent of the combined total of both CDBG–MIT grants in HUD-identified MID areas resulting from Hurricanes Matthew and Florence.

V. Duration of Funding

The Appropriations Act makes funds available for obligation by HUD until expended. This notice requires each grantee to expend 50 percent of its CDBG–MIT grant for 2018 disasters on eligible activities within six years of HUD's execution of the grant agreement and 100 percent of its CDBG–MIT grant for 2018 disasters within twelve years of HUD's execution of the grant agreement. HUD may extend the period of performance administratively, if good cause for such an extension exists at that time, as requested by the grantee and approved by HUD. When the period of performance has ended, HUD will close out the grant and any remaining funds not expended by the grantee on appropriate programmatic purposes will be recaptured by HUD.

VI. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the grants under this notice are as follows: 14.218 and 14.228.

VII. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available for public inspection on HUD's website and in-person between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Due to

security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339 (this is a toll-free number).

John Gibbs,

Principal Deputy Assistant Secretary for Community Planning and Development.

Appendix A—Detailed Methodology

Allocation of CDBG–MIT Funds to Most Impacted and Distressed Areas Due to 2018 Federally Declared Disasters

According to Public Law 116–20:

Provided further, That any funds made available under this heading and under the same heading in Public Law 115–254 that remain available, after the funds under such headings have been allocated for necessary expenses for activities authorized under such headings, shall be allocated to grantees, for mitigation activities in the most impacted and distressed areas resulting from a major disaster that occurred in 2018: Provided further, That such allocations shall be made in the same proportion that the amount of funds each grantee received under this Act and the same heading in division I of Public Law 115–254 bears to the amount of all funds provided to all grantees that received allocations for disasters that occurred in 2018:

The Table below shows the total unmet needs for each 2018 grantee as calculated by HUD, each grantee's share of the unmet needs for all 2018 disasters, and the amounts allocated to each 2018 grantee which are proportional to the total amount each of the grantees has been allocated for unmet needs from the aggregate of Public Law 116–20 and Public Law 115–254.

FEMA disaster No.	Grantee	Combined allocation for unmet needs (Pub. L. 115–254 and Pub. L. 116–20)	Proportional share of 2018 unmet needs (%)	2018 Mitigation grants (Pub. L. 116–20)
4357	American Samoa	$23,039,000	0.7869	$1,470,000
4413	State of Alaska	35,856,000	1.2247	2,288,000
4407, 4382	State of California	1,017,399,000	34.7504	64,907,000
4399	State of Florida	735,553,000	25.1236	46,926,000
4400	State of Georgia	41,837,000	1.4290	2,669,000
4365	Kauai County, HI	9,176,000	0.3134	585,000
4366	Hawaii County, HI	107,561,000	3.6739	6,862,000
4396, 4404	Commonwealth of the Northern Mariana Islands	254,324,000	8.6867	16,225,000
4393	State of North Carolina	542,644,000	18.5346	34,619,000
4394	State of South Carolina	72,075,000	2.4618	4,598,000
4377	State of Texas	72,913,000	2.4904	4,652,000
4402	State of Wisconsin	15,355,000	0.5245	980,000
	2018 Disasters	2,927,732,000	100.0000	186,781,000

[FR Doc. 2020–29261 Filed 1–5–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6182–N–02]

Allocations, Common Application, Waivers, and Alternative Requirements for Disaster Community Development Block Grant Disaster Recovery Grantees; Second Allocation

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This notice allocates a total of $85,291,000 in Community Development Block Grant disaster recovery (CDBG–DR) funds appropriated by the Additional Supplemental Appropriations for Disaster Relief Act, 2019 (the Act). The $85,291,000 in CDBG–DR funds allocated by this notice is for the purpose of assisting in long-term recovery from major disasters that occurred in 2018 and 2019. The allocations in this notice add to the funding previously allocated in the January 27, 2020 notice for these disasters. The Act requires HUD to allocate any funds not identified for long-term recovery from major disasters to be allocated for mitigation activities for 2018 disasters. Accordingly, under a separate notice, HUD will allocate the remaining $185,730,000 of funds available under the Act for mitigation activities in the most impacted and distressed areas resulting from a major disaster that occurred in 2018. This notice also contains a waiver and alternative requirement addressing the income limits applicable to the Commonwealth of Puerto Rico for its CDBG–DR and CDBG–MIT grants. Additionally, this notice also provides additional flexibility to CDBG–DR grantees as they continue their disaster recovery efforts while also responding to the Coronavirus Disease 2019 (COVID–19) pandemic.

DATES: Applicability Date: January 11, 2021.

FOR FURTHER INFORMATION CONTACT: Jessie Handforth Kome, Acting Director, Office of Block Grant Assistance, Department of Housing and Urban Development, 451 7th Street SW, Room 7282, Washington, DC 20410, telephone number 202–708–3587. Persons with hearing or speech impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Facsimile inquiries may be sent to Ms. Kome at 202–708–0033. (Except for the ''800'' number, these telephone numbers are not toll-free.) Email inquiries may be sent to *disaster_recovery@hud.gov.*

SUPPLEMENTARY INFORMATION:

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Appendix A: Allocation Methodology

I. Allocations

The Additional Supplemental Appropriations for Disaster Relief Act, 2019 (Pub. L. 116–20, approved June 6, 2019) (Appropriations Act) made $2,431,000,000 in CDBG–DR funds available for major disasters occurring in 2017, 2018, or 2019, of which $431,000,000 was for grantees that received funds in response to disasters occurring in 2017. In the January 27, 2020 **Federal Register** notice (''January 2020 Notice'') HUD allocated $2,153,928,000 in CDBG–DR funds in accordance with the Appropriations Act for major disasters occurring in 2018 and 2019, and for unmet infrastructure needs for 2017 disasters, as well as $1,677,500,000 in accordance with the Supplemental Appropriations for Disaster Relief Act, 2018 (Pub. L. 115–254, approved October 5, 2018) (Prior Appropriation) for major disasters occurring in 2018.

This notice allocates an additional $85,291,000 from the Appropriations Act to address unmet disaster recovery needs through activities authorized under title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301 *et seq.*) (HCDA) related to disaster relief, long-term recovery, restoration of infrastructure and housing, economic revitalization, and mitigation in the ''most impacted and distressed'' areas resulting from a qualifying major disaster in 2018 and 2019. Qualifying major disasters are those declared by the President pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974 (42 U.S.C. 5121 *et seq.*) (Stafford Act) and identified in Table 1.

HUD has described the applicable waivers and alternative requirements, relevant statutory and regulatory requirements, the grant award process, criteria for action plan approval, updates to duplication of benefits requirements, and eligible disaster recovery activities associated with grants for 2017, 2018, and 2019 disasters in the following **Federal Register** notices (''Prior Notices''): February 9, 2018 at 83 FR 5844, August 14, 2018 at 83 FR 40314, February 19, 2019 at 84 FR 4836, June 20, 2019 at 84 FR 28848, January 27, 2020 at 85 FR 4681,[1] August 17, 2020 at 85 FR 50041, and September 28, 2020 at 85 FR 60821. CDBG–DR funds allocated pursuant to this notice are subject to the requirements of the Prior Notices, as amended by provisions in this notice.

The Appropriations Act provides that grants shall be awarded directly to a state, unit of general local government, or Indian tribe at the discretion of the Secretary. Unless noted otherwise, the term ''grantee'' refers to the entity receiving a grant from HUD under this notice.

Pursuant to the Prior Notices, each grantee receiving an allocation for a 2018 or 2019 disaster is required to primarily consider and address its unmet housing recovery needs. These grantees may, however, propose the use of funds for unmet economic revitalization and infrastructure needs unrelated to the grantee's unmet housing needs if the grantee demonstrates in its needs assessment that there is no remaining unmet housing need or that the remaining unmet housing need will be addressed by other sources of funds.

Table 1 (below) shows the major disasters that grants under this notice may address and the minimum amount of funds from the Appropriations Act and Prior Appropriations that must be expended in the HUD-identified most impacted and distressed (MID) areas. The information in this table is based on HUD's review of the impacts from the qualifying disasters and estimates of unmet need.

TABLE 1—ALLOCATIONS UNDER PUBLIC LAWS 115–254 AND 116–20 FOR 2018 & 2019 DISASTERS

Disaster year	Disaster Nos.	Grantee	Allocation under Public Law 115–254 (covered by the January 27, 2020 notice)	Allocation under Public Law 116–20 (covered by the January 27, 2020 notice)	Unmet needs allocation under Public Law 116–20 (covered by this notice)	Combined allocation for unmet needs (Pub. L. 115–254 and 116–20)	Minimum combined amount from Public Law 115–254 and Public Law 116–20 that must be expended for unmet needs recovery in the HUD identified ''most impacted and distressed'' areas listed herein
2018	4366	Hawaii County, HI	$66,890,000	$16,951,000	$23,720,000	$107,561,000	($107,561,00) Hawaii County.
2018	4396 & 4404	Commonwealth of the Northern Mariana Islands.	188,652,000	55,294,000	10,378,000	254,324,000	(No less than 203,459,200) Saipan and Tinian Municipalities.
2019	4454 & 4466	State of Texas	0	212,741,000	14,769,000	227,510,000	(No less than 182,008,000) Cameron, Chambers, Harris, Jefferson, Liberty, Montgomery, and Orange Counties; 78570 (Hildalgo) Zip Code.
2019	4473	Commonwealth of Puerto Rico.	0	0	36,424,000	36,424,000	(No less than 29,139,200) Guanica Municipio; Zip Codes: 00656 (Guayanilla Municipio), 00698 (Yauco Municipio), and 00728 (Ponce Municipio).
Totals			255,542,000	284,986,000	85,291,000	625,819,000	

Pursuant to the Appropriations Act, HUD has identified the MID areas based on the best available data for all eligible affected areas. A detailed explanation of HUD's allocation methodology is provided in Appendix A of this notice. In some instances, HUD has identified the entire jurisdiction of a grantee as the HUD-identified MID area. For all other grantees, at least 80 percent of the total funds provided to a grantee under this notice must address unmet disaster needs within the HUD-identified MID areas, as identified in the last column in Table 1. Note that if HUD designates a zip code as a MID area for purposes of allocating funds, the grantee may carry out activities within the whole county (county is indicated in parentheses next to the zip code) as a MID area. The grantee should indicate the decision to carry out activities throughout the whole county in its action plan.

A grantee may use up to 5 percent of the total grant award for grant administration and no more than 15 percent of the total grant award for planning activities. Therefore, HUD will include 80 percent of a grantee's expenditures for grant administration in its determination that 80 percent of the total award has been expended in the

[1] The **Federal Register** published minor corrections to Table 1 of the January 27, 2020 notice in a notice published on February 21, 2020, at 85 FR 10182.

MID areas identified in Table 1. Additionally, expenditures for planning activities may be counted towards a grantee's 80 percent expenditure requirement, provided that the grantee describes in its action plan how those planning activities benefit the HUD-identified MID areas.

A grantee may determine where to use the remaining 20 percent of the allocation, but that portion of the allocation may only be used to address unmet disaster needs in those areas that the grantee determines are ''most impacted and distressed'' and that received a presidential major disaster declaration pursuant to the disaster numbers listed in Table 1.

II. Use of Funds

Funds allocated under this notice are subject to the requirements of the Prior Notices, as amended by this notice or subsequent notices. This notice outlines additional requirements imposed by the Appropriations Act that apply to funds allocated under this notice.

The Appropriations Act requires that prior to the obligation of CDBG–DR funds a grantee shall submit a plan detailing the proposed use of all funds. The plan must include criteria for eligibility, and how the use of these funds will address long-term recovery and restoration of infrastructure and housing, economic revitalization, and mitigation in the MID areas. Therefore, the action plan submitted in response to this notice must describe uses and activities that: (1) Are authorized under title I of the HCDA or allowed by a waiver or alternative requirement; and (2) respond to a disaster-related impact to infrastructure, housing, or economic revitalization in the MID areas, and if the grantee chooses to do so, how mitigation will be incorporated into recovery activities. To inform the plan, each grantee must conduct an assessment of community impacts and unmet needs and guide the development and prioritization of planned recovery activities, pursuant to section VI.A.2.a. of the February 9, 2018 notice (83 FR 5849).

While CDBG–DR funding is a valuable resource for long-term recovery and mitigation in the wake of major disasters, HUD expects that grantees will take steps to set in place substantial state and local governmental policies to enhance the impact of HUD-funded investments and limit damage from future disasters. The **Federal Register** notice published on February 9, 2018 requires all grantees to describe how they plan to promote sound, sustainable long-term planning (83 FR 5850). To maximize the impact of all available funds, grantees are encouraged to coordinate and align CDBG–DR funds under this notice with activities funded with other CDBG–DR and CDBG–MIT funds, as well as other disaster recovery activities funded by the Federal Emergency Management Agency (FEMA), the U.S. Army Corps of Engineers (USACE), the U.S. Forest Service, and other agencies as appropriate.

For convenience, Table 2 (below) identifies clarifications and modifications to the requirements in the February 9, 2018 notice.

TABLE 2—RULES, WAIVERS, AND ALTERNATIVE REQUIREMENTS ESTABLISHED IN THE PRIOR NOTICES

Citation	Rules, waivers, and alternative requirements
August 14, 2018 notice	
83 FR 40314	Allowing for unmet economic revitalization and infrastructure needs; also addressed in section I of this notice.
83 FR 40317	Use of terminology around an evaluation of the cost or price of a product or service.
83 FR 40317	Additional requirements for the comprehensive disaster recovery website.
83 FR 40317	Working capital to aid in recovery.
83 FR 40317	Underwriting requirements.
83 FR 40317	Limitation of use of funds for eminent domain.
83 FR 40318	Increased minimum public comment period for action plans and substantial amendments.
83 FR 40318	Cost verification.
83 FR 40318	Additional specific criteria and conditions to mitigate risk.
83 FR 40319	Waiver of Section 414 of the Stafford Act, as amended and addressed in section IV.C.2. of the January 27, 2020 notice (85 FR 4687).
83 FR 40319	Clarification of the environmental review requirements.
83 FR 40320	Modification of affordability periods for rental properties.
83 FR 40320	CDBG–DR housing assistance and FEMA's permanent and semi-permanent housing programs.
83 FR 40321	Rehabilitation and reconstruction cost-effectiveness.
83 FR 40321	Infrastructure planning and design.
83 FR 40321	Discipline and accountability in the environmental review and permitting of infrastructure projects.
83 FR 40321	CDBG–DR funds as match for FEMA 428 Public Assistance projects.
June 20, 2019 notice	
84 FR 28836	Updates to Duplication of Benefits Requirements Under the Stafford Act for Community Development Block Grant (CDBG) Disaster Recovery Grantees (entire notice).
84 FR 28848	Applicability of Updates to Duplication of Benefits Requirements Under the Stafford Act for Community Development Block Grant (CDBG) Disaster Recovery Grantees (only portions described in the January 27, 2020 notice (85 FR 4687).
February 19, 2019 notice	
84 FR 4844	Clarification of green building standards.
January 27, 2020 notice	
85 FR 4685	HUD will condition the availability of funds for unmet infrastructure needs for 2017 disasters allocated to grantees that have entered into alternative procedures under section 428 of the Stafford Act.
85 FR 4685	Incorporation of waivers and alternative requirements for local government grantees.
85 FR 4686	Use of administrative funds across multiple grants.
	One-for-one replacement housing, relocation and real property acquisition requirements for multiple grants.
85 FR 4687	Duplication of benefits changes.

TABLE 2—RULES, WAIVERS, AND ALTERNATIVE REQUIREMENTS ESTABLISHED IN THE PRIOR NOTICES—Continued

Citation	Rules, waivers, and alternative requirements
85 FR 4687	Consolidated plan consistency requirements.
85 FR 4687	Clarification on affordability periods.
85 FR 4687	Clarification and amendment on section 414 of Robert T. Stafford Disaster Relief and Emergency Assistance Act.
85 FR 4688	Clarification on procurement requirements.
85 FR 4688	Clarification on acquisition of real property, flood and other buyouts to include wildfire-impacted grantees.
August 17, 2020 notice	
85 FR 50042	Extension of administrative deadlines to provide flexibility to CDBG–DR grantees as they respond to the impacts of the COVID–19 pandemic.
September 28, 2020 notice	
85 FR 60822	Waiver and Alternative Requirements for Use of FEMA-Approved Elevation Standards for Nonresidential Structures.
85 FR 60823	Use of the ''Upper Quartile'' or ''Exception Criteria'' for Low- and Moderate-Income Area Benefit Activities (State of Texas only).
85 FR 60824	Use of Standardized Area Median Income (State of Texas only).
85 FR 60827	Authorizing Tourism and Business Marketing Assistance Activities (The Northern Mariana Islands only).
85 FR 60827	Financial Certification Requirements under Public Laws 115–254 and 116–20.

III. Overview of Grant Process

III.A. Appropriations Act (Pub. L. 116–20) Action Plan Process

A grantee receiving an allocation under this notice for disasters occurring in 2019 (Commonwealth of Puerto Rico) must submit an action plan per the requirements in section VI.A.2 of the February 9, 2018 notice (83 FR 5849), as modified by the requirements of the August 14, 2018 notice (83 FR 40314), not later than 210 days after the applicability date of this notice, unless the grantee has requested, and HUD has approved an extension of this submission deadline. All requirements of the Prior Notices related to the action plan submission shall apply, including the public comment period which was extended to not less than 30 calendar days under the August 14, 2018 notice (83 FR 40318), and the manner of publication which must include prominent posting on the grantee's official website (83 FR 40317). Posting information online may not always be an effective way to solicit public comment, particularly in areas with extensive damage limiting the public's access to electricity, internet, and cellular service as a result of the disaster. Grantees should consider other ways to effectively solicit public comment, in addition to posting information. Each grantee must publish the action plan in a manner that affords citizens, affected local governments, and other interested parties a reasonable opportunity to examine the contents and provide feedback. Plan publication efforts must meet the effective communications requirements of 24 CFR 8.6 and other fair housing and civil rights requirements, such as the effective communication requirements under the Americans with Disabilities Act.

The grantee must submit an Implementation Plan and a Capacity Assessment that satisfies the requirements of paragraphs VI.A.1.b.(1) and (2) of the February 9, 2018 notice (83 FR 5848) titled *Implementation Plan and Capacity Assessment.*

The grantee must submit information to support the Secretary's certification of proficient financial controls and procurement processes and adequate procedures for proper grant management required by the Appropriations Act. The grantee can submit all of the information required by section VI.A.1.a. of the February 9, 2018 notice (83 FR 5847), paragraphs (1)–(6), as updated and amended by section IV.B.1. of the January 2020 Notice to impose additional requirements related to the duplication of benefits (85 FR 4686) using the ''Pub. L. 116–20 and 115–254 CDBG–DR Financial Management and Grant Compliance Certification Checklist'' posted on HUD's website. Alternatively, the grantee may request that HUD rely on the submissions made in response to section V.A.1.a. in the August 30, 2019 Main CDBG–MIT Notice (84 FR 45844), as modified by the January 27, 2020 CDBG–MIT Notice allocating funds to the Commonwealth of Puerto Rico (85 FR 4676), to support a new HUD certification for purposes of this allocation, provided, however, that HUD's approval will be conditioned on the requirement that the grantee must update its previous submissions to reflect any material changes. The grantee can use the ''Pub. L. 116–20 and 115–254 CDBG–DR Financial Management and Grant Compliance Certification Checklist'' Addendum A and B posted on HUD's website to notify HUD of its intention to rely on previous submissions.

For purposes of the Implementation Plan and Capacity Assessment and submissions to support the Secretary's certification, the submission deadlines were amended by section II of the August 17, 2020 notice to provide flexibility to CDBG–DR grantees as they also respond to the impacts of the COVID–19 pandemic. Grantees must submit the required information within 150 days of the applicability date of this notice.

In the Prior Notices, the Department stated its intention to establish special grant conditions for individual CDBG–DR grants based upon the risks posed by the grantee, including risks related to the grantee's capacity to carry out the specific programs and projects proposed in its action plan. As described in the Prior Notices, these conditions will be designed to provide additional assurances that programs are implemented in a manner to prevent waste, fraud, and abuse and that the Department has established specific criteria and conditions for each grant award as provided for at 2 CFR 200.206 and 200.208,[2] respectively, to mitigate the risks of the grant.

[2] Revisions to 2 CFR part 200 became effective on November 12, 2020 (85 FR 49506). In the Prior Notices, the references to requirements for the review of grantee risk and specific conditions were in 2 CFR 200.205 and 200.207, respectively. The revised 2 CFR part 200 regulations apply to funds allocated by this notice.

III.B. Action Plan Substantial Amendment Process To Incorporate Additional Funds

Each grantee that received an allocation for 2018 or 2019 disasters under the January 2020 Notice and this notice (Commonwealth of the Northern Mariana Islands; Hawaii County, HI; and the State of Texas) is required to submit a substantial amendment to the action plan that was submitted in response to the January 2020 Notice.

The substantial amendment must be submitted not later than 180 days after the initial action plan is approved in whole or in part by HUD or not later than 180 days after the applicability date of this notice, whichever is later, unless the grantee has requested, and HUD has approved an extension of this submission deadline. The substantial amendment must include the additional allocation of funds and address the requirements of this notice.

Grantees that received allocations under the January 2020 Notice for 2018 and 2019 disasters submitted information described in section VI.A.1. of the February 9, 2018 notice (as amended and updated by section IV.B.1. of the January 27, 2020 notice, 85 FR 4686). These submissions supported the Secretary's evaluation of grantee capacity and the Secretary's certification of proficient financial controls and procurement processes and adequate procedures for proper grant management required by the Appropriations Act. Rather than resubmit the same information for allocations under this notice, grantees receiving a second allocation for 2018 and 2019 disasters are required to update submissions for their first allocations to reflect any material changes. This includes updates to: (a) The information required by section VI.A.1.a. of the February 9, 2018 notice (83 FR 5847), paragraphs (1)–(6), as updated and amended by section IV.B.1. of the January 2020 Notice (85 FR 4686); and (b) to the Implementation Plan and Capacity Assessment that satisfies paragraphs (1) and (2) in section VI.A.1.b. of the February 9, 2018 notice (83 FR 5848). HUD will consider these updates before granting funds allocated by this notice. The submission deadlines were amended by section II of the August 17, 2020 notice to provide flexibility to CDBG–DR grantees as they also respond to the impacts of the COVID–19 pandemic. Grantees must submit the required information within 150 days of the applicability date of this notice.

III.B.1. *Timeline for Action Plan Substantial Amendment.* Additionally, each grantee that received an allocation under the January 2020 Notice for 2018 and 2019 disasters must meet the following requirements to substantially amend its action plan. These steps are only applicable to this substantial amendment process to add the additional allocation under this notice.

- Grantee must consult with affected citizens, stakeholders, local governments, and public housing authorities to determine updates to its needs assessment (as described in paragraph A.7 of section VI of the February 9, 2018 Notice (83 FR 5854)).
- Grantee must amend its action plan to update its impact and needs assessment, modify or create new activities, or reprogram funds in accordance with requirements for substantial amendments in the Prior Notices. Each amendment must be highlighted, or otherwise identified within the context of the entire action plan. The beginning of every substantial amendment must include a: (1) Section that identifies exactly what content is being added, deleted, or changed; (2) chart or table that clearly illustrates where funds are coming from and where they are moving to; and (3) a revised budget allocation table that reflects all funds.
- Grantee must publish the substantial amendment to its previously approved action plan for disaster recovery in a manner that affords citizens, affected local governments, and other interested parties a reasonable opportunity to examine the amendment's contents and provide feedback, in accordance with requirements published in paragraph IV.A.3. of the August 14, 2018 Notice (83 FR 40318). The manner of publication must include, at a minimum, prominent posting on the grantee's official website for not less than 30 calendar days for public comment.
- Grantee must respond to public comment and submit its substantial amendment to HUD (together with SF–424 and certifications required by Section VI.E. of the February 9, 2018 Notice) no later than 180 days after the grantee's action plan is approved in whole or in part by HUD or not later than 180 days after the applicability date of this notice, whichever comes later.
- HUD will review the substantial amendment within 45 days from date of receipt and determine whether to approve the substantial amendment per criteria identified in this notice and the Prior Notices.
- HUD will send a substantial amendment approval letter, revised grant conditions, and an unsigned grant agreement to the grantee. If the substantial amendment is not approved, HUD will send a letter identifying the substantial amendment deficiencies; the grantee must then re-submit the substantial amendment within 45 days of the notification letter.
- Grantee must ensure that the HUD-approved substantial amendment and HUD-approved action plan are posted prominently on its official website. Each grantee's current version of its entire action plan (including amendments) must be accessible for viewing as a single document at any given point in time, rather than the public or HUD having to view and cross-reference changes among multiple amendments.
- Grantee must enter the activities from its published substantial amendment into the Disaster Recovery Grant Reporting (DRGR) system and submit the updated DRGR action plan (revised to reflect the HUD-approved substantial amendment) to HUD within the DRGR system.
- Grantee must sign and return the grant agreement to HUD.
- HUD will sign the grant agreement and establish the grantee's CDBG–DR line of credit amount to reflect the total amount of available funds.
- Grantee may draw down CDBG–DR funds from its line of credit after the Responsible Entity completes applicable environmental review(s) pursuant to 24 CFR part 58, or adopts another Federal agency's environmental review as authorized under the Appropriations Act and the Prior Appropriation, and, as applicable, receives from HUD or the state the Authority to Use Grant Funds (AUGF) form and certification.
- Grantee must amend and submit its projection of CDBG–DR expenditures and performance outcomes with the substantial amendment.

IV. Applicable Rules, Statutes, Waivers, and Alternative Requirements

This section of the notice describes rules, statutes, waivers, and alternative requirements that apply to each grantee receiving an allocation under this notice (unless otherwise noted). The Secretary has determined that good cause exists to apply each waiver and alternative requirement established in the Prior Notices to grantees receiving funds under this notice and that such waivers and alternative requirements are not inconsistent with the overall purpose of title I of the HCDA. The Secretary's determination of good cause extends to each waiver or alternative requirement as amended by this notice. Grantees are reminded that all fair housing and nondiscrimination requirements, as well

as environmental and labor requirements, continue to apply. The following requirements apply only to the CDBG–DR funds appropriated under the Appropriations Act (unless otherwise noted) and not to funds provided under the annual formula State or Entitlement CDBG programs, the Indian Community Development Block Grant program, or those provided under any other component of the CDBG program, such as the Section 108 Loan Guarantee Program, or any previous CDBG–DR appropriations, unless otherwise noted.

A grantee may request additional waivers and alternative requirements from the Department as needed to address specific needs related to its recovery activities, accompanied by data to support the request. Grantees are reminded that requirements related to nondiscrimination cannot be waived. Grantees should work with the assigned Community Planning and Development representatives to request any additional waivers or alternative requirements from HUD. Except where noted, the waivers and alternative requirements described below apply to all grantees under this notice. Pursuant to the requirements of the Appropriations Acts, waivers and alternative requirements are effective five days after they are published in the **Federal Register**.

Except as described in this notice or the Prior Notices, statutory and regulatory provisions governing the State CDBG program shall apply to state grantees receiving a CDBG–DR grant and statutory and regulatory provisions governing the entitlement CDBG program shall apply to any local government receiving a CDBG–DR grant. State and Entitlement CDBG regulations can be found at 24 CFR part 570. References to the action plan in these regulations shall refer to the action plan for disaster recovery required by this notice and the Prior Notices.

HUD amends the Prior Notices and waives the provisions of 24 CFR part 570, subpart F to authorize the Commonwealth of the Northern Mariana Islands and American Samoa to administer its CDBG–DR allocation in accordance with the regulatory and statutory provisions governing the State CDBG program, as modified by rules, statutes, waivers, and alternative requirements made applicable by **Federal Register** notices. This includes the requirement that the aggregate total for administrative and technical assistance expenditures by the Commonwealth of the Northern Mariana Islands and American Samoa must not exceed 5 percent of any CDBG–DR grant made pursuant to the Appropriations Act, plus 5 percent of program income generated by the grant. Also, HUD extends the waivers and alternative requirements in the Prior Notices to Hawaii County, which is subject to requirements imposed in 24 CFR part 570, subpart F. However, because the Prior Notices do not include waivers and alternative requirements to the provisions in 24 CFR part 570, subpart F, HUD amends the Prior Notices and waives 24 CFR 570.420(c), 24 CFR 570.431(a), and 24 CFR 570. 431(b) for Hawaii and Kauai Counties. The Department has determined that good cause exists for these waivers and that such waivers are not inconsistent with the overall purposes of title I of the HCDA.

Additionally, the February 9, 2018 notice required state grantees and subrecipients to attend fraud-related training provided by HUD OIG to assist in the proper management of CDBG–DR grant funds. With this notice, HUD is applying this provision to local government grantees allocated funds under the Prior Notices or this notice.

All references in this notice pertaining to timelines and/or deadlines are in terms of calendar days unless otherwise noted. The date of this notice shall mean the applicability date of this notice unless otherwise noted.

IV.A. Grant Administration

IV.A.1. *Use of administrative funds across multiple grants.* The Appropriations Act authorizes special treatment of grant administrative funds for grantees that received awards under certain CDBG–DR grants. Grantees that received awards under Public Laws 114–113, 114– 223, 114–254, 115–31, 115–56, 115–123, and 115–254, or any future act may use eligible administrative funds (up to 5 percent of each grant award plus up to 5 percent of program income generated by the grant) appropriated by these acts for the cost of administering any of these grants without regard to the particular disaster appropriation from which such funds originated. If the grantee chooses to exercise this authority, the grantee must ensure that it has appropriate financial controls to ensure that the amount of grant administration expenditures for each of the aforementioned grants will not exceed 5 percent of the total grant award for each grant (plus 5 percent of program income), review and modify its financial management policies and procedures regarding the tracking and accounting of administration costs, as necessary, and address the adoption of this treatment of administrative costs in the applicable portions of its submissions described in sections III.A. or III.B. of this notice that meet the requirements of section VI.A.1.a. of the February 9, 2018 notice (83 FR 5847), paragraphs (1)–(6), as updated and amended by section IV.B.1. of the January 2020 Notice (85 FR 4686). Grantees can address this through the submission of the ''Pub. L. 116–20 and 115–254 CDBG–DR Financial Management and Grant Compliance Certification Checklist'' Addendum B available on HUD's website. Grantees are reminded that all costs incurred for administration must still qualify as an eligible administration expense.

IV.B. Waiver and Alternative Requirement Related to Adjusted Income Limits for Grants Under Public Laws 115–56, 115–123, and 116–20 (Commonwealth of Puerto Rico Only)

In the August 14, 2018 notice (83 FR 40320), HUD provided the following adjustment to Puerto Rico's income limits in accordance with section 102(a)(20)(B) of the HCDA:

''Section 102(a)(20) of the HCDA defines 'persons of low- and moderate-income' and 'low- and moderate-income persons.' Subparagraph (B) of this definition authorizes the Secretary to establish for any area percentages of median income that are higher or lower than the percentages defined as 'low- and moderate-income' under 102(a)(20)(A), if the Secretary finds such variations to be necessary because of unusually high or low family incomes in such areas. Due to the unusually low incomes in Puerto Rico, residents that meet the CDBG program definition of 'low- and moderate-income' by having incomes of 80 percent AMI or less, also remain below the Federal poverty level. Therefore, the Department is increasing the income limits for low- and moderate-income persons in Puerto Rico, which will be listed in income tables posted on HUD's website. Under this adjustment, Puerto Rico may use these alternative income limits when determining that activities undertaken with CDBG–DR funds meet the low- and moderate-income benefit CDBG national objective criteria. These income limits apply only to the use of CDBG–DR funds under this notice and the Prior Notice.''

In order to ensure consistency with the use of CDBG–DR funds that are governed by alternative income limits authorized by the Department, the Department is extending the income limit adjustments of the August 14, 2018 notice to all CDBG–DR funds allocated under Public Laws 115–56, 115–123, and 116–20 and to CDBG–MIT funds allocated to Puerto Rico for mitigation

activities under Public Law 115–123. Under this extension, Puerto Rico may use these alternative income limits when determining that activities undertaken with CDBG–DR or CDBG–MIT funds meet the low- and moderate-income benefit CDBG national objective criteria. HUD will continue to post the applicable income tables online.

In addition, Puerto Rico may currently choose to take advantage of the waiver HUD issued in the February 9, 2018 notice (83 FR 5861) and the August 30, 2019 notice (84 FR 45863) to provide homeownership assistance for households earning up to 120 percent of the area median income (AMI). For consistency with HUD's alternative income limits because of the unusually low incomes in Puerto Rico, the Department finds that good cause exists to make similar adjustments to the income limits for homeownership assistance activities authorized by the waiver in the February 9, 2018 notice. Therefore, HUD waives 42 U.S.C. 5302(a)(20) to the extent necessary to add the following alternative requirement. When HUD establishes percentages of median income that are higher or lower than the percentages defined as 'low- and moderate-income' under section 102(a)(20)(A) of the HCDA, HUD may also apply the same adjustments to revise other income limits that apply to the use of grant funds (with adjustments for smaller and larger families). For Puerto Rico, this alternative requirement authorizes HUD to annually publish adjusted income limits that apply whenever grant requirements necessitate the calculation of 120 percent of AMI. This waiver applies to Puerto Rico's allocation of funds under the Prior Notices under Public Laws 115–56 and 115–123, funding for mitigation activities under Public Law 115–23, and funding allocated under this notice or any other notice under Public Law 116–20.

IV.C. Waiver and Alternative Requirement Related to Tourism and Business Marketing (Commonwealth of Puerto Rico and U.S. Virgin Islands Only)

In the August 14, 2018 notice (83 FR 40322), the Department granted the Commonwealth of Puerto Rico a waiver and alternative requirement to create a new eligible tourism and marketing activity to use up to $15,000,000 of CDBG–DR funds to promote the Commonwealth in general or specific communities, consistent with the amount allocated by the Commonwealth to promote travel and to attract new businesses to disaster-impacted areas in the action plan submitted to HUD pursuant to the February 9, 2018 notice. Additionally, in the August 14, 2018 notice (83 FR 40322), HUD granted the U.S. Virgin Islands (USVI) a waiver and alternative requirement to spend up to $5,000,000 of CDBG–DR funds on tourism marketing activities to promote the Territory in general or specific components of the islands, consistent with the amount allocated by the USVI in the action plan submitted to HUD pursuant to the February 9, 2018 notice. HUD granted these waivers and alternative requirements to support economic recovery in areas that depend on the tourism industry following Hurricanes Irma and Maria. HUD increased each grantee's cap on allowable tourism marketing activities to $25 million to benefit disaster-impacted areas in a notice published February 19, 2019 (84 FR 4844–45).''

Both of these waivers and alternative requirements expire two years after the grantees' first draw of CDBG–DR funds under the respective allocations. For both Puerto Rico and USVI, it is two years after their first draw of funds allocated in the February 9, 2018 notice. HUD has determined that the rapidly emerging needs of states and local governments in responding to the COVID–19 pandemic provides good cause to allow extensions of the expiration date for these waivers and alternative requirements established in **Federal Register** notices published on August 14, 2018 (83 FR 40322) and February 19, 2019 (84 FR 4844–45), as referenced above. In response to the COVID–19 pandemic, HUD is providing a one-year extension of the previously established expiration deadlines for these two grantees.

V. Duration of Funding

The Appropriations Act makes the funds available for obligation by HUD until expended. This notice requires each grantee to expend 100 percent of its CDBG–DR grant on eligible activities within 6 years of HUD's initial obligation of funds under Public Laws 115–254 and 116–20 for a 2018 or 2019 disaster pursuant to an executed grant agreement. HUD may extend the period of performance administratively, if good cause for such an extension exists at that time, as requested by the grantee and approved by HUD. When the period of performance has ended, HUD will close out the grant and any remaining funds not expended by the grantee on appropriate programmatic purposes will be recaptured by HUD.

VI. Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance numbers for the disaster recovery grants under this notice are as follows: 14.228 for State CDBG grantees and 14.218 for Entitlement CDBG Grantees.

VII. Finding of No Significant Impact

A Finding of No Significant Impact (FONSI) with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The FONSI is available online on HUD's website and for public inspection between 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the Federal Information Relay Service at 800–877–8339 (this is a toll-free number).

John Gibbs,

Principal Deputy Assistant Secretary for Community Planning and Development.

Appendix A—Detailed Methodology

Allocation of CDBG–DR Funds to Most Impacted and Distressed Areas Due to 2018 and 2019 Federally Declared Disasters

Background

Public Law 116–20 appropriated $2,431,000,000 through the Community Development Block Grant Disaster Recovery (CDBG–DR) program. The funds were to be used to address specific infrastructure needs of select 2017 disasters and remaining unmet disaster recovery needs for disasters in 2018 and 2019, and then provide any remaining funds to support mitigation activities for 2018 disasters. On December 3rd, HUD announced allocations for all but $272 million of available funds.

The remaining $272 million have been held pending complete data for the remaining disasters of 2019 as well as updates to other select disasters of 2018 and 2019 due to extraordinary circumstances.

Methodology

Using data received from FEMA and the Small Business Administration (SBA) on May 11, 2020, HUD updated unmet needs for a select set of disasters in 2018 and 2019. The updated unmet needs are only for extraordinary circumstances:

• Hawaii County, HI (DR 4366, an additional $23,720,000). *Extraordinary circumstance:* At the time of the December 2019 allocation FEMA Public Assistance (PA) estimates were still being discussed with state officials. The PA estimate at the time of the 2019 allocation was just $1.5 million with local match (''unmet need'') of $378,000. The updated data from FEMA is that DR 4366 has $96 million in Category C to G needs with a $24 million match requirement which substantially increases unmet needs.

• Northern Marianas (DR 4396 and DR 4404, an additional $10,378,000). *Extraordinary circumstance:* FEMA's Permanent Housing Construction (PHC) program is seldom activated by FEMA so it requires a special consideration for HUD's calculation of unmet needs. In HUD's December 3rd allocation announcement we had reduced the housing needs estimate for the Northern Marianas based on a FEMA early estimate that 455 homes would be repaired or replaced by the PHC program and thus would not need CDBG–DR assistance. At the time, the program was in its early implementation and the number of homes served was expected to change. Due to the unusual nature of this FEMA program, HUD requested from FEMA in May 2020 a revised estimate of how many homes would be served. That revised FEMA PHC estimate is that 300 homes are now expected to be served by PHC instead of the previously estimated 455 homes. This reduction in the FEMA PHC leads to an increase in the Northern Marianas unmet CDBG–DR need estimate by 155 homes.

• Texas (DR 4466, an additional $14,769,000). *Extraordinary circumstance:* This disaster was declared on October 4th and the data used for the December 3rd allocation had been extracted from FEMA's systems on November 15, 2019. In general, HUD's experience is that FEMA data is most complete for the purpose of calculating CDBG–DR unmet needs approximately 90 days after a disaster declaration. DR 4466 was the only disaster in 2019 that had been declared within 90 days of the November 15th data extraction. For this reason, HUD requested a refresh of the FEMA data for DR 4466 which identified 252 additional homes with serious damage than had been identified in the prior allocation leading to the increased estimate of need.

• Puerto Rico (DR 4473, $36,424,000). *Extraordinary circumstance:* On December 28, 2019, Puerto Rico experienced a major disaster (DR 4473) that has continued for some months with continuing after-shocks. This is a disaster occurring in both 2019 and 2020. Because it initially occurred in 2019 it is eligible for funding from Public Law 116–20. However, this disaster is on-going. FEMA had closed the application period for the IHP program but due to a serious after-shock on May 2, 2020, FEMA reopened the application period for this disaster. This allocation is based on the data before FEMA reopened the application period.

[FR Doc. 2020–29262 Filed 1–5–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Geological Survey

[GX21EE000101100]

Call for Nominations to the National Geospatial Advisory Committee

AGENCY: U.S. Geological Survey, Interior.

ACTION: Call for Nominations.

SUMMARY: The Department of the Interior (DOI) is seeking nominations to serve on the National Geospatial Advisory Committee (NGAC). The NGAC is a Federal Advisory Committee authorized through the Geospatial Data Act of 2018 (GDA), which operates in accordance with the Federal Advisory Committee Act (FACA). The Committee provides advice and recommendations to the Secretary of the Interior through the Federal Geographic Data Committee (FGDC) related to management of Federal geospatial programs, development of the National Spatial Data Infrastructure, and the implementation of the GDA. The Committee reviews and comments on geospatial policy and management issues and provides a forum for views of non-Federal stakeholders in the geospatial community.

DATES: Nominations to participate on this Committee must be received by February 22, 2021.

ADDRESSES: Send nominations electronically to *ngacnominations@fgdc.gov,* or by mail to John Mahoney, U.S. Geological Survey (USGS), DOI, 909 First Avenue, Suite 800, Seattle, WA 98104. Nominations may come from employers, associations, professional organizations, or other geospatial organizations. Nominations should include a resume providing an adequate description of the nominee's qualifications, including information that would enable the DOI to make an informed decision regarding meeting the membership requirements of the Committee and permit the DOI to contact a potential member. Nominees are strongly encouraged to include supporting letters from employers, associations, professional organizations, and/or other organizations that indicate support by a meaningful constituency for the nominee.

FOR FURTHER INFORMATION CONTACT: John Mahoney, USGS, (206–220–4621). Additional information about the NGAC and the nomination process is posted on the NGAC web page at *www.fgdc.gov/ngac.*

SUPPLEMENTARY INFORMATION: The Committee conducts its operations in accordance with the provisions of the GDA and the FACA. It reports to the Secretary of the Interior through the FGDC and functions solely as an advisory body. The Committee provides recommendations and advice to the DOI and the FGDC on policy and management issues related to the effective operation of Federal geospatial programs.

The NGAC includes up to 30 members, selected to generally achieve a balanced representation of the viewpoints of the various stakeholders involved in national geospatial activities. NGAC members are appointed for staggered terms, and nominations received through this call for nominations may be used to fill vacancies on the Committee that will become available in 2021 and 2022. Nominations will be reviewed by the FGDC and additional information may be requested from nominees. Final selection and appointment of Committee members will be made by the Secretary of the Interior.

The Committee meets approximately 3–4 times per year. Committee members will serve without compensation, but travel and per diem costs will be provided by USGS. The USGS will also provide necessary support services to the Committee.

Committee meetings are open to the public. Notice of committee meetings are published in the **Federal Register** at least 15 days before the date of the meeting. The public will have an opportunity to provide input at these meetings.

Authority: 5 U.S.C. Appendix 2.

Kenneth Shaffer,

Deputy Executive Director, Federal Geographic Data Committee.

[FR Doc. 2020–26729 Filed 1–5–21; 8:45 am]

BILLING CODE 4311–AM–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Batteries and Products Containing the Same DN 3519;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing

pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov* . The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of One World Technologies, Inc. and Techtronic Power Tools Technology Ltd. on December 30, 2020. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain batteries and products containing the same. The complaint names as respondents: Darui Development Limited of China; Dongguan Xinjitong Electronic Technology Co., Ltd. of China; Shenzhen Laipaili Electronics Co., Ltd. of China; Shenzhen Liancheng Weiye Industrial Co., Ltd. of China; Shenzhen MingYang Creation Electronic Co., Ltd. of China; Shenzhen Ollop Technology Co. Ltd. of China; Shenzhen Rich Hao Yuan Energy Technology Co., Ltd. of China; Shenzhen Runsensheng Trading Co., Ltd. of China; Shenzhen Saen Trading Co., Ltd. of China; Shenzhen Shengruixiang E-Commerce Co., Ltd. of China; Shenzhen Tuo Yu Technology Co., Ltd. of China; Shenzhen Uni-Sun Electronics Co., Ltd. of China; and Shenzhen Vmartego Electronic Commerce Co., Ltd. of China. The complainant requests that the Commission issue a general exclusion order or, in the alternative, issue a limited exclusion order, and cease and desist orders and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3519'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

Issued: December 30, 2020.

Katherine Hiner,

Supervisory Attorney.

[FR Doc. 2020–29199 Filed 1–5–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Bureau of Alcohol, Tobacco, Firearms and Explosives

[OMB Number 1140–NEW]

Agency Information Collection Activities; Proposed eCollection for eComments Requested; New Information Collection; Prohibited Persons Questionnaire—ATF Form 8620.57

AGENCY: Bureau of Alcohol, Tobacco, Firearms and Explosives, Department of Justice.

ACTION: 60-Day notice.

SUMMARY: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), Department of Justice (DOJ), will submit the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection (IC) is also being published to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and will be accepted for 60 days until March 8, 2021.

FOR FURTHER INFORMATION CONTACT: If you have additional comments, regarding the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact: Lakisha Gregory, Chief, Personnel Security Division, either by mail at 99 New York Avenue NE, Washington, DC 20226, by email at *Lakisha.Gregory@atf.gov,* or by telephone at 202–648–9260.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

—Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

—Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

—Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and

—Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

1. *Type of Information Collection (check justification or form 83):* New collection.

2. *The Title of the Form/Collection:* Prohibited Persons Questionnaire.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:*

Form number (if applicable): ATF Form 8620.57.

Component: Bureau of Alcohol, Tobacco, Firearms and Explosives, U.S. Department of Justice.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Individuals or households.

Other (if applicable): None.

Abstract: The Prohibited Persons Questionnaire—ATF Form 8620.57 will be used to determine if a candidate for Federal or contractor employment at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), is prohibited from possessing or receiving firearms or explosives as described in 18 U.S.C. 922(g) or (n), and/or 18 U.S.C. 842(i).

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 2,000 respondents will use the form annually, and it will take each respondent approximately 5 minutes to complete their responses.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated annual public burden associated with this collection is 167 hours, which is equal to 2,000 (# of respondents) * 0.0833333 (5 minutes).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE, 3E.405A, Washington, DC 20530.

Dated: December 30, 2020.

Melody Braswell,

Department Clearance Officer for PRA, Department of Justice.

[FR Doc. 2020–29197 Filed 1–5–21; 8:45 am]

BILLING CODE 4410–18–P

LIBRARY OF CONGRESS

Copyright Office

[Docket No. 2020–13]

Satellite Television Community Protection and Promotion Act of 2019 Study: Notice and Request for Public Comment

AGENCY: Copyright Office, Library of Congress.

ACTION: Notice of Inquiry.

SUMMARY: The U.S. Copyright Office is initiating a study to evaluate the impact on the satellite television market of the Satellite Television Community Protection and Promotion Act of 2019's adoption of new statutory requirements for certain uses of the section 119 compulsory license for distant-into-local satellite transmission, and sunsetting of other uses from the license. The Office seeks public comment on this topic to assist in preparing a report to Congress.

DATES: Written comments are due on or before March 8, 2021.

ADDRESSES: The Copyright Office is using the regulations.gov system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov.* Specific instructions are available on the Copyright Office website at *http://www.copyright.gov/policy/119.* If electronic submission of comments is not feasible due to lack of access to a computer and/or the internet, please contact the Office, using the contact information below, for special instructions.

FOR FURTHER INFORMATION CONTACT: Kimberley Isbell, Deputy Director of Policy and International Affairs, *kisbell@copyright.gov,* or Chris Weston, Senior Counsel for Policy and International Affairs, *cwes@copyright.gov.* They can be reached by telephone at 202–707–3000.

SUPPLEMENTARY INFORMATION: On December 20, 2019, the President signed the Satellite Television Community Protection and Promotion Act of 2019 (''STCPPA''), which makes permanent the satellite carrier distant broadcast

signal license found in section 119 of the Copyright Act (17 U.S.C. 119) for non-network stations as well as for network stations transmitted both to recreational vehicles (''RVs'') and commercial trucks and to ''short markets'' that lack one or more of the four most widely available network stations.[1] The STCPPA removes other previously permitted uses of the license and requires that a satellite carrier provide local service in all 210 designated market areas (''DMAs'') if it wishes to utilize the section 119 license.[2] The STCPPA also amends several provisions of the Communications Act.[3]

Simultaneously with the enactment of the STCPPA, the Appropriations Committee of the U.S. House of Representatives directed the Register of Copyrights to conduct a study on the impact of the expiration of the STCPPA's predecessor—the STELA Reauthorization Act of 2014 (''STELAR'')[4]—on the satellite television market.[5] The Committee expressed concern that the distant signal provisions of section 119 ''may provide a below-market incentive for a mature satellite industry to restrict local news transmission.''[6]

I. Background

A. The Section 119 Distant Broadcast Signal License

In 1988, Congress enacted the Satellite Home Viewer Act (''SHVA''),[7] which created a temporary statutory license (section 119 of the Copyright Act) for satellite carriers to retransmit distant network and certain non-network broadcasts to subscribers with satellite dishes. Distant network retransmissions were available only to those subscribers living in ''unserved households.''[8] This statutory license, also known as a compulsory license, allowed satellite carriers to retransmit broadcast signals without the network's permission, so long as they paid a government-determined royalty rate.[9] The section 119 license was intended to encourage satellite carriers to ''develop and flourish'' in the absence of a sufficient marketplace[10] and was scheduled to expire at the end of 1994.[11]

The section 119 license created by SHVA was extended for successive five year periods in 1994,[12] 1999,[13] 2004,[14] 2010,[15] and 2014.[16] With each extension, Congress also modified the statutory terms of the section 119 license. For example, by the time of the 2014 enactment of STELAR, there were multiple types of unserved households eligible to receive distant broadcast signals defined in the statute, including RVs, commercial trucks, and households in ''short markets'' (markets where one of the four most viewed networks is not available from the local carrier).

In the five years following STELAR's reauthorization of the section 119 license, use of that license sharply decreased. Royalties paid by one of the two satellite carriers in this market, AT&T's DirecTV, decreased by 86.75% between 2014 and 2018.[17] Royalties paid by the other satellite carrier, DISH Network, decreased by 85% during the same reporting period.[18] In terms of gross numbers, as of 2019, between 500,000 and 870,000 households received at least one distant signal under the pre-STCPPA section 119 license.[19] It is estimated that these subscribers typically live in rural areas of the United States.[20]

This decline in use of the section 119 license has been attributed primarily to the transformation of the television marketplace since 2014, which is exemplified by ''over-the-top'' (''OTT'') television services that offer broadcast network programming over the internet, such as Hulu with Live TV, YouTube TV, and Sling TV, none of which rely upon a statutory license to operate but instead negotiate licenses with broadcast networks in the marketplace.[21]

B. The Satellite Television Community Protection and Promotion Act of 2019

With STELAR due to expire at the end of 2019, and with it the section 119 compulsory license, Congress had to decide whether to extend the license again, and, if so, whether the extension should be for another fixed-year term. Congress decided not to reauthorize several of the uses of the license and to

[1] Satellite Television Community Protection and Promotion Act of 2019 (''STCPPA''), Public Law 116–94, 133 Stat. 2534, 3201 (2019).

[2] The STCPPA contained a transition provision that allowed satellite carriers who had been utilizing the license but did not satisfy the additional conditions set forth in the STCCPA to continue to use a limited version of the existing license through May 31, 2020. That transitional authorization has now expired. *See infra* Section I.B.

[3] 47 U.S.C. 151 *et seq.*

[4] STELA Reauthorization Act of 2014, Public Law 113–200, 128 Stat. 2059 (2014).

[5] Staff of H.R. Comm. on Appropriations, 116th Cong., Further Consolidated Appropriations Act, 2020, Legislative Text and Explanatory Statement (Comm. Print 2020). While STCPPA made permanent several provisions of STELAR, it also allowed other provisions to expire.

[6] *Id.*

[7] Public Law 100–667, 102 Stat. 3949.

[8] For purposes of the Satellite Home Viewer Act of 1988, ''unserved households'' were defined as households of individuals who live in an area where they cannot receive a ''Grade B'' television signal via a rooftop antenna, and have not, at the time they become subscribers to a satellite service that carries a network signal, subscribed within 90 days to a cable system that provides the signal of a station affiliated with that network. *See* U.S. Copyright Office, The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis 104–05 (1992), *https://copyright.gov/reports/cable-sat-licenses1992.pdf.* The section 119 definitions of ''unserved households'' evolved as the license was extended over the subsequent 26 years.

[9] The Copyright Office has, since 1989, administered the section 119 license, which includes collecting statements of account and royalties from satellite carriers and distributing the royalties to the appropriate rights holders. *See Statutory License for Secondary Transmissions for Satellite Carriers— Section 119,* U.S. Copyright Office, *https://www.copyright.gov/licensing/sec_119.html.*

[10] H.R. Rep. No. 887, 100th Cong., 2d Sess., pt. 1, at 15 (1988). *See also H.R. Rep. No.* 116–354, at 5 (2019) (''Congress created the section 119 license during the satellite industry's nascency to allow satellite television to better compete with cable.'').

[11] Public Law 100–667, 102 Stat. 3949, 3960.

[12] Satellite Home Viewer Act of 1994, Public Law 103–369, 108 Stat. 3477 (1994).

[13] Satellite Home Viewer Improvement Act of 1999 (''SHVIA''), Public Law 106–113, 113 Stat. 1501A–523 (1999).

[14] Satellite Home Viewer Extension and Reauthorization Act of 2004 (''SHVERA''), Public Law 108–447, 118 Stat. 3394 (2004).

[15] Satellite Television Extension and Localism Act of 2010 (''STELA''), Public Law 111–174, 124 Stat. 1218 (2010).

[16] STELAR, Public Law 113–200, 128 Stat. 2059 (2014).

[17] *See* U.S. Copyright Office, *Analysis and Recommendations Regarding the Section 119 Compulsory License* 2 (June 3, 2019), *https://www.copyright.gov/laws/hearings/views-concerning-section-119-compulsory-license.pdf.*

[18] *See id.* Since the 2018 reporting periods, satellite receipts have further declined. According to information from the U.S. Copyright Office's Licensing Division, total satellite receipts in 2019 were down 20.8% from 2018, and total satellite receipts for the first half of 2020 were down 20% from the first half of 2019. *See Licensing Division,* U.S. Copyright Office, Report of Receipts 10/31/2020, 2, *https://www.copyright.gov/licensing/receipts.pdf.*

[19] The 500,000 subscribers estimate is from the National Association of Broadcasters. *See Narrow Satellite Legislation Should Expire as Congress Intended,* Nat'l Ass'n of Broadcasters, 2 (Sept. 2018), *http://www.nab.org/documents/newsRoom/pdfs/NAB_STELAR_expiration.pdf.* The 870,000 subscribers estimate is from the Satellite Broadcasting and Communications Association. *See Reauthorize and Revitalize the Satellite Home Viewer Act, Satellite Broad. & Commc'ns Ass'n,* 1 (last visited Nov. 30, 2020), *http://www.sbca.org/documents/Rural_Sat_Act.pdf.* The number of subscribers who receive distant signals under the current license is not publicly available.

[20] *See* H.R. Rep. No. 116–354, at 4 (2019); Letter from Timothy P. McKone, Executive Vice President, Federal Relations, AT&T, to Jerrold Nadler, Chairman, and Doug Collins, Ranking Member, U.S. House of Representatives, Comm. on the Judiciary 1 (Apr. 19, 2019), *https://www.copyright.gov/laws/hearings/views-concerning-section-119-compulsory-license.pdf.*

[21] *See* H.R. Rep. No. 116–354, at 6 (2019); U.S. Copyright Office, *Analysis and Recommendations Regarding the Section 119 Compulsory License* 2 (June 3, 2019), *https://www.copyright.gov/laws/hearings/views-concerning-section-119-compulsory-license.pdf.*

make others permanent. Specifically, in the STCPPA,[22] Congress removed coverage of the following ''unserved households'' from the section 119 distant network signal license:

- Households that cannot receive a local over-the-air signal via an antenna; [23]
- Households that receive a waiver from a local network affiliate to receive a distant signal; [24]
- ''Grandfathered'' households that received distant signals via a section 119 license on or before October 31, 1999; [25] and
- Households eligible for the statutory exemption related to receiving ''C-Band'' satellite signals.[26]

For a satellite carrier to transmit distant signals to these households, it must now negotiate directly with the broadcaster for a license.

Additionally, the STCPPA made availability of the section 119 license for transmission of distant network signals permanent for the following ''unserved households'':[27]

- RVs and commercial trucks; [28] and
- Subscribers located in short markets.[29]

The STCPPA made the use of the section 119 license for these purposes contingent upon satellite carriers providing local-into-local network signals to each of the 210 television designated market areas (''DMAs'').[30] It also established a transition period (through May 31, 2020) during which subscribers covered under STELAR who were no longer eligible for the new license (as amended by the STCPPA) remained eligible to receive distant network signals from their satellite carriers.[31]

In amending section 119, Congress was particularly concerned with satellite subscribers' ability to access local network stations. As the House Judiciary Committee described the situation in its STCPPA Report:

> Most satellite television subscribers receive local broadcast programming that is retransmitted from their local network stations. When a satellite carrier provides such ''local service,'' subscribers have access to important local news, local weather, and local emergency information. For some (typically rural) subscribers, instead of seeing news, weather, or emergency information from their own towns, they get retransmissions of ''distant'' programming from outside of their local market. Those subscribers see network programming from a larger, sometimes much farther, market like New York or Los Angeles instead.[32]

In other words, Congress believed that the section 119 license, operating under government-set royalty rates, risked undermining rural communities' access to local broadcast stations because it encouraged satellite carriers to carry distant-into-local instead of local-into-local broadcast signals.

In light of that concern, Congress sought in the STCPPA to account for ''the need to prioritize access to local programming'' [33] by requiring every satellite carrier using the section 119 license to provide local network television service in all of the 210 DMAs. Additionally, by removing several household types from coverage under section 119, Congress believed that these households would be more likely to receive local instead of distant network signals.[34] Congress also ''acknowledge[d] the vulnerabilities that some households might face in a purely market-based system'' [35] by reauthorizing and making permanent the section 119 license for RVs and commercial trucks and households in short markets.

C. The Current Study

In its Committee Print accompanying the Further Consolidated Appropriations Act, 2020, the Committee on Appropriations of the U.S. House of Representatives, in agreement with the U.S. Senate, expressed a ''concern that the distant signal provision contained in the STELA Reauthorization Act of 2014 [''STELAR''] . . . may provide a below-market incentive for a mature satellite industry to restrict local news transmission.'' [36] The statement went on to recognize that STELAR was due to expire at the end of 2019, and directed the Register of Copyrights to ''conduct a study on the impact on the market post-expiration,'' and deliver the results of this study to the House and Senate Committees on Appropriations by June 20, 2021.[37]

Pursuant to this direction, the U.S. Copyright Office is seeking public comment via this notice, as well as via a separate questionnaire that will be directed to ''unserved household'' subscribers both previously and currently covered by the section 119 license. A copy of this questionnaire is available at *http://www.copyright.gov/policy/119.* The questions in this notice are divided as to who should answer them, based upon the different stakeholders in the section 119 satellite television ecosystem. The overall aim of these questions is to ascertain (a) whether the STCPPA appropriately incentivizes satellite carriers to provide local network signals to their residential subscribers and (b) the impact of the changes to the section 119 license on RVers and commercial truckers.

II. Subjects of Inquiry

The Copyright Office invites written comments on the subjects below. A party choosing to respond to this Notice of Inquiry need not address every subject, but the Office requests that responding parties clearly identify and separately address each subject for which a response is submitted.

1. General Questions

a. Post-STCPPA, do households that previously did not receive local network stations from their satellite provider now receive them?

b. The STCPPA removed the use of the section 119 license for households that are unable to receive local network stations via an antenna, as well as for certain other categories of households. How do these households now receive network signals? Are they distant or local network signals?

c. The STCPPA makes a revised section 119 license permanent, on the condition that all licensees provide local-into-local service. Does this change resolve previously-voiced concerns about a subsidized distant-into-local license discouraging the provision of local network service by section 119 licensees?

d. Have the changes to the section 119 license made by STCPPA affected the availability of network retransmission service for households previously covered by the license? If so, how?

e. Have the changes to the section 119 license made by STCPPA affected the market for television service for households previously covered by the license? If so, how?

[22] STCPPA, Public Law 16–94, 133 Stat. 2534, 3201 (2019).

[23] 17 U.S.C. 119(d)(10)(A) (text repealed and replaced by Public Law 116–94, 133 Stat. 2534, 3201 (2019)).

[24] 17 U.S.C. 119(d)(10)(B) (text repealed and replaced by Public Law 116–94, 133 Stat. 2534, 3201 (2019)).

[25] 17 U.S.C. 119(d)(10)(C) (repealed 2019).

[26] 17 U.S.C. 119(d)(10)(E) (repealed 2019).

[27] The STCPPA also made permanent the section 119 license for transmission of distant non-network signals to all subscribers. *See* 17 U.S.C. 119(a)(1).

[28] 17 U.S.C. 119(d)(10)(A).

[29] 17 U.S.C. 119(d)(10)(B).

[30] *See* 17 U.S.C. 119(a)(2)(A); (f)(7).

[31] Public Law 116–94, 133 Stat. 3203 (2019).

[32] H.R. Rep. No. 116–354, at 4 (2019).

[33] H.R. Rep. No. 116–354, at 6 (2019).

[34] H.R. Rep. No. 116–354, at 7 (2019).

[35] H.R. Rep. No. 116–354, at 6 (2019).

[36] Staff of H.R. Comm. on Appropriations, 116th Cong., Further Consolidated Appropriations Act, 2020, Legislative Text and Explanatory Statement(Comm. Print 2020).

[37] *Id.*

2. Questions for Satellite Television Subscribers in Unserved Households.[38]

When answering, please indicate if you receive satellite service at your residence, your RV, or your commercial truck. Please also indicate which category of ''unserved household'' applies to you.

a. Before June 1, 2020, did you receive distant network retransmissions (*i.e.,* network stations from markets outside of your local area) from DISH or DirecTV?

i. If your answer is ''yes,'' did you continue to receive the same distant networks after June 1, 2020?

(1) If you continued to receive the same distant networks, did the price of your subscription increase or decrease? If it did, was the reason for the change explained?

(2) If you did not continue to receive the same distant networks after June 1, 2020, did you receive access to new networks that are physically closer to you as a replacement for the distant networks you no longer receive? Did the price of your subscription increase or decrease? If it did, was the reason for the change explained?

ii. If your answer is ''no,'' did the price of your satellite subscription increase or decrease on or after June 1, 2020? If it did, was the reason for the change explained?

b. Before June 1, 2020, did you receive local network retransmissions (*i.e.,* network stations from a nearby market) from DISH or DirecTV?

i. If your answer is ''yes,'' did you continue to receive local networks from DISH or DirecTV on or after June 1, 2020?

(1) If you continued to receive local networks, did the price of your subscription increase or decrease? If it did, was the reason for the change explained?

(2) If you did not continue to receive local networks, did you receive access to replacement networks? Were these replacement networks physically closer to or further from your location? Did the price of your subscription increase or decrease? If it did, was the reason for the change explained?

c. If you received distant network retransmissions from DISH or DirecTV before June 1, 2020, did you begin to receive local network retransmissions from DISH or DirecTV on or after that date?

i. If you did begin to receive local networks on or after June 1, 2020, were the local networks in addition to or instead of the distant network retransmissions?

ii. If you did begin to receive local networks on or after June 1, 2020, did the price of your subscription increase or decrease?

d. Have you changed television service providers since June 1, 2020?

i. If your answer is ''yes,'' did you change to a different satellite provider, or did you obtain television service from a different type of service provider (such as a cable provider)? Why did you change television service providers?

e. If you are a commercial trucker, which satellite carrier do you use?

f. If you are an RVer, which satellite carrier do you use? Do you also receive satellite service at your residence? If so, is your home satellite carrier the same as your RV satellite carrier?

3. Questions for Satellite Carriers

a. If you relied upon the section 119 statutory license to provide distant-into-local network retransmissions before June 1, 2020, did you continue to rely upon the amended license (under the STCPPA) on or after that date?

i. If your answer is ''no,'' did you continue to provide distant-into-local network retransmissions after that date?

b. Do you meet the new STCPPA requirement of providing local-into-local network retransmissions to all 210 DMAs as a prerequisite for using the new section 119 statutory license to provide distant-into-local network retransmissions?

i. If your answer is ''no,'' what approach did you take to providing distant-into-local network retransmissions after May 31, 2020?

ii. If you declined to provide local-into-local network retransmissions for all 210 DMAs, thus forgoing the use of the section 119 license, and instead decided to make individual carriage deals with each broadcast network for distant-into-local retransmission, please explain your reasoning.

c. Did you use the transition license provided by the STCPPA from January 1, 2020 to May 31, 2020?

i. If your answer is ''no,'' please explain why you did not use the transition license.

ii. If you did use the transition license, did you use the new STCPPA license after May 31, 2020? If not, why not?

4. Question for Broadcasters

a. Has the expiration of certain provisions of the section 119 license impacted your ability to provide comparable television service to households previously subject to the section 119 license? If so, how?

Dated: December 30, 2020.

Shira Perlmutter,

Register of Copyrights and Director of the U.S. Copyright Office.

[FR Doc. 2020–29231 Filed 1–5–21; 8:45 am]

BILLING CODE 1410–30–P

[38] Households in unserved markets are households in one or more of the following categories:

- Households that cannot receive a local over-the-air signal via an antenna;
- Households that receive a waiver from a local network affiliate to receive a distant signal;
- ''Grandfathered'' households that received distant signals via a section 119 license on or before October 31, 1999;
- Households eligible for the statutory exemption related to receiving ''C-Band'' satellite signals;
- RVs and commercial trucks;
- Households located in short markets (meaning markets that lack one or more of the four most widely available network stations).

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0024]

Information Collection: NRC Form 446, ''Request for Approval of Official Foreign Travel by Non-Government Personnel''

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of submission to the Office of Management and Budget; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted a proposed collection of information to the Office of Management and Budget (OMB) for review. The information collection is entitled, NRC Form 446, ''Request for Approval of Official Foreign Travel by Non-Government Personnel.''

DATES: Submit comments by February 5, 2021. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: David Cullison, NRC Clearance Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0024 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0024.
- *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.* A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML20310A196.
- *Attention:* The PDR, where you may examine and order copies of public documents is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m. (EST), Monday through Friday, except Federal holidays.
- *NRC's Clearance Officer:* A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: *Infocollects.Resource@nrc.gov.*

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal Rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2020–0024 in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the OMB, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the NRC recently submitted a proposed collection of information to OMB for review entitled, NRC Form 446, ''Request for Approval of International Foreign Travel by Non-Government Personnel.'' The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** notice with a 60-day comment period on this information collection on August 27, 2020, (85 FR 53023).

1. *The title of the information collection:* NRC Form 446, ''Request for Approval of Official Foreign Travel by Non-Government Personnel.''
2. *OMB approval number:* An OMB control number has not yet been assigned to this proposed information collection.
3. *Type of submission:* New.
4. *The form number if applicable:* NRC Form 446.
5. *How often the collection is required or requested:* As needed.
6. *Who will be required or asked to respond:* Individuals who are not federal employees or individuals requesting official international travel on behalf of the NRC that is not being requested under the provisions of an active NRC contract.
7. *The estimated number of annual responses:* 1.
8. *The estimated number of annual respondents:* 1.
9. *An estimate of the total number of hours needed annually to comply with the information collection requirement or request:* 1.
10. *Abstract:* The information collected on NRC Form 446 is required to justify and receive approval for official international travel by individuals who are not federal employees or who are not traveling under the provisions of an active NRC contract. The information collected is required to coordinate with and obtain approval from the appropriate U.S. Department of State Chief of Mission. Absent the collected information, the official travel may not be approved.

Dated: December 30, 2020.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2020–29195 Filed 1–5–21; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. ACR2020; Order No. 5796]

FY 2020 Annual Compliance Report

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Postal Service has filed an Annual Compliance Report on the costs, revenues, rates, and quality of service associated with its products in fiscal year 2020. Within 90 days, the Commission must evaluate that information and issue its determination as to whether rates were in compliance with title 39, chapter 36, and whether service standards in effect were met. To assist in this, the Commission seeks public comments on the Postal Service's Annual Compliance Report.

DATES: *Comments are due:* February 1, 2021. *Reply Comments are due:* February 12, 2021.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Overview of the Postal Service's FY 2020 ACR
III. Procedural Steps
IV. Ordering Paragraphs

I. Introduction

On December 29, 2020, the United States Postal Service (Postal Service) filed with the Commission its Annual Compliance Report (ACR) for fiscal year (FY) 2020, pursuant to 39 U.S.C. 3652.[1]

[1] United States Postal Service FY 2020 Annual Compliance Report, December 29, 2020, at 1 (FY 2020 ACR). Public portions of the Postal Service's filing are available on the Commission's website at: *http://www.prc.gov.*

Section 3652 requires submission of data and information on the costs, revenues, rates, and quality of service associated with postal products within 90 days of the closing of each fiscal year. In conformance with other statutory provisions and Commission rules, the ACR includes the Postal Service's FY 2020 Comprehensive Statement, its FY 2020 annual report to the Secretary of the Treasury on the Competitive Products Fund, and certain related Competitive Products Fund material. *See respectively,* 39 U.S.C. 3652(g), 39 U.S.C. 2011(i), and 39 CFR 3060.20–23. In line with past practice, some of the material in the FY 2020 ACR appears in non-public annexes.

The filing begins a review process that results in an Annual Compliance Determination (ACD) issued by the Commission to determine whether Postal Service products offered during FY 2020 were in compliance with applicable title 39 requirements.

II. Overview of the Postal Service's FY 2020 ACR

Contents of the filing. The Postal Service's FY 2020 ACR consists of a 75-page narrative; extensive additional material appended as separate folders and identified in Attachment One; and an application for non-public treatment of certain materials, along with supporting rationale, filed as Attachment Two. The filing also includes the Comprehensive Statement,[2] Report to the Secretary of the Treasury, and information on the Competitive Products Fund filed in response to Commission rules. This material has been filed electronically with the Commission.

Scope of the filing. The material appended to the narrative consists of: (1) Domestic product costing material filed on an annual basis summarized in the Cost and Revenue Analysis (CRA); (2) comparable international costing material summarized in the International Cost and Revenue Analysis (ICRA); (3) worksharing-related cost studies; and (4) billing determinant information for both domestic and international mail. FY 2020 ACR at 2–3. Inclusion of these four data sets is consistent with the Postal Service's past ACR practices. As with past ACRs, the Postal Service has split certain materials into public and non-public versions. *Id.* at 3.

''*Roadmap*'' *document.* A roadmap to the FY 2020 ACR can be found in Library Reference USPS–FY20–9. This document provides brief descriptions of the materials submitted, as well as the flow of inputs and outputs among them; a discussion of differences in methodology relative to Commission methodologies in last year's ACD; and a list of special studies and a discussion of obsolescence, as required by Commission rule 3050.12. *Id.* at 3–4.

Methodology. The Postal Service states that it has adhered to the methodologies historically used by the Commission subject to changes identified and discussed in Library Reference USPS–FY20–9 and in prefaces accompanying the appended folders. *Id.* at 4.

Market dominant product-by-product costs, revenues, and volumes. Comprehensive cost, revenue, and volume data for all market dominant products of general applicability are shown directly in the FY 2020 CRA or ICRA. *Id.* at 6.

The FY 2020 ACR includes a discussion by class of each market dominant product, including costs, revenues, and volumes, workshare discounts, and passthroughs responsive to 39 U.S.C. 3652(b), and FY 2020 promotions. *Id.* at 6–35.

In response to the Commission's FY 2010 ACD directives,[3] the Postal Service states that it is providing information regarding its progress in increasing Flats prices, implementing operation changes aimed at lowering flats costs, effectuating costing methodology improvements, and phasing out the subsidy in Flats. FY 2020 ACR at 21. In Docket No. RM2018–1, the Commission codified and expanded the first directive as Rule 3050.50(f), which applies to all flat-shaped mail.[4] Accordingly, the Postal Service states that the information required by Rule 3050.50(f) is provided in Library Reference USPS–FY2020–45, noting that the section titled ''Costing Methodology Changes and Subsidy of the Flats Product'' responds to the second and third directives. FY 2020 ACR at 23–26. In addition, the Postal Service presented its schedule of above-average price increases for Flats. *Id.* at 22.

Service performance. The Postal Service notes that the Commission issued rules on periodic reporting of service performance measurement and customer satisfaction in FY 2010. Responsive information appears in Library Reference USPS–FY20–29. *Id.* at 36.

Customer satisfaction. The FY 2020 ACR discusses the Postal Service's approach for measuring customer experience and satisfaction; discusses survey modifications; describes the methodology; presents a table with survey results; compares the results from FY 2019 to FY 2020; and provides information regarding consumer access to postal services. *Id.* at 40–60.

Competitive products. The FY 2020 ACR provides costs, revenues, and volumes for competitive products of general applicability in the FY 2020 CRA or ICRA. For competitive products not of general applicability, data are provided in non-public Library References USPS–FY20–NP2 and USPS–FY20–NP27. *Id.* at 64. The FY 2020 ACR also addresses the competitive product pricing standards of 39 U.S.C. 3633. *Id.* at 64–71.

Market tests; nonpostal services. The Postal Service discusses three market dominant market tests conducted during FY 2020 as well as nonpostal services. *Id.* at 72–73.

III. Procedural Steps

Statutory requirements. Section 3653 of title 39 requires the Commission to provide interested persons with an opportunity to comment on the ACR and to appoint an officer of the Commission (Public Representative) to represent the interests of the general public. The Commission hereby solicits public comment on the Postal Service's FY 2020 ACR and on whether any rates or fees in effect during FY 2020 (for products individually or collectively) were not in compliance with applicable provisions of chapter 36 of title 39 or Commission regulations promulgated thereunder. Commenters addressing market dominant products are referred in particular to the applicable requirements (39 U.S.C. 3622(d) and (e) and 39 U.S.C. 3626); objectives (39 U.S.C. 3622(b)); and factors (39 U.S.C. 3622(c)). Commenters addressing competitive products are referred to 39 U.S.C. 3633.

The Commission also invites public comment on the cost coverage matters the Postal Service addresses in its filing; service performance results; levels of customer satisfaction achieved; and such other matters that may be relevant to the Commission's review.

Access to filing. The Commission has posted the publicly available portions of

[2] In years prior to 2013, the Commission reviewed the Postal Service's reports prepared pursuant to 39 U.S.C. 2803 and 39 U.S.C. 2804 (filed as the Comprehensive Statement by the Postal Service) in its ACD. However, as it has for the past several years, the Commission intends to issue a separate notice soliciting comments on the comprehensive statement and provide its related analysis in a separate report from the ACD.

[3] Docket No. ACR2010, Annual Compliance Determination, March 29, 2011, at 106–107 (FY 2010 ACD).

[4] *Id.* at 23; *see* Docket No. RM2018–1, Order Adopting Final Rules on Reporting Requirements Related to Flats, May 8, 2019 (Order No. 5086).

the FY 2020 ACR on its website at: *http://www.prc.gov.*

Comment deadlines. Comments by interested persons are due on or before February 1, 2021. Reply comments are due on or before February 12, 2021. The Commission, upon completion of its review of the FY 2020 ACR, comments, and other data and information submitted in this proceeding, will issue its ACD.

Public Representative. Kenneth E. Richardson is designated to serve as the Public Representative to represent the interests of the general public in this proceeding. Neither the Public Representative nor any additional persons assigned to assist him shall participate in or advise as to any Commission decision in this proceeding other than in his or her designated capacity.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. ACR2020 to consider matters raised by the United States Postal Service's FY 2020 Annual Compliance Report.
2. Pursuant to 39 U.S.C. 505, the Commission appoints Kenneth E. Richardson as an officer of the Commission (Public Representative) in this proceeding to represent the interests of the general public.
3. Comments on the United States Postal Service's FY 2020 Annual Compliance Report to the Commission are due on or before February 1, 2021.
4. Reply comments are due on or before February 12, 2021.
5. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Erica A. Barker,

Secretary.

[FR Doc. 2020–29204 Filed 1–5–21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90834; File No. SR–FICC–2020–804]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Extension of the Review Period of an Advance Notice To Modify the Calculation of the MBSD VaR Floor To Incorporate a Minimum Margin Amount

December 31, 2020.

Pursuant to Section 806(e)(1) of Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') [1] and Rule 19b–4(n)(1)(i) under the Securities Exchange Act of 1934 (''Act''),[2] notice is hereby given that on November 27, 2020, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the advance notice SR–FICC–2020–804 (''Advance Notice'') as described in Items I and II below, which Items have been prepared by the clearing agency.[3] The Commission is publishing this notice to solicit comments on the Advance Notice from interested persons and to extend the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act.[4]

I. Clearing Agency's Statement of the Terms of Substance of the Advance Notice

This advance notice of Fixed Income Clearing Corporation (''FICC'') is attached [sic] hereto as Exhibit 5 and consists of a proposal to modify the calculation of the VaR Floor (as defined below) and the corresponding description in the FICC Mortgage-Backed Securities Division (''MBSD'') Clearing Rules (''MBSD Rules'') [5] to incorporate a ''Minimum Margin Amount'' as described in greater detail below.

The proposal would necessitate changes to the Methodology and Model Operations Document—MBSD Quantitative Risk Model (the ''QRM Methodology''), which is attached hereto as Exhibit 5.[6] FICC is requesting confidential treatment of this document and has filed it separately with the Secretary of the Commission.[7]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, the clearing agency included statements concerning the purpose of and basis for the Advance Notice and discussed any comments it received on the Advance Notice. The text of these statements may be examined at the places specified in Item IV below. The clearing agency has prepared summaries, set forth in sections A and B below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement on Comments on the Advance Notice Received From Members, Participants, or Others

FICC has not received or solicited any written comments relating to this proposal. FICC will notify the Commission of any written comments received by FICC.

(B) Advance Notice Filed Pursuant to Section 806(e) of the Clearing Supervision Act

Description of Proposed Change

The purpose of the proposed rule change is to modify the calculation of the VaR Floor and the corresponding description in the MBSD Rules to incorporate a Minimum Margin Amount.

The proposed changes would necessitate changes to the QRM Methodology. The proposed changes are described in detail below.

(i) Overview of the Required Fund Deposit and Clearing Fund Calculation

A key tool that FICC uses to manage market risk is the daily calculation and collection of Required Fund Deposits from Clearing Members. The Required Fund Deposit serves as each Clearing Member's margin. The aggregate of all Clearing Members' Required Fund Deposits constitutes the Clearing Fund of MBSD, which FICC would access should a defaulting Clearing Member's own Required Fund Deposit be insufficient to satisfy losses to FICC caused by the liquidation of that Clearing Member's portfolio.

The objective of a Clearing Member's Required Fund Deposit is to mitigate

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[1] 12 U.S.C. 5465(e)(1).

[2] 17 CFR 240.19b–4(n)(1)(i).

[3] On November 20, 2020, FICC filed this Advance Notice as a proposed rule change (SR–FICC–2020–017) with the Commission pursuant to Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), and Rule 19b–4 thereunder, 17 CFR 240.19b–4. A copy of the proposed rule change is *available at http://www.dtcc.com/legal/sec-rule-filings.aspx* (''Proposed Rule Change'').

[4] 12 U.S.C. 5465(e)(1)(H).

[5] Capitalized terms not defined herein are defined in the MBSD Rules, *available at http://www.dtcc.com/~/media/Files/Downloads/legal/rules/ficc_mbsd_rules.pdf.*

[6] Because FICC requested confidential treatment, the QRM Methodology was filed separately with the Secretary of the Commission as part of proposed rule change SR–FICC–2016–007 (the ''VaR Filing''). *See* Securities Exchange Act Release No. 79868 (January 24, 2017), 82 FR 8780 (January 30, 2017) (SR–FICC–2016–007) (''VaR Filing Approval Order''). FICC also filed the VaR Filing proposal as an advance notice pursuant to Section 806(e)(1) of the Clearing Supervision Act (12 U.S.C. 5465(e)(1)) and Rule 19b–4(n)(1)(i) under the Act (17 CFR 240.19b–4(n)(1)(i)), with respect to which the Commission issued a Notice of No Objection. *See* Securities Exchange Act Release No. 79843 (January 19, 2017), 82 FR 8555 (January 26, 2017) (SR–FICC–2016–801). The QRM Methodology has been amended following the VaR Filing Approval Order. *See* Securities Exchange Act Release Nos. 85944 (May 24, 2019), 84 FR 25315 (May 31, 2019) (SR–FICC–2019–001) and 90182 (October 14, 2020) 85 FR 66630 (October 20, 2020) (SR–FICC–2020–009).

[7] 17 CFR 240.24b–2.

potential losses to FICC associated with liquidation of such Clearing Member's portfolio in the event that FICC ceases to act for such Clearing Member (hereinafter referred to as a ''default''). Pursuant to the MBSD Rules, each Clearing Member's Required Fund Deposit amount currently consists of the greater of (i) the Minimum Charge or (ii) the sum of the following components: The VaR Charge, the Deterministic Risk Component, a special charge (to the extent determined to be appropriate), and, if applicable, the Backtesting Charge, Holiday Charge and Intraday Mark-to-Market Charge.[8] Of these components, the VaR Charge typically comprises the largest portion of a Clearing Member's Required Fund Deposit amount.

The VaR Charge is calculated using a risk-based margin methodology that is intended to capture the market price risk associated with the securities in a Clearing Member's portfolio. The VaR Charge provides an estimate of the projected liquidation losses at a 99% confidence level. The methodology is designed to project the potential gains or losses that could occur in connection with the liquidation of a defaulting Clearing Member's portfolio, assuming that a portfolio would take three days to hedge or liquidate in normal market conditions. The projected liquidation gains or losses are used to determine the amount of the VaR Charge, which is calculated to cover projected liquidation losses at 99% confidence level.[9]

On January 24, 2017, the Commission approved FICC's VaR Filing to make certain enhancements to the MBSD value-at-risk (''VaR'') margin calculation methodology including the VaR Charge.[10] The VaR Filing amended the definition of VaR Charge to, among other things, incorporate the VaR Floor.[11] The VaR Floor is a calculation using a percentage of gross notional value of a Clearing Member's portfolio and is used as an alternative to the VaR Charge amount calculated by the VaR model for Clearing Members' portfolios where the VaR Floor calculation is greater than the VaR model-based calculation. The VaR Floor currently addresses the risk that the VaR model may calculate too low a VaR Charge for certain portfolios where the VaR model applies substantial risk offsets among long and short positions in different classes of mortgage-backed securities that have a high degree of historical price correlation. FICC applies the VaR Floor at the Clearing Member portfolio level. The VaR Floor is calculated by multiplying the market value of a Clearing Member's gross unsettled positions by a designated percentage that is no less than 0.05% and no greater than 0.30%.[12] FICC informs Clearing Members of the applicable percentage utilized by the VaR Floor by an Important Notice issued no later than 10 Business Days prior to the implementation of such percentage.[13] The percentage currently designated by FICC is 0.10%.[14]

FICC's VaR model did not respond effectively to the recent levels of market volatility and economic uncertainty, and the VaR Charge amounts that were calculated using the profit and loss scenarios generated by FICC's VaR model did not achieve a 99% confidence level for the period beginning in March 2020 through the beginning of April 2020. FICC's VaR model calculates the risk profile of each Clearing Member's portfolio by applying certain representative risk factors to measure the degree of responsiveness of a portfolio's value to the changes of these risk factors. COVID–19 market volatility, borrower protection programs, home price outlook, and the Federal Reserve Bank of New York (''FRBNY'') authority to buy and sell mortgage-backed securities have created uncertainty in forward rates, origination/refinance pipelines, voluntary/involuntary mortgage prepayments, and supply/demand dynamics that are not reflected in the FICC VaR historical data set and the FICC VaR model incorporates this historical data to calibrate the volatilities of the risk factors and the correlations between risk factors. During this period, the market uncertainty and FRBNY purchases led to market price changes that exceeded the VaR model's projections which yielded insufficient VaR Charges—particularly for higher coupon TBAs [15] where current TBA market prices may reflect higher mortgage prepayment risk than implied by the VaR model's historical risk factor data in the lookback period.

In addition, the VaR Floor did not effectively address the risk that the VaR model calculated too low a VaR Charge for all portfolios during the recent market volatility and economic uncertainty. The VaR Floor is currently designed specifically to account for substantial risk offsets among long and short positions in different classes of mortgage-backed securities that have a high degree of historical price correlation. The recent market volatility and economic uncertainty resulted in a variance between historical price changes and observed market price changes resulting in TBA price changes significantly exceeding those implied by the VaR model risk factors as indicated by backtesting data.

FICC employs daily backtesting to determine the adequacy of each Clearing Member's Required Fund Deposit.[16] FICC compares the Required Fund Deposit for each Clearing Member with the simulated liquidation gains/losses using the actual positions in the Clearing Member's portfolio, and the actual historical security returns. During the recent market volatility and economic uncertainty, the VaR Charges and the Required Fund Deposits yielded backtesting deficiencies beyond FICC's risk tolerance.[17] FICC proposes to introduce a Minimum Margin Amount into the VaR Floor to enhance the MBSD VaR model performance and improve the backtesting coverage during periods of heightened market volatility and economic uncertainty. FICC believes that this proposal will increase the margin back-testing performance during periods of heightened market volatility by maintaining a VaR Charge that is appropriately calibrated to the current market price volatility.

(ii) Proposed Rule Change To Incorporate the Minimum Margin Amount in the VaR Floor

FICC is proposing to introduce a new calculation called the ''Minimum

[8] MBSD Rule 4 Section 2, *supra,* note 4.

[9] Unregistered Investment Pool Clearing Members are subject to a VaR Charge with a minimum targeted confidence level assumption of 99.5 percent. *See* MBSD Rule 4, Section 2(c), *supra* note 4.

[10] *See* VaR Filing Approval Order, *supra* note 5.

[11] The term ''VaR Floor'' is defined within the definition of VaR Charge. *See* MBSD Rule 1, *supra* note 4.

[12] The VaR Floor calculation and percentages are described within the definition of VaR Charge. *See* MBSD Rule 1, *supra* note 4.

[13] *See* definition of VaR Charge, MBSD Rule 1, *supra* note 4.

[14] *See* FICC–MBSD Important Notice MBS761–19, dated November 5, 2019 (notifying Clearing Members that the designated VaR Floor percentage is 0.10%).

[15] The vast majority of agency mortgage-backed securities trading occurs in a forward market, on a ''to-be-announced'' or ''TBA'' basis. In a TBA trade, the seller of MBS agrees on a sale price, but does not specify which particular securities will be delivered to the buyer on settlement day. Instead, only a few basic characteristics of the securities are agreed upon, such as the mortgage-backed security program, maturity, coupon rate and the face value of the bonds to be delivered. This TBA trading convention enables a heterogeneous market consisting of thousands of different mortgage-backed security pools backed by millions of individual mortgages to be reduced—for trading purposes—to a series of liquid contracts.

[16] For backtesting comparisons, FICC uses the Required Fund Deposit amount, without regard to the actual collateral posted by the Clearing Member.

[17] MBSD's monthly backtesting coverage ratios for Required Fund Deposit was 86.6% in March 2020 and 94.2% in April 2020.

Margin Amount'' to complement the existing VaR Floor calculation in the MBSD Rules. The Minimum Margin Amount would enhance backtesting coverage when there are potential VaR model performance challenges particularly when TBA price changes significantly exceed those implied by the VaR model risk factors as observed during March and April 2020.

The Minimum Margin Amount would be defined in the MBSD Rules as a minimum volatility calculation for specified net unsettled positions, calculated using the historical market price changes of such benchmark TBA securities determined by FICC. The definition would state that the Minimum Margin Amount would cover such range of historical market price moves and parameters as FICC from time to time deems appropriate using a look-back period of no less than one year and no more than three years.

FICC would set the range of historical market price moves and parameters from time to time in accordance with FICC's model risk management practices and governance set forth in the Clearing Agency Model Risk Management Framework (''Model Risk Management Framework'').[18] Under the proposed changes to the QRM Methodology, the Minimum Margin Amount would be computed through a dynamic haircut method that is based on observed TBA price moves that would provide a more reliable estimate for the portfolio risk level when current market conditions deviate from historical observations. The Minimum Margin Amount would also improve the responsiveness of the VaR model to a volatile market because it would have a shorter look back period from the VaR model.

The MBSD Rules currently define the VaR Floor as an amount designated by FICC that is determined by multiplying the sum of the absolute values of a Clearing Member's Long Positions and Short Positions, at market value, by a percentage designated by FICC that is no less than 0.05% and no greater than 0.30%.[19] FICC is proposing to revise the definition of the VaR Floor to incorporate the Minimum Margin Amount such that the VaR Floor would be the greater of (i) the VaR Floor Percentage Amount and (ii) the Minimum Margin Amount.

The ''VaR Floor Percentage Amount'' would be an amount derived using the current VaR Floor percentage calculation in the MBSD Rules: An amount designated by FICC that is determined by multiplying the sum of the absolute values of a Clearing Member's Long Positions and Short Positions, at market value, by a percentage designated by FICC that is no less than 0.05% and no greater than 0.30%. As with the existing VaR Floor percentage, FICC would determine the percentage within this range to be applied based on factors including but not limited to a review performed at least annually of the impact of the VaR Floor parameter at different levels within the range to the backtesting performance and to Clearing Members' margin charges. The VaR Floor percentage currently in place is 0.10%.

Likewise, as with the existing VaR Floor percentage, FICC would inform Clearing Members of the applicable percentage used in the VaR Floor Percentage Amount by Important Notice issued no later than 10 Business Days prior to implementation of such percentage. This rule change is not proposing to change the VaR Floor percentage or the manner in which this component is calculated.

The proposed Minimum Margin Amount would modify the VaR Floor to also cover circumstances where the market price volatility implied by the current VaR Charge calculation and the VaR Floor Percentage Amount is lower than market price volatility from corresponding price changes of the proposed TBA securities benchmarks observed during the lookback period. The proposed TBA securities benchmarks to be used in to calculate the Minimum Margin Amount in the QRM Methodology would be Federal National Mortgage Association (''Fannie Mae'') and Federal Home Loan Mortgage Corporation (''Freddie Mac'') conventional 30-year mortgage-backed securities (''CONV30''), Government National Mortgage Association (''Ginnie Mae'') 30-year mortgage-backed securities (''GNMA30''), Fannie Mae and Freddie Mac conventional 15-year mortgage-backed securities (''CONV15''), and Ginnie Mae 15-year mortgage-backed securities (''GNMA15''). These benchmarks were selected because they represent the majority of the trading volumes in the market.[20] This proposal would allow offsetting between short and long positions within TBA securities benchmarks given that the TBAs aggregated in each benchmark exhibit similar risk profiles and can be netted together to calculate the Minimum Margin Amount that will cover the observed market price changes for each portfolio.

FICC is proposing to modify the QRM Methodology to specify that the Minimum Margin Amount would be calculated per Clearing Member portfolio as follows: (i) Risk factors would be calculated using historical market prices of benchmark TBA securities and (ii) each Clearing Member's portfolio exposure would be calculated on a net position across all products and for each securitization program (*i.e.,* CONV30, GNMA30, CONV15 and GNMA15). The Minimum Margin Amount would be calculated by multiplying a ''base risk factor'' (described below) by the absolute value of the Clearing Member's net position across all products, plus the sum of each risk factor spread to the base risk factor multiplied by the absolute value of its corresponding position.

Pursuant to the QRM Methodology, FICC calculates an outright risk factor for GNMA30 and CONV30. The base risk factor for a portfolio for the Minimum Margin Amount would be based on whether GNMA30 or CONV30 constitutes the larger absolute net market value in each Clearing Member's portfolio. If GNMA30 constitute the larger absolute net market value in the portfolio, the base risk factor would be equal to the outright risk factor for GNMA30. If CONV30 constitute the larger absolute new market value in the portfolio, the base risk factor would be equal to the outright risk factor for the CONV30.[21] GNMA30 and CONV30 are

[18] *See* Securities Exchange Act Release Nos. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (SR–DTC–2017–008; SR–FICC–2017–014; SR–NSCC–2017–008); 84458 (October 19, 2018), 83 FR 53925 (October 25, 2018) (SR–DTC–2018–009; SR–FICC–2018–010; SR–NSCC–2018–009) and 88911 (May 20, 2020), 85 FR 31828 (May 27, 2020) (SR–DTC–2020–008; SR–FICC–2020–004; SR–NSCC–2020–008) (''Model Risk Management Framework Filings''). The Model Risk Management Framework sets forth the model risk management practices adopted by FICC, National Securities Clearing Corporation, and The Depository Trust Company. The Model Risk Management Framework is designed to help identify, measure, monitor, and manage the risks associated with the design, development, implementation, use, and validation of quantitative models. The Model Risk Management Framework describes (i) governance of the Model Risk Management Framework; (ii) key terms; (iii) model inventory procedures; (iv) model validation procedures; (v) model approval process; and (vi) model performance procedures.

[19] *See* definition of VaR Charge, MBSD Rule 1, *supra* note 4.

[20] FICC plans to map 10-year and 20-year TBA to the corresponding 15-year TBA security benchmark. As of August 31, 2020, 20-year TBAs account for less than 0.5%, and 10-year TBAs account for less than 0.1%, of the positions in MBSD clearing portfolios. In the QRM Methodology, these TBAs are not selected as separate TBA security benchmarks due to the limited trading volumes in the market. FICC will continue to monitor the position exposures in MBSD and determine if a modification to the QRM Methodology may be required.

[21] To illustrate the Minimum Margin Amount calculation, consider an example where a Clearing Member has a portfolio with a net long position

used as the baseline programs for determining the base risk factors because those programs constitute the majority part of the TBA market and the majority of positions in MBSD portfolios.

The proposed benchmark TBA securities, historical market price moves and parameters to be used to calculate the Minimum Margin Amount would be determined by FICC from time to time in accordance with FICC's model risk management practices and governance set forth in the Clearing Agency Model Risk Management Framework.[22]

FICC is proposing to introduce the Minimum Margin Amount to complement the VaR Floor during market conditions when the TBA prices are driven by factors outside of those implied by the VaR model. The Minimum Margin Amount would use observable TBA prices and would be calculated with a shorter lookback period than the VaR model so it would be more responsive to current market conditions. This proposal provides a more transparent and market price sensitive approach than alternatives, such as a VaR model parameter adjustment and VaR model add-on, would provide to Clearing Members.[23]

The lookback period of the Minimum Margin Amount is intended to be shorter than the lookback period used for the VaR model, which is 10 years, plus, to the extent applicable, one stressed period.[24] The lookback period of the Minimum Margin Amount would be between one to three years. Consistent with the VaR methodology outlined in the QRM Methodology and pursuant to the model performance monitoring required under the Model Risk Management Framework,[25] the lookback period would be analyzed to evaluate its sensitivity and impact to the model performance under four distinctive market regimes, epitomized by recent observations: (i) Calm markets where the VaR coverage is above 99% (*e.g.,* 2018); (ii) moderately volatile markets or external mortgage market events (*e.g.,* summer 2013; summer 2019); (iii) at the beginning of extreme market volatility (*e.g.,* 2007; COVID–19 in March), and (iv) post extreme market stress and mean-reverting to 'normal' market conditions. The lookback parameter in general affects (i) whether and how the floor will be invoked; (ii) the peak level of margin increase or the degree of procyclicality; and (iii) how quickly the margin will fall back to pre-stress levels. The lookback parameter update is intended to be an infrequent event and would typically happen only when there is a market regime change. The decision to update the lookback parameter would be based on the above-mentioned sensitivity analysis with considerations to the impacts to both the VaR Charges and the backtesting performance. The shorter lookback would more accurately reflect recent market conditions and would provide more responsiveness to market condition changes. The initial default lookback period for the Minimum Margin Amount calculation would be two years but may be adjusted as set forth above in accordance with FICC's model risk management practices and governance set forth in the Model Risk Management Framework.[26]

The Model Risk Management Framework would also require FICC to conduct model performance reviews of the Minimum Margin Amount methodology.[27] Specifically, FICC would monitor each Clearing Member's Required Fund Deposit and the aggregate Clearing Fund requirements versus the requirements calculated by the Minimum Margin Amount. In order to apply the risk management principles and model performance monitoring required under the Model Risk Management Framework, FICC's current model risk management practices would provide for a review of the robustness of the Required Fund Deposit inclusive of the Minimum Margin Amount by comparing the results versus the three-day profit and loss of each Clearing Member's margin portfolio based on actual market price moves. If the backtesting results of Required Fund Deposit inclusive of the Minimum Margin Amount did not meet FICC's 99% confidence level, FICC could consider adjustments to the Minimum Margin Amount, including changing the look-back period (as discussed above) and/or applying a historical stressed period to the Minimum Margin Amount calibration, as appropriate. Any adjustment to the Minimum Margin Amount calibration would be subject to the model risk management practices and governance process set forth in the Model Risk Management Framework.[28]

A. Proposed MBSD Rule Changes

In connection with incorporating the Minimum Margin Amount, FICC would modify the MBSD Rules to:

- Add a definition of ''Minimum Margin Amount'' and define it as a minimum volatility calculation for specified net unsettled positions of a Clearing Member, calculated using the historical market price changes of such benchmark TBA securities determined by FICC. The definition would specify that the Minimum Margin Amount shall cover such range of historical market price moves and parameters as the Corporation from time to time deems appropriate using a look-back period of no less than one year and no more than three years;
- add a definition of ''VaR Floor Percentage Amount'' which would be defined substantially the same as the current calculation for the VaR Floor percentage with non-substantive modifications to reflect that the calculated amount is a separate defined term; and
- move the defined term VaR Floor out of the definition of VaR Charge and define it as the greater of (i) the VaR Floor Percentage Amount and (ii) the Minimum Margin Amount.

across all products of $2 billion and CONV30 constitutes the larger absolute net market value in its portfolio as between GNMA30 and CONV30. Assume that the outright risk factor for CONV30 is 0.0096. Further assume the Clearing Member has a net short position of $30 million in CONV15, and the corresponding risk factor spread to the base risk factor is 0.006; a net short position of $500 million in GNMA30, and the corresponding risk factor spread is 0.005; and a net long position of $120 million in GNMA15, and the corresponding risk factor spread is 0.007. In order to generate the Minimum Margin Amount, FICC would multiply the base risk factor by the absolute value of the Clearing Member's net position across all products, plus the sum of each risk factor spread of the subsequent products multiplied by absolute value of the position for the respective product (*i.e.,* ([base risk factor] * ABS[portfolio net position]) + ([CONV15 spread risk factor] * ABS[CONV15 net position]) + ([GNMA30 spread risk factor] * ABS[GNMA30 net position]) + ([GNMA15 Spread Risk Factor] * ABS[GNMA15 net position])). The resulting Minimum Margin Amount would be $22.72 million.

[22] *See* Model Risk Management Framework, *supra* note 17.

[23] A VaR model parameter adjustment or a VaR model add-on would be implemented by estimating how much the VaR model should be modified to correspond to the current market price volatility. A parameter adjustment would be a modification to one or more VaR model risk factors while an add-on would be a percentage adjustment to the calculated VaR.

[24] FICC maintains the ability to include an additional period of historically observed stressed market conditions to a 10-year look-back period if FICC observes that (1) the results of the model performance monitoring are not within FICC's 99th percentile confidence level or (2) the 10-year look-back period does not contain sufficient stressed market conditions.

[25] The Model Risk Management Framework provides that all models undergo ongoing model performance monitoring and backtesting which is the process of (i) evaluating an active model's ongoing performance based on theoretical tests, (ii) monitoring the model's parameters through the use of threshold indicators, and/or (iii) backtesting using actual historical data/realizations to test a VaR model's predictive power. *See* Model Risk Management Framework Filings, *supra* note 17.

[26] *See* Model Risk Management Framework, *supra* note 17.

[27] *See* note 24.

[28] *See* Model Risk Management Framework, *supra* note 17.

B. Proposed QRM Methodology Changes

In connection with incorporating the Minimum Margin Amount, FICC would modify the QRM Methodology to:

- Describe how the Minimum Margin Amount, as defined in the MBSD Rules, would be calculated, including
- establishing CONV30, GNMA30, CONV15 and GNMA15 as proposed TBA securities benchmarks for purposes of the calculation and calculating risk factors using historical market prices of such benchmark TBA securities;
- using a dynamic haircut method that allows offsetting between short and long positions within a program and among different programs; and
- multiplying a ''base risk factor'' (based on whether GNMA30 or CONV30 constitutes the larger absolute net market value in each Clearing Member's portfolio) by the absolute value of the Clearing Member's net position across all products, plus the sum of each risk factor spread to the base risk factor multiplied by the absolute value of its corresponding position;
- describe the developmental evidence and impacts to backtesting performance and margin charges relating to Minimum Margin Amount; and
- make certain technical changes to the QRM Methodology to re-number sections and tables, and update certain section titles as necessary, to add a new section that describes the proposed Minimum Margin Amount and the selection of benchmarks.

C. Impact Studies

FICC performed an impact study on Clearing Members' portfolios for the period beginning February 3, 2020 through June 30, 2020 (''Impact Study Period'). If the proposed rule changes had been in place during the Impact Study Period compared to the existing MBSD Rules:

- Aggregate average daily aggregate VaR Charges would have increased by approximately $2.2 billion or 42%; and
- aggregate average daily Backtesting Charges would have decreased by approximately $450 million or 53%.

Impact studies also indicated that if the proposed rule changes had been in place, overall margin backtesting coverage (based on 12-month trailing backtesting) would have increased from approximately 99.3% to 99.6% through January 31, 2020 and approximately 97.3% to 98.5% through June 30, 2020.

D. Impacts to Clearing Members Over the Impact Study Period

On average, at the Clearing Member level, the Minimum Margin Amount would have increased the VaR Charge by $27 million over the Impact Study Period. The largest percent increase in VaR Charge for any Clearing Member would have been 146%, or $22 million. The largest dollar increase for any Clearing Member would have been $333 million, or 37% increase in the VaR Charge. The top 10 Clearing Members based on the size of their VaR Charges would have contributed 69.3% of the aggregate VaR Charges during the Impact Study Period had the Minimum Margin Amount been in place. The same Clearing Members would have contributed to 54% of the increase resulting from the Minimum Margin Amount during the Impact Study Period.

The portfolios that would have observed large percent increases were largely made up with concentrations in higher coupon TBAs and GNMA positions. However, no Clearing Members would have triggered the Excess Capital Premium charge [29] due to the increase in Required Fund Deposits resulting from the Minimum Margin Amount during the Impact Study Period.

(iii) Implementation Timeframe

FICC would implement the proposed changes no later than 20 Business Days after the later of the no objection to the advance notice and the approval of the related proposed rule change [30] by the Commission. FICC would announce the effective date of the proposed changes by Important Notice posted to its website.

Anticipated Effect on and Management of Risk

FICC believes that the proposed change, which consists of a proposal to modify the calculation of the VaR Floor and the corresponding description in the MBSD Rules to incorporate a Minimum Margin Amount, would enable FICC to better limit its exposure to Clearing Members arising out of the activity in their portfolios. As stated above, the proposed charge is designed to enhance the MBSD VaR model performance and improve the backtesting coverage during periods of heightened market volatility and economic uncertainty. The proposed charge would help ensure that FICC maintains an appropriate level of margin to address its risk management needs.

Specifically, the proposed rule change seeks to remedy potential situations that are described above where FICC's VaR model, including the existing VaR Floor, does not respond effectively to increased market volatility and economic uncertainty and the VaR Charge amounts do not achieve a 99% confidence level. Therefore, by enabling FICC to collect margin that more accurately reflects the risk characteristics of its Clearing Members, the proposal would enhance FICC's risk management capabilities.

By providing FICC with a more effective limit on its exposures, the proposed change would also mitigate risk for Members because lowering the risk profile for FICC would in turn lower the risk exposure that Members may have with respect to FICC in its role as a central counterparty. Further, the proposal is designed to meet FICC's risk management goals and its regulatory obligations, as described below.

Consistency With the Clearing Supervision Act

Although Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act entitled the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') does not specify a standard of review for an advance notice, its stated purpose is instructive: To mitigate systemic risk in the financial system and promote financial stability by, among other things, promoting uniform risk management standards for systemically important financial market utilities and strengthening the liquidity of systemically important financial market utilities.[31]

FICC believes that the proposal is consistent with the Clearing Supervision Act, specifically with the risk management objectives and principles of Section 805(b), and with certain of the risk management standards adopted by the Commission pursuant to Section 805(a)(2), for the reasons described below.

(i) Consistency With Section 805(b) of the Clearing Supervision Act

Section 805(b) of the Clearing Supervision Act [32] states that the objectives and principles for the risk management standards prescribed under Section 805(a) shall be to, among other things, promote robust risk management, promote safety and soundness, reduce systemic risks, and support the stability of the broader financial system. For the reasons described below, FICC believes that the

[29] Excess Capital Premium is assessed when the Clearing Member's VaR Charge exceeds the Excess Capital it maintains.

[30] *Supra* note 3.

[31] *See* 12 U.S.C. 5461(b).

[32] *See* 12 U.S.C. 5464(b).

proposed changes in this advance notice are consistent with the objectives and principles of the risk management standards as described in Section 805(b) of the Clearing Supervision Act.

FICC is proposing to modify the calculation of the VaR Floor and the corresponding description in the MBSD Rules and QRM Methodology to incorporate a Minimum Margin Amount which would enable FICC to better limit its exposure to Clearing Members arising out of the activity in their portfolios. FICC believes the proposed changes are consistent with promoting robust risk management because the changes would better enable FICC to limit its exposure to Clearing Members in the event of a Clearing Member default by collecting adequate prefunded financial resources to cover its potential losses resulting from the default of a Clearing Member and the liquidation of a defaulting Clearing Member's portfolio. Specifically, the proposed Minimum Margin Amount would modify the VaR Floor to cover circumstances, such as market volatility and economic uncertainty, where the current VaR Charge calculation and the Var Floor is lower than market price volatility from corresponding TBA securities benchmarks. The proposed changes are designed to more effectively measure and address risk characteristics in situations where the risk factors used in the VaR method do not adequately predict TBA prices. As reflected in backtesting studies, FICC believes the proposed changes would appropriately limit FICC's credit exposure to Clearing Members in the event that the VaR model yields too low a VaR Charge in such situations. Such backtesting studies indicate that average daily Backtesting Charges would have decreased by approximately $450 million or 53% during the Impact Study Period and the overall margin backtesting coverage (based on 12 month trailing backtesting) would have improved from approximately 97.3% to 98.5% through June 30, 2020 if the Minimum Margin Amount calculation had been in place. Improving the overall backtesting coverage level would help FICC ensure that it maintains an appropriate level of margin to address its risk management needs.

The use of the Minimum Margin Amount would reduce risk by allowing FICC to calculate the exposure in each portfolio using the risk spread based on observed TBA price moves of TBA positions within each portfolio. As reflected by backtesting studies during the Impact Study Period, using observed market prices of such benchmark TBA securities to set risk exposure would provide a more reliable estimate than the FICC VaR historical data set for the portfolio risk level when current market conditions deviate from historical observations. This proposal would allow offsetting between short and long positions within TBA securities benchmarks given that the TBAs aggregated in each benchmark exhibit similar risk profiles and can be netted together to calculate the Minimum Margin Amount that will cover the observed market price changes for each portfolio. Adding the Minimum Margin Amount to the VaR Floor would help to ensure that the risk exposure during periods of market volatility and economic uncertainty is adequately captured in the VaR Charges. FICC believes that would help to ensure that FICC continues to accurately calculate and assess margin and in turn, collect sufficient margin from its Clearing Members and better enable FICC to limit its exposures that could be incurred when liquidating a portfolio.

For these reasons, FICC believes the proposed changes would help to promote MBSD's robust risk management, which, in turn, is consistent with reducing systemic risks and supporting the stability of the broader financial system, consistent with Section 805(b) of the Clearing Supervision Act.[33]

FICC also believes the changes proposed in this advance notice are consistent with promoting safety and soundness, which, in turn, is consistent with reducing systemic risks and supporting the stability of the broader financial system, consistent with Section 805(b) of the Clearing Supervision Act.[34] As described above, the proposed changes are designed to help ensure that FICC is collecting adequate prefunded financial resources to cover its potential losses resulting from the default of a Clearing Member and the liquidation of a defaulting Clearing Member's portfolio in times of market volatility and economic uncertainty. Because the proposed changes would better position FICC to limit its exposures to Clearing Members in the event of a Clearing Member's default, FICC believes the proposed changes are consistent with promoting safety and soundness, which, in turn, is consistent with reducing systemic risks and supporting the stability of the broader financial system.

[33] *Id.*

[34] *Id.*

(ii) Consistency With 805(a)(2) of the Clearing Supervision Act

Section 805(a)(2) of the Clearing Supervision Act[35] authorizes the Commission to prescribe risk management standards for the payment, clearing and settlement activities of designated clearing entities, like FICC, and financial institutions engaged in designated activities for which the Commission is the supervisory agency or the appropriate financial regulator. The Commission has adopted risk management standards under Section 805(a)(2) of the Clearing Supervision Act[36] and Section 17A of the Securities Exchange Act of 1934 (the ''Act'')[37] (the risk management standards are referred to as the ''Covered Clearing Agency Standards'').[38]

The Covered Clearing Agency Standards require registered clearing agencies to establish, implement, maintain, and enforce written policies and procedures that are reasonably designed to be consistent with the minimum requirements for their operations and risk management practices on an ongoing basis.[39] FICC believes that this proposal is consistent with Rules 17Ad–22(e)(4)(i) and (e)(6)(i), each promulgated under the Act,[40] for the reasons described below.

Rule 17Ad–22(e)(4)(i) under the Act[41] requires a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those exposures arising from its payment, clearing, and settlement processes by maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence. As described above, FICC believes that the proposed changes would enable it to better identify, measure, monitor, and, through the collection of Clearing Members' Required Fund Deposits, manage its credit exposures to Clearing Members by maintaining sufficient resources to cover those credit exposures fully with a high degree of confidence. More specifically, as indicated by backtesting studies, implementation of a Minimum Margin Amount by changing the MBSD Rules and QRM Methodology as described herein would allow FICC to limit its

[35] *See* 12 U.S.C. 5464(a)(2).

[36] *See* 12 U.S.C. 5464(a)(2).

[37] *See* 15 U.S.C. 78q–1.

[38] *See* 17 CFR 240.17Ad–22.

[39] *Id.*

[40] 17 CFR 240.17Ad–22(e)(4), (e)(6) and (e)(23)(ii).

[41] *See* 17 CFR 240.17Ad–22(e)(4)(i).

credit exposures to Clearing Members in the event that the current VaR model yields too low a VaR Charge for such portfolios and improve backtesting performance. As indicated by the backtesting studies, aggregate average daily aggregate VaR Charges would have increased by approximately $2.2 billion or 42%, average aggregate daily Backtesting Charges would have decreased by approximately $450 million or 53% during the Impact Study Period and the overall margin backtesting coverage (based on 12-month trailing backtesting) would have improved from approximately 97.3% to 98.5% through June 30, 2020 if the Minimum Margin Amount calculation had been in place. By identifying and providing for appropriate VaR Charges, adding the Minimum Margin Amount to the VaR Floor would help to ensure that the risk exposure during periods of market volatility and economic uncertainty is adequately identified, measured and monitored. As a result, FICC believes that the proposal would enhance FICC's ability to effectively identify, measure and monitor its credit exposures and would enhance its ability to maintain sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence, consistent with the requirements of Rule 17Ad–22(e)(4)(i) of the Act.[42]

Rule 17Ad–22(e)(6)(i) under the Act[43] requires a covered clearing agency to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market. FICC believes that the proposed changes to adjust the VaR Floor to include the Minimum Margin Amount by changing the MBSD Rules and QRM Methodology as described herein are consistent with the requirements of Rule 17Ad–22(e)(6)(i) cited above. The Required Fund Deposits are made up of risk-based components (as margin) that are calculated and assessed daily to limit FICC's credit exposures to Clearing Members. FICC is proposing changes that are designed to more effectively measure and address risk characteristics in situations where the risk factors used in the VaR method do not adequately predict TBA prices. As reflected in backtesting studies, FICC believes the proposed changes would appropriately limit FICC's credit exposure to Clearing Members in the event that the VaR model yields too low a VaR Charge in such situations. Such backtesting studies indicate that aggregate average daily aggregate VaR Charges would have increased by approximately $2.2 billion or 42%, aggregate average daily Backtesting Charges would have decreased by approximately $450 million or 53% during the Impact Study Period and the overall margin backtesting coverage (based on 12-month trailing backtesting) would have improved from approximately 97.3% to 98.5% through June 30, 2020 if the Minimum Margin Amount calculation had been in place. By identifying and providing for appropriate VaR Charges, adding the Minimum Margin Amount to the VaR Floor would help to ensure that margin levels are commensurate with the risk exposure of each portfolio during periods of market volatility and economic uncertainty. The proposed changes would therefore allow FICC to continue to produce margin levels commensurate with the risks and particular attributes of each relevant product, portfolio, and market. As such, FICC believes that the proposed changes are consistent with the requirements of Rule 17Ad–22(e)(6)(i) of the Act.[44]

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received,[45] unless extended as described below. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.[46]

Pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act,[47] the Commission may extend the review period of an advance notice for an additional 60 days, if the changes proposed in the advance notice raise novel or complex issues, subject to the Commission providing the clearing agency with prompt written notice of the extension.

Here, as the Commission has not requested any additional information, the date that is 60 days after FICC filed the Advance Notice with the Commission is January 26, 2021. However, the Commission is extending the review period of the Advance Notice for an additional 60 days under Section 806(e)(1)(H) of the Clearing Supervision Act[48] because the Commission finds the Advance Notice is both novel and complex, as discussed below.

The Commission believes that the changes proposed in the Advance Notice raise novel and complex issues. Specifically, FICC developed this proposal as a direct response to lessons learned during the pandemic-related market volatility experienced in March and April 2020. As noted above, the TBA price changes significantly exceeded those implied by the VaR model risk factors, which resulted in insufficient VaR Charges during that time period. Moreover, because of the variance between historical price changes and the observed market price changes in March and April 2020, the current VaR Floor did not effectively address the risk that the margin model calculated too low a VaR Charge for all portfolios during that time period. Therefore, FICC has developed the proposal described in the Advance Notice to provide a more reliable estimate for the portfolio risk level when current market conditions deviate from historical observations, as occurred in March and April 2020. Determining the appropriate method to address this particular set of circumstances in the context of FICC's VaR Model presents novel and complex issues.

Moreover, the Commission understands that comments likely would assert that the changes to FICC's risk management practices described in the Advance Notice would have a significant and lasting impact on the market participants in the mortgage market.[49] Currently, there is the

[42] *Id.*

[43] *See* 17 CFR 240.17Ad–22(e)(6)(i).

[44] *Id.*

[45] 12 U.S.C. 5465(e)(1)(G).

[46] 12 U.S.C. 5465(e)(1)(F).

[47] 12 U.S.C. 5465(e)(1)(H).

[48] *Id.*

[49] *See* Letter from Kelli McMorrow, Head of Government Affairs, American Securities Association, dated December 18, 2020, to Vanessa Countryman, Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8173139-227003.pdf* (''ASA Letter''); Letter from Pete Mills, Senior Vice President, Mortgage Bankers Association, dated December 17, 2020, to Jay Clayton, Chairman, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8155338-226778.pdf* (''MBA Letter''); Letter from Christopher Killian, Managing Director, Securities Industry and Financial Markets Association, dated December 16, 2020, to Vanessa Countryman, Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8154310-226759.pdf* (''SIFMA Letter''); Letter from Curtis Richins, President & CEO, Mortgage Capital Trading, Inc., dated December 15, 2020, to Vanessa Countryman, Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8156568-226839.pdf* (''MCT Letter''); and Letter from James Tabacchi, Chairman, Independent Dealer and Trader Association, dated December 10, 2020, to Vanessa Countryman,

potential for additional economic uncertainty in the mortgage market due to, among other things, uncertainty associated with the effects of the Federal Reserve Bank of New York asset purchases of MBS and CARES Act mortgage forbearance programs.[50] The Commission believes that the potential impact on the mortgage market arising from this proposal also presents novel and complex issues.

Accordingly, pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act,[51] the Commission is extending the review period of the Advance Notice to March 27, 2021, which is the date by which the Commission shall notify the clearing agency of any objection regarding the Advance Notice, unless the Commission requests further information for consideration of the Advance Notice (SR–FICC–2020–804).[52]

The clearing agency shall post notice on its website of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the Advance Notice is consistent with the Clearing Supervision 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–FICC–2020–804 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–FICC–2020–804. 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 Advance Notice that are filed with the Commission, and all written communications relating to the Advance Notice between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2020–804 and should be submitted on or before January 29, 2021.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

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BILLING CODE 8011–01–P

Secretary, Commission, *available at https://www.sec.gov/comments/sr-ficc-2020-017/srficc2020017-8127766-226454.pdf* (''IDTA Letter''). In addition, commenters stated that the Commission should expect to receive additional comments that will assert substantive issues with the proposal. *Id.* Because the proposals contained in the Advance Notice and Proposed Rule Change raise the same substantive issues, *supra* note 3, the Commission considers all public comments received on the proposal regardless of whether the comments were submitted to the Advance Notice or the Proposed Rule Change.

[50] *See generally* Agency MBS Historical Operational Results and Planned Purchase Amounts, *https://www.newyorkfed.org/markets/ambs/ambs_schedule;* Consumer Finance Protection Bureau information site, *https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/mortgage-relief/.*

[51] 12 U.S.C. 5465(e)(1)(H).

[52] This extension extends the time periods under Sections 806(e)(1)(E) and (G) of the Clearing Supervision Act. 12 U.S.C. 5465(e)(1)(E) and (G).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90826; File No. 4–698]

Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail by BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

December 30, 2020.

I. Introduction

On December 18, 2020, the Operating Committee for Consolidated Audit Trail, LLC (''CAT LLC''), on behalf of the following parties to the National Market System Plan Governing the Consolidated Audit Trail (the ''CAT NMS Plan'' or ''Plan''):[1] BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the ''Participants,'' ''self-regulatory organizations,'' or ''SROs'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (''Exchange Act''),[2] and Rule 608

[1] The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016).

[2] 15 U.S.C 78k–1(a)(3).

thereunder,[3] a proposed amendment to the CAT NMS Plan that would authorize CAT LLC to revise the Consolidated Audit Trail Reporter Agreement (the ''Reporter Agreement'') and the Consolidated Audit Trail Reporting Agent Agreement (the ''Reporting Agent Agreement'') to insert the limitation of liability provisions (the ''Limitation of Liability Provisions''), as contained in *Appendix A,* attached hereto.[4] The Commission is publishing this notice to solicit comments from interested persons on the amendment.[5]

II. Description of the Plan

Set forth in this Section II is the statement of the purpose and summary of the amendment, along with information required by Rule 608(a)(4) and (5) under the Exchange Act,[6] substantially as prepared and submitted by the Participants to the Commission.[7]

A. Statement of Purpose of the Amendment to the CAT NMS Plan

The Proposed Amendment adds industry-standard Limitation of Liability Provisions to the Reporter Agreement and Reporting Agent Agreement.[8] The Limitation of Liability Provisions are appropriately tailored, consistent with longstanding principles regarding allocation of liability between self-regulatory organizations (''SROs'') and Industry Members, and have been agreed to in substance by virtually all Industry Members in connection with Order Audit Trail System (''OATS'') reporting.

Moreover, CAT LLC has retained Charles River Associates (''Charles River'') to conduct a comprehensive economic analysis of the liability issues presented by a potential CAT data breach. That analysis, attached to this Proposed Amendment as *Appendix B,* concludes that combining ongoing Commission oversight with a limitation on liability is the most efficient manner of addressing the complex issues presented by such potential breaches. Although Industry Members have advocated for an approach that would allow them (and their clients) to sue CAT LLC and the Participants in the event of a breach, the Charles River analysis demonstrates that this approach would significantly increase CAT LLC's costs—potentially without bounds—without any corresponding benefit to the Commission, investors, or other stakeholders, and likewise would not materially improve the security of the data transmitted to and stored within the CAT. Charles River also concludes that in light of the CAT's extensive cybersecurity (among other reasons), most potential breach scenarios, including the possibility of reverse engineering of Industry Members' trading algorithms, are relatively low-frequency events. For those reasons, and as discussed in detail below, there is no economic basis to deviate from industry norms by shifting liability from Industry Members to the Participants.

1. Background

On July 11, 2012, the Commission adopted Rule 613 of Regulation NMS to enhance regulatory oversight of the U.S. securities markets. The rule directed the Participants to create a ''Consolidated Audit Trail'' (also referred to herein as the ''CAT'') that would strengthen the ability of regulators—including the Commission and the SROs—to surveil the securities markets.[9] Following the adoption of Rule 613, the Participants prepared and proposed the CAT NMS Plan and then implemented the Plan's extensive requirements, including its cybersecurity requirements. The Commission approved that Plan in November 2016, concluding that it incorporates ''robust security requirements'' that ''provide appropriate, adequate protection for the CAT Data.'' [10]

In preparation for the launch of initial CAT equities reporting, in August 2019 the Participants shared with CAT LLC's Advisory Committee a draft Reporter Agreement.[11] Among other provisions, the draft Reporter Agreement contained an industry-standard limitation of liability provision that provided:

> TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL THE TOTAL LIABILITY OF CAT LLC OR ANY OF ITS REPRESENTATIVES TO CAT REPORTER UNDER THIS AGREEMENT FOR ANY CALENDAR YEAR EXCEED THE LESSER OF THE TOTAL OF THE FEES ACTUALLY PAID BY CAT REPORTER TO CAT LLC FOR THE CALENDAR YEAR IN WHICH THE CLAIM AROSE OR FIVE HUNDRED DOLLARS ($500.00). *See id.* § 5.5.

On August 29, 2019, CAT LLC's Operating Committee approved the then-draft Reporter Agreement—including the limitation of liability—by unanimous written consent.[12]

Following the approval process, the Securities Industry and Financial Markets Association (''SIFMA'') objected on behalf of certain Industry Members to the Reporter Agreement's limitation of liability provisions, particularly in relation to a potential CAT data breach. The Participants attempted to engage in a constructive dialogue with SIFMA and offered several proposed revisions to the limitation of liability provisions to address SIFMA's concerns. Among other proposals, the Participants offered: (1) To create a reserve (funded jointly by Industry Members and the Participants) to cover damages in the event of a data breach and (2) to revise the limitation of liability provision to conform with analogous provisions in the agreements that Industry Members require their retail customers to execute. Throughout those discussions, the Participants repeatedly stated that they were willing to consider any proposals offered by Industry Members whereby a limitation of liability provision would remain in the Reporter Agreement. SIFMA did not offer any substantive counterproposals; instead, it maintained its wholesale objection to any limitation of liability.

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[3] 17 CFR 242.608.

[4] *See* Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Ms. Vanessa Countryman, Secretary, Commission, dated December 18, 2020. The Participants state that these provisions would address the liability of CAT LLC and the Participants in the event of a CAT data breach. The Participants further state that in conjunction with this proposed amendment (the ''Proposed Amendment'') to the CAT NMS Plan, each Participant intends to file with the Commission corresponding proposed changes to its individual CAT Compliance Rules.

[5] 17 CFR 242.608.

[6] *See* 17 CFR 242.608(a)(4) and (a)(5).

[7] *See supra* note 4. Unless otherwise defined herein, capitalized terms used herein are defined as set forth in the CAT NMS Plan.

[8] The Participants believe that the CAT NMS Plan and certain individual self-regulatory organization rules already authorize the inclusion of the Limitation of Liability Provisions in the Reporter Agreement and the Reporting Agent Agreement. *See generally,* May 6, 2020 CAT LLC Memo of Law in Opposition to SIFMA'S Motion to Stay, Admin. Proc. File No. 3–19766. The Participants nonetheless submit this Proposed Amendment to provide industry members (''Industry Members'') and other interested constituencies with an opportunity to comment on the Limitation of Liability Provisions.

[9] *See* 17 CFR 242.613 (2012).

[10] *SEC, Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail,* Release No. 34–79318; File No. 4–698, at 715 (Nov. 15, 2016), *https://www.sec.gov/rules/sro/nms/2016/34-79318.pdf.*

[11] The Advisory Committee is comprised of broker-dealers of varying sizes and types of business, a clearing firm, an individual who maintains a securities account, an academic, institutional investors, an individual with significant and reputable regulatory expertise, and a service bureau that provides reporting services to one or more CAT Reporters. *See* CAT NMS Plan, Section 4.13(b). The Advisory Committee provides a forum for Industry Members (among other constituencies) to stay informed about, and to provide feedback to the Participants and the Operating Committee regarding, the operation and administration of the CAT. *See* CAT NMS Plan, Section 4.13(d)–(e).

[12] ''[T]he Operating Committee shall make all policy decisions on behalf of the Company in furtherance of the functions and objectives of the Company under the Exchange Act, any rules thereunder, including SEC Rule 613, and under this Agreement.'' CAT NMS Plan, Section 4.1.

Notwithstanding SIFMA's objections, between September 2019 and May 5, 2020, over 1,300 Industry Members executed the then-operative Reporter Agreement containing the limitation of liability provision. In advance of the initial equities reporting deadline, all CAT Reporters were required to test their ability to upload data to the CAT database and then complete a certification form. To enable the approximately 60 Industry Members who did not execute the Reporter Agreement to complete the testing and certification process, CAT LLC permitted them to test with obfuscated data pursuant to a ''Limited Testing Acknowledgment Form.''

In March and April 2020, 10 of those 60 Industry Members rescinded their execution of the Limited Testing Acknowledgement Forms and attempted to report production data to the CAT. Because those Industry Members had not executed the Reporter Agreement, FINRA CAT (*i.e.,* the Plan Processor) refused to permit them to submit production data. On April 22, 2020, SIFMA filed an application for review of actions taken by CAT LLC and the Participants pursuant to Sections 19(d) and 19(f) of the Exchange Act (the ''Administrative Proceeding''). SIFMA's application alleged that the Participants improperly required Industry Members to execute a Reporter Agreement as a prerequisite to submitting data to the CAT and that the agreement's limitation of liability provision was ''unfair, inappropriate, and bad policy.'' [13] Contemporaneously with the filing of the Administrative Proceeding, SIFMA moved for a stay of the requirement that Industry Members sign a Reporter Agreement, or in the alternative, asked the Commission to further delay the launch of CAT reporting on June 22, 2020. On May 13, SIFMA and the Participants informed the Commission that the parties reached a settlement of the Administrative Proceeding and requested that the Commission dismiss SIFMA's application. On May 14, the Commission granted the parties' dismissal request.

The settlement between SIFMA and the Participants did not resolve the underlying disagreement regarding the proper allocation of liability in the event of a loss due to a breach of the CAT. Rather, the settlement provided a path for the minority of Industry Members that had not signed the original Reporter Agreement to test data and, subsequently, report live production data to the CAT. In particular, the settlement permitted Industry Members to report data to the CAT pursuant to a revised Reporter Agreement that does not contain a limitation of liability provision, while the Participants prepared a filing with the Commission to resolve the parties' underlying disagreement regarding the proper allocation of liability. CAT LLC's and the Participants' decision to resolve the Administrative Proceeding was animated by a desire to progress unimpeded toward the CAT's June 22 compliance date.

Initial equities reporting commenced as planned on June 22, 2020. Since that time, Industry Members have been transmitting data to the CAT pursuant to the revised Reporter Agreement, which does not contain any limitation of liability provision.

2. The Limitation of Liability Provisions

The Limitation of Liability Provisions in this Proposed Amendment, each of which was included (in substance) in the original Reporter Agreement and Reporting Agent Agreement, are contained in Appendix A to this Proposed Amendment.[14] In sum and substance, the Limitation of Liability Provisions:

- Provide that CAT Reporters and CAT Reporting Agents accept sole responsibility for their access to and use of the CAT System, and that CAT LLC makes no representations or warranties regarding the CAT system or any other matter;
- Limit the liability of CAT LLC, the Participants, and their respective representatives to any individual CAT Reporter or CAT Reporting Agent to the lesser of the fees actually paid to CAT for the calendar year or $500;
- Exclude all direct and indirect damages; and
- Provide that CAT LLC, the Participants, and their respective representatives shall not be liable for the loss or corruption of any data submitted by a CAT Reporter or CAT Reporting Agent to the CAT System.[15]

2. The Limitation of Liability Provisions Reflect Longstanding Principles of Allocation of Liability Between Industry Members and Self-Regulatory Organizations

Limitations of liability are ubiquitous within the securities industry and have long governed the economic relationships between self-regulatory organizations and the entities that they regulate. The Limitation of Liability Provisions at issue here fall squarely within industry norms.

For over half of a century, U.S. securities exchanges have adopted rules to limit their liability for losses that Industry Members incur through their use of exchange facilities.[16] These rules broadly disclaim all liability to exchange members. By way of example, NASDAQ Equities Rule 4626 provides that the exchange ''shall not be liable for any losses, damages, or other claims arising out of the NASDAQ Market Center or its use.'' [17] Every other securities exchange has a similar rule, each of which was approved by the Commission as consistent with the Exchange Act.[18]

These Commission-approved limitations of liability support a foundational aspect of The Exchange Act: The self-regulatory framework. This bedrock principle of securities regulation dates back to 1934, when Congress initially codified the legal

[13] SIFMA also challenged the Reporter Agreement's provision that required Industry Members to indemnify CAT LLC and the Participants from third party claims arising from an Industry Member's unlawful acts and omissions including a failure: (1) By an Industry Member to protect and secure PII under its control, (2) of an Industry Member to protect its own systems from misuse, or (3) of an Industry Member to comply with its obligations under the Reporter Agreement. All CAT Reporters and CAT Reporting Agents (as defined in each of the Reporter Agreement and the Reporting Agent Agreement) eventually signed an Agreement that contained these industry standard indemnification provisions.

[14] The modifications in this Proposed Amendment are not intended to and do not affect the limitations of liability set forth in the agreements between individual Participants and Industry Members or SEC-approved rules regarding limitations of liability, or those limitations or immunities that bar claims for damages against the Participants and CAT LLC as a matter of law.

[15] Appendix A also contains language clarifying the entities to which the Limitation of Liability Provisions apply. *See* Appendix A at § 5.5.

[16] *See, e.g.,* Securities Exchange Act Release No. 14777 (May 17, 1978) (SR–CBOE–78–14) (noting that an exchange ''cannot proceed with innovative systems and procedures for the execution, clearance, and settlement of Exchange transactions . . . unless it is protected against losses which might be incurred by members as a result of their use of such systems,'' and further that ''[t]o the extent [a limitation of liability rule] enables the Exchange to proceed with innovative systems, competition should be enhanced.''); Securities Exchange Act Release No. 58137 (July 10, 2008), 73 FR 41145 (July 17, 2008) (SR–NYSE–2008–55) (explaining that exchange's limitation of liability rule encourages vendors to provide services to the exchange, which results in faster and more innovative products for order entry, execution, and dissemination of market information).

[17] *See* Nasdaq Equities Rule 4626 (Limitation of Liability) (emphasis added).

[18] New York Stock Exchange LLC Rule 17, BOX Exchange LLC, Rule 7230; Cboe Exchange, Inc., Rule 1.10; Investors Exchange LLC, Rule 11.260; Long-Term Stock Exchange, Rule 11.260; Miami International Securities Exchange, LLC, Rule 527; MEMX Rule 11.14. Although FINRA does not operate a securities exchange, the Commission has recognized that limiting FINRA's liability to Industry Members is consistent with the Exchange Act. *See* FINRA Rule 14108.

status of self-regulatory organizations.[19] The essence of this framework is that the Commission regulates the SROs, and, in turn, each SRO regulates its members.[20] To empower the self-regulatory organizations to regulate Industry Members, Congress granted the securities exchanges with the authority—and the responsibility—to enforce compliance with the securities laws among exchange members.[21] It is in this context that the Commission has concluded that rules requiring Industry Members to limit the liability of the Participants are consistent with the Exchange Act.

Likewise, the Commission has concluded that it is appropriate for self-regulatory organizations to adopt agreements with terms of use in connection with regulatory reporting facilities. The Commission has approved rules requiring Industry Members to agree to terms of use that customarily limit the liability of various regulatory reporting facilities—and the individual participants that comprise or operate those facilities—in connection with the reporting of order and execution data. And as with the CAT, those reporting facilities ingest substantial volumes of sensitive transaction data. For example, from 1998 through the present, the OATS has functioned as an integrated audit trail of order, quote, and trade data for equity securities. And to comply with their OATS reporting requirements, FINRA members must acknowledge an agreement that includes a limitation of liability provision that is similar in scope to the Limitation of Liability Provisions that are the subject of this Proposed Amendment.[22]

Congress and the Commission have recognized that these principles also apply to National Market System facilities comprised of self-regulatory organizations. In 1975, Congress enacted the Securities Act Amendments of 1975, which reinforced the importance of the self-regulatory framework. The 1975 legislation also tasked the exchanges with certain responsibilities for the creation of a ''national market system'' including the development and maintenance of a consolidated market data stream.[23]

Following the adoption of the market data rules of Regulation NMS in 2007, various NMS facilities have been formed to execute the regulation's mandates. There too, the Commission has concluded that limitations of liability are consistent with the Exchange Act. Accordingly, NMS facilities that receive transaction and customer data uniformly contain broad limitations of liability protecting both the actual facility and its constituent self-regulatory organizations. For example, the Consolidated Quotation Plan vendor and subscriber agreements—approved by the Commission—provide that no disseminating party will:

> be liable in any way to [Customer/Subscriber] or to any other person for (a) any inaccuracy, error or delay in, or omission of, (i) any such data, information or message, or (ii) the transmission or delivery of any such data, information or message, or (b) any loss or damage arising from or occasioned by (i) any such inaccuracy, error, delay or omission, (ii) non-performance, or (iii) interruption in any such data, information or message, due either to any negligent act or omission by any Disseminating Party or to any ''Force Majeure'' (*i.e.,* any flood, extraordinary weather conditions, earthquake or other act of God, fire, war, insurrection, riot, labor dispute, accident, action of government, communications or power failure, or equipment or software malfunction) or any other cause beyond the reasonable control of any Disseminating Party.[24]

As the Commission has recognized by approving limitations of liability in the rules of every self-regulatory organization and in the context of regulatory and NMS reporting facilities, limiting the liability of self-regulatory organizations to Industry Members is consistent with the Exchange Act. There is no reason to depart from the principles that served the securities markets well for over half of a century and create a different framework for CAT reporting. Indeed, to comply with the Administrative Procedure Act, the Commission may not depart from this longstanding approach without: (1) Acknowledging the change in course and (2) providing a reasoned justification for the new, conflicting policy. *See F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 514–15 (2009). And because the Participants have invested substantial resources into the CAT in reliance on the agency's repeated approval of limitations on SRO liability, the Commission must provide an even more detailed justification if it opts to depart from that longstanding principle of liability here. *See Smiley* v. *Citibank (South Dakota) N.A.,* 517 U.S. 735, 742 (1996) (explaining that ''change that does not take account of legitimate reliance on prior interpretation . . . may be 'arbitrary, capricious, or an abuse of discretion'') (citing 5 U.S.C. 706(2)(A)); *Fox Television Stations, Inc.,* 556 U.S. at 516 (''[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.'').

The case for a limitation of liability is particularly compelling where, as here, the Participants and CAT LLC are implementing the requirements of the CAT NMS Plan in their regulatory capacities. Rule 613 of Regulation NMS tasked the SROs with creating the CAT to achieve a core regulatory function—*i.e.,* to ''oversee our securities markets on a consolidated basis—and in so doing, better protect these markets and investors.''[25] During Rule 613's adoption, the Commission made clear that the rule imposed regulatory obligations on the Participants.[26] And SIFMA recognized the important

[19] *See* Exchange Act Section 6(d).

[20] Section 6 of Exchange Act requires the SROs to enact rules subject to SEC approval and enforce those rules against members. The Commission oversees the SROs through its examination authority under Section 17 and its enforcement authority pursuant to Sections 19(h)(1) and 21C.

[21] *See* Exchange Act Section 6(b) (original version) (providing that exchanges must have provisions for expelling, suspending, or otherwise disciplining members for conduct that is inconsistent with just and equitable principles of trade and willful violations of the Exchange Act).

[22] FINRA Rule 1013(a)(1)(R) requires all applicants for FINRA Membership to acknowledge the FINRA Entitlement Program Agreement and Terms of Use, which applies to OATS. Industry Members click to indicate that they agree to its terms—including its limitation of liability provision—every time they access FINRA's OATS system to report trade information (*i.e.,* repeatedly over the course of a trading day for many Industry Members).

[23] *See* Exchange Act Section 11A.

[24] *See* Consolidated Tape Association/Consolidated Quotation Plan, July 1978, as restated December 1995 available at *https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/CQ_Plan-9.17.2020.pdf.* Other NMS facilities and regulatory reporting systems likewise require Industry Members to agree to limit the liability of SROs. The Commission has approved multiple NMS Plans and rules regarding reporting facilities that condition use of the facility on the execution of an agreement. *See, e.g.,* Nasdaq Unlisted Trading Privileges Plan, available at *http://www.utpplan.com/DOC/Nasdaq-UTPPlan_Composite_as_of_September_17_2020.pdf;* Options Price Reporting Authority Plan, available at *https://assets.website-files.com/5ba40927ac854d8c970;bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Updated%20Exhibit%20A%20-%2006-19-2019.pdf.* All such agreements limit liability. *See, e.g.,* UTP Plan Subscriber Agreement, available at *http://www.utpplan.com/DOC/subagreement.pdf.*; Options Price Reporting Authority Vendor Agreement, available at *https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5c6f058889c3684b7571a552_OPRA%20Vendor%20Agreement%20100118.pdf*; Options Price Reporting Authority Subscriber Agreement, available at *https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5bf421d078a39dec23185180_hardcopy_subscriber_agreement.pdf.*

[25] Chairman Jay Clayton, SEC, Statement on the Status of the Consolidated Audit Trail, Nov. 14, 2017, available at *https://www.sec.gov/news/public-statement/statement-status-consolidated-audit-trail-chairman-jay-clayton.*

[26] SEC Release No. 34–67457; File No. S7–11–10, at 4 (Oct. 1, 2012) (noting lack of key information in prior audit trails needed for regulatory oversight) and 20 (noting that prior to the CAT, SROs and the Commission must use a variety of data sources to fulfill their regulatory obligations).

regulatory function of the CAT, expressing its ''belie[f] that a centralized and comprehensive audit trail would enable the SEC and securities self-regulatory organizations (''SROs'') to perform their monitoring, enforcement, and regulatory activities more effectively.'' [27]

Notwithstanding the Commission's repeated conclusion that limiting the liability of the Participants and their facilities is consistent with the Exchange Act, during prior negotiations and during the Administrative Proceeding, SIFMA objected to *any* limitation of liability provision in the Reporter Agreement based on a purported ''guiding principle'' that the party that controls the data should bear the risk. But this ''principle'' is inapplicable to a regulatory program with Commission-mandated reporting.[28] It is also inconsistent with how SIFMA members treat their own customers. Despite controlling sensitive data that would harm customers if compromised via data breach, Industry Members routinely disclaim such liability.[29] At bottom, the Participants are not aware of any context in which liability that is usually borne by Industry Members is shifted to their regulators, and there is no compelling reason to do so here.

3. *The Commission's Exemptive Relief Regarding PII Reduces the Risk of a Serious Data Breach*

During negotiations regarding liability issues prior to the Administrative Proceeding, SIFMA focused on the allocation of liability between CAT LLC and Industry Members in the event of a data breach involving investors' personally identifiable information (''PII''). For example, SIFMA expressed concerns in correspondence dated November 11, 2019 that focused on inclusion of PII in the CAT, and in a similar letter dated January 8, 2020 expressed concerns about bulk downloading of data and PII.[30] The Participants appreciate those concerns and remain vigilant in taking all appropriate cybersecurity measures to protect customer information (and all CAT data). Further, the Commission subsequently granted the Participants' requested relief to no longer require that Industry Members report social security numbers, dates of birth, and full account numbers for individual retail customers.[31]

This plan amendment ''minimizes the risk of theft of SSNs—the most sensitive piece of PII—by allowing the elimination of SSNs from the CAT, while still facilitating the creation of a reliable and accurate Customer-ID.'' [32] As discussed in detail by Charles River, and as the Commission has recognized, the exemptive relief limiting customer information to phonebook data (*i.e.,* name, address, and birth year) substantially minimizes the risk of a data breach involving sensitive customer data.[33] Due to this exemptive relief, the customer data stored in the CAT is comparable to the data reported to other regulatory reporting facilities, for which the Commission has previously approved limitations of liability.

4. The Proposed Limitation of Liability Provisions Are Necessary To Ensure the Financial Stability of the CAT

Limiting CAT LLC's and the Participants' liability in the event of a potential data breach is critical to ensuring a secure financial foundation for the CAT. In approving the CAT NMS Plan, the Commission mandated that the Operating Committee ''shall seek . . . to build financial stability to support [CAT LLC] as a going concern.'' [34] To that end, CAT LLC has obtained the maximum extent of cyber-breach insurance coverage available and has implemented a full cybersecurity program to safeguard data stored in the CAT, as required by Rule 613 and the Plan. Nevertheless, considering the potential for substantial losses that may result from certain categories of low probability cyberbreaches,[35] it is difficult to imagine how CAT LLC could ensure its solvency—as required by the CAT NMS Plan—without limiting its liability to Industry Members. Additionally, because the Commission has approved joint funding of CAT LLC by Industry Members and the Participants,[36] the Limitation of Liability Provisions also protect the financial industry (and, in turn, the investing public) from the possibility of funding catastrophic losses.[37]

5. An Economic Analysis Highlights the Importance of Limiting CAT LLC's and the Participants' Liability

CAT LLC retained Charles River to conduct an economic analysis of liability issues in relation to a theoretical CAT data breach.[38] There are two principal components to this analysis. First, Charles River identified specific potential breach scenarios that could impact the CAT, and quantified the likelihood and potential financial magnitude of each scenario.[39] Second, Charles River applied economic principles regarding the costs and benefits of litigation to the question of whether a limitation of liability should appropriately be included in the Reporter Agreement.[40]

Charles River's extensive economic analysis supports CAT LLC's and the Participants' decision to limit their liability to Industry Members. As

[27] August 17, 2010 SIFMA Letter at 1–2, available at *https://www.sec.gov/comments/s7-11-10/s71110-63.pdf.*

[28] *See, e.g., supra* at 7, n. 21 (limitations of liability in regulatory reporting facilities).

[29] *See, e.g.,* Vanguard Electronic Services Agreement (effective Sep. 5, 2017), available at *https://personal.vanguard.com/pdf/v718.pdf;* E*TRADE Customer Agreement (effective June 30, 2020), available at *https://us.etrade.com/e/t/estation/contexthelp?id=1209031000*); Bank of America Electronic Trading Terms and Conditions (Nov. 2020), available at *https://www.bofaml.com/content/dam/boamlimages/documents/PDFs/baml_electronic_trading_platform_terms_final_12_03_2015.pdf*).

[30] In February 2020, SIFMA clarified that, in addition to PII concerns, a minority of Industry Members had refused to sign the Reporter Agreement due to concerns regarding the ability of third parties to reverse engineer their proprietary trading strategies.

[31] Order Granting Conditional Exemptive Relief, Pursuant to Section 36 and Rule 608(e) of the Securities Exchange Act of 1934, from Section 6.4(d)(ii)(C) and Appendix D Sections 4.1.6, 6.2, 8.1.1, 8.2, 9.1, 9.2, 9.4, 10.1, and 10.3 of the National Market System Plan Governing the Consolidated Audit Trail, SEC Release No. 34–88393 (Mar. 17, 2020).

[32] *Id.* at 19.

[33] *Id.* at 20 (''Reduction of these additional sensitive PII data elements in the CAT is expected to further reduce both the attractiveness of the database as a target for hackers and reduce the impact on retail investors in the event of an incident of unauthorized access and use.''); Appendix B at 19, 21.

[34] CAT NMS Plan § 11.2(f).

[35] *See infra* at 13; *See generally* Appendix B.

[36] *See* CAT NMS Plan at §§ 11.1–11.2. The Commission recently reiterated its support for the CAT NMS Plan's joint-funding model, and explicitly rejected the industry's argument that the Participants should not be permitted to recover fees, costs, and expenses from Industry Members. *See* May 15, 2020 Amendments to the National Market System Plan Governing the Consolidated Audit Trail, SEC Release No. 34–88890; File No. S7–13–19, at 39–40.

[37] The CAT NMS Plan also mandates that the individual Participants shall not have any liability for any debts, liabilities, commitments, or any other obligations of CAT LLC or for any losses of CAT LLC. *See* CAT NMS Plan § 3.8(b). Accordingly, the Commission has authorized the substance of the Limitation of Liability Provisions as to self-regulatory organizations. Notably, SIFMA and its constituent Industry Members did not object to this provision of the CAT NMS Plan during the extensive notice and comment period for the CAT NMS Plan.

[38] In the Administrative Proceeding, SIFMA asserted that ''[t]he public has a significant interest in the allocation of risk (and resulting incentives) relating to a potential CAT data breach to ensure that data is not misused, misappropriated or lost.'' SIFMA Br. at 15. The Participants agree and asked Charles River to specifically assess whether a limitation of liability provision properly incentivizes all economic actors to take appropriate precautions against cyber incidents. *See* Appendix B at 1.

[39] Appendix B at Section II.

[40] Appendix B at Section III.

detailed in the Charles River white paper (the ''White Paper''), society can create incentives for economic actors—in this case, CAT LLC, the Participants, and FINRA CAT—to take precautions to minimize the costs of accidents and misconduct. These incentives can take various forms, including: (1) Enacting a *regulatory* regime that dictates specific *ex ante* rules that individuals and entities must follow, (2) asking courts to determine the appropriate standard of care *ex post* through *litigation,* or (3) a combination of both the regulatory and litigation approaches.[41] From an economic perspective, the choice between these methods is informed by the goal of maximizing social welfare—*i.e.,* ''the benefits [each] party derives from engaging in their activities, less the sum of the costs of precautions, the harms done, and the administrative expenses associated with the means of social control.'' [42] Charles River applied the well-settled body of economic literature regarding the respective benefits and costs of regulation and litigation, and concluded that allowing Industry Members to litigate against CAT LLC, the Participants, and FINRA CAT would provide minimal benefits while imposing substantial costs for all participants in the U.S. securities markets, including the Commission, Industry Members, the Participants, and the investing public. Under these circumstances, the economic analysis weighs heavily against permitting litigation and in favor of the Limitation of Liability Provisions.[43]

As discussed in the White Paper, a critical component of potential litigation benefits is the extent to which permitting Industry Members to litigate against CAT LLC and the Participants would incentivize CAT LLC and the Participants to appropriately invest in cybersecurity precautions.[44] Charles River addresses this question in the context of an extensive regulatory regime that the Commission enacted to govern CAT LLC's and the Plan Processor's cybersecurity policies, procedures, systems, and controls.[45] After reviewing those measures from an economic perspective, Charles River concurs with the Commission's assessment ''that the extensive, robust security requirements in the adopted Plan . . . provide appropriate, adequate protection for the CAT Data'' and concludes that private litigation would not result in additional appropriate cybersecurity measures or produce other benefits.[46] In fact, as parties that use the CAT to carry out their own regulatory functions, the Participants have a strong incentive (beyond the obligation to comply with the Commission rules governing the CAT) to ensure that the CAT is secure and operational.

The Participants note that Charles River's analysis is borne out by their extensive discussions with Industry Members regarding the cybersecurity of the CAT and liability issues.[47] During negotiations with SIFMA prior to the launch of CAT reporting and the filing of the Administrative Proceeding, the Participants repeatedly asked SIFMA to identify specific deficiencies in the CAT's cybersecurity program. SIFMA was unable to do so, which is not surprising in light of CAT's robust cybersecurity.[48] To the extent that Industry Members conclude that CAT LLC should make adjustments to its policies, procedures, systems, and controls, Industry Members (and other constituencies) have extensive avenues to provide feedback including through the Advisory Committee or by directly petitioning the Commission to amend the CAT NMS Plan.[49] Industry Members' inability to identify any meaningful deficiencies underscores Charles River's conclusion that CAT LLC is already properly incentivized to take necessary cyber precautions. Allowing Industry Members to litigate against CAT LLC and the Participants would not further improve the CAT's cybersecurity or produce any other programmatic benefits.[50]

Charles River's analysis also highlights that, as heavily regulated entities, CAT LLC and the Participants have a strong incentive to comply with the Commission's rules—*i.e.,* another advantage of the *ex-ante* regulatory regime already in place.[51] Moreover, as Charles River notes, regulatory systems are particularly appropriate where, as here, the regulator (*i.e.,* the Commission) is enacting rules that are designed to govern one entity (*i.e.,* CAT LLC).[52] As a result, ''the regulatory system is tailored specifically on an *ex-ante* basis with rules targeted to this particular firm.'' [53] As part of the regulatory regime, CAT LLC's cybersecurity policies, procedures, systems, and controls are subject to examination by the Office of Compliance Inspections and Examinations (on both a for-cause and cyclical basis).[54] And any cybersecurity deficiencies could, of course, be referred to the Division of Enforcement for an investigation and potential enforcement action.[55] As Charles River notes, this regulatory enforcement structure creates strong incentives for CAT LLC and the Participants to comply with the Commission's extensive cyber regulatory regime.[56]

In assessing the value of permitting Industry Members to sue CAT LLC and the Participants, an economic analysis also must consider the costs of litigation. Charles River's White Paper addresses this question and concludes that the costs of litigating a potential CAT data breach are likely to be both substantial and unquantifiable on an *ex-ante* basis.[57] Charles River also has identified ''several marginal operating costs'' that would result from eliminating a limitation of liability even in the absence of actual litigation, including costs associated with ''extra-marginal defensive investments in cyber risk protection, with reduced efficacy of the CAT system due to excess, litigation-driven security measures, or a cash build-up scheme that would be

[41] Appendix B at 3.

[42] Appendix B at 33 (citing Steven Shavell, ''Liability for Harm Versus Regulation of Safety,'' *The Journal of Legal Studies,* Vol. 13, No. 2 (June 1984), pp. 357–74).

[43] Appendix B at 53–54.

[44] Appendix B at 38.

[45] Appendix B at 3.

[46] Order Approving the NMS Plan Governing the CAT, Section V.F.4, p. 715; Appendix B at 3, 54.

[47] As part of the Participants' efforts to give SIFMA and its members further comfort as to the security of the CAT system, and as suggested by the Commission, the Participants have offered to facilitate a meeting with security officials from the SROs and the Industry Members to discuss the CAT's extensive cybersecurity and respond to questions that might constructively address SIFMA's concerns. The Participants remain willing to facilitate this meeting and look forward to opportunities to foster an open dialogue regarding security issues with Industry Members.

[48] *See, e.g.,* CAT NMS Plan, Section 6.6 (noting requirement that CAT LLC evaluate its information security program ''to ensure that the program is consistent with the highest industry standards for the protection of data'').

[49] As Charles River highlights, the sufficiency of the regulatory regime here is underscored by the ability of the Commission—whether in response to concerns from Industry Members or on its own initiative—to revise the applicable rules to impose additional cybersecurity measures on CAT LLC, the Plan Processor, and the Participants. *See* Appendix B at 43. The Commission has not hesitated to propose revisions when necessary, including, most recently in August 2020. *See* SEC Release No. 34–89632; File No. S7–10–20, Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security (Aug. 21, 2020).

[50] Appendix B at 54.

[51] Appendix B at 39. It is also worth noting that the Commission has recently reiterated that ''[t]he security and confidentiality of CAT Data has been—and continues to be—a top priority of the Commission.'' SEC Release No. 34–89632; File No. S7–10–20, Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security (Aug. 21, 2020), at 9.

[52] Appendix B at 3–4, 43.

[53] Appendix B at 43.

[54] Appendix B at 43.

[55] Appendix B at 3, 37.

[56] Appendix B at 3–4, 43.

[57] Appendix B at 46.

borne by the Participants/SROs and Industry Members who would ultimately pass those higher costs on to their customers, employees or owners.'' [58] Critically, these added costs—whether resulting from litigation, investment in cybersecurity beyond optimal levels, or any other source—ultimately would be passed along to investors (including retail investors). These added costs will ''likely lead[ ] to reduced trading levels, reduced participation in markets by investors, or increased costs of raising capital.'' [59] The White Paper also explains that excess cybersecurity measures driven by third-party litigation risk could reduce the CAT's effectiveness in serving the Commission's and the SROs' regulatory missions, and likewise could result in court-ordered security measures that conflict or interfere with the security regime adopted by the Commission.[60] The combination here of no articulable benefit of allowing litigation coupled with costs that are potentially ''substantial'' and ''unquantifiable'' present the quintessential economic case in favor of a limitation of liability.

Charles River's analysis of potential breach scenarios further supports the need for CAT LLC, the Participants, and FINRA CAT to limit their liability to Industry Members. Charles River identified eight potential scenarios in which a bad actor could unlawfully obtain, utilize, and monetize CAT data.[61] The analysis indicates that, in light of the CAT's extensive cybersecurity (among other reasons), most potential breaches are relatively low-frequency events because they are either difficult to implement, unlikely to be meaningfully profitable, or both.[62] Charles River's review supports the Commission's conclusion that CAT LLC's cybersecurity program provides ''appropriate, adequate protection for the CAT Data.'' [63] The Participants know of no valid basis for challenging that Commission finding.

During the negotiations prior to the Administrative Proceeding, SIFMA focused extensively on the possibility of a hacker reverse engineering certain Industry Members' proprietary trading strategies. In that regard, Charles River's scenario analysis indicates that reverse engineering of trading algorithms—and two other potential breach scenarios—could result in ''extremely'' severe economic consequences (*i.e.,* potentially greater than $100 million in damages).[64] In light of CAT LLC's cybersecurity and the attendant difficulties that a bad actor would face in monetizing these scenarios, Charles River concluded that all three of these potential categories of breaches (including reverse engineering of trading algorithms) are relatively low-frequency events.[65]

Even if these low probability scenarios occurred, there is no economic basis for shifting liability for potential catastrophic losses to CAT LLC or the Participants.[66] Indeed, if CAT LLC or the Participants could be required to fund such substantial losses, it would need to be reflected in the funding structure for the CAT, and the portion of the losses that is funded by the Participants would effectively be passed on to all market participants, including retail investors. Shifting liability to CAT LLC or the Participants is fundamentally inconsistent with the Commission's longstanding views on allocation of liability between self-regulatory organizations and Industry Members memorialized in the Commission-approved rules of every securities exchange, and in agreements for NMS facilities, as well as regulatory reporting facilities.[67]

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

The Participants propose to implement the Limitation of Liability Provisions by requiring all CAT Reporters and CAT Reporting Agents to execute revised agreements that contain the amended provisions.

D. Development and Implementation Phases

The Participants propose to require CAT Reporters and CAT Reporting Agents to execute the revised agreements upon Commission approval of this Proposed Amendment.

E. Analysis of Impact on Competition

The Participants do not believe the Proposed Amendment will have any impact on competition. The Proposed Amendment would require all CAT Reporters and CAT Reporting Agents to execute revised agreements that contain the amended provisions. Adopting the Proposed Amendment would, however, avoid the increased costs that would otherwise arise, and therefore would promote efficiency and capital formation in the U.S. securities markets. Indeed, the White Paper provides an extensive analysis indicating that the Proposed Amendment is the most efficient manner of addressing the allocation of liability in the event of a CAT data breach, and that other approaches (such as allowing third-party litigation) would generate few, if any, benefits while imposing significant costs.[68]

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Plan Sponsors in Accordance With Plan

Section 12.3 of the CAT NMS Plan states that, subject to certain exceptions, the Plan may be amended from time to time only by a written amendment, authorized by the affirmative vote of not less than two-thirds of all of the Participants, that has been approved by the SEC pursuant to Rule 608 or has otherwise become effective under Rule 608. The Participants, by a vote of the Operating Committee taken on December 15, 2020 have authorized the filing of this Proposed Amendment with the SEC in accordance with the Plan.[69]

H. Description of Operation of Facility Contemplated by the Proposed Amendment and Any Fees or Charges in Connection Thereto

Not applicable.

I. Terms and Conditions of Access

Any CAT Reporter or CAT Reporting Agent that fails to execute a revised agreement with the Limitation of Liability Provisions will not be permitted to transmit data to the CAT. Pursuant to the court's decision in *NASDAQ Stock Market, LLC* v. *SEC,* 961 F.3d 421 (D.C. Cir. 2020), this restriction will not constitute a denial of access to services within the meaning of Section 19(d) of the Exchange Act.

[58] Appendix B at 46.

[59] Appendix B at 47. The Commission has a statutory obligation to consider efficiency, competition, and effects on capital formation when engaging in rulemaking. *See* 15 U.S.C. 77b(b); 15 U.S.C. 78c(f); 15 U.S.C. 80a–2(c).

[60] Appendix B at 45.

[61] Appendix B at 2, 18–32.

[62] Appendix B at 18–32.

[63] Order Approving the NMS Plan Governing the CAT, Section V.F.4, p. 715.

[64] Appendix B at 2.

[65] Appendix B at 25. As Charles River explains, while ''[w]e ultimately deem it unlikely that a bad actor would seek to use CAT data in this way because of the difficulty in both achieving the hack as well as the effort to reverse engineer an algorithm, . . . [g]iven the potential value (severity) of this type of information, however, bad actors could be so motivated.''

[66] Appendix B at 50.

[67] *See supra* at Section A3.

[68] *See* Appendix B at Sections III(A)–(D).

[69] The Participants remain willing to work with SIFMA in good faith to resolve any remaining differing perspectives on liability. Although we believe that the Limitation of Liability Provisions in Appendix A are appropriate, we look forward to constructively engaging with SIFMA during the comment process to address any concerns that Industry Members may have.

J. Method and Frequency of Processor Evaluation

Not applicable.

K. Dispute Resolution

Not applicable.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amendment is consistent with the Exchange 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 4–698 on the subject line.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number 4–698. 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 plan amendment that are filed with the Commission, and all written communications relating to the amendment between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the Participants' offices. 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 4–698 and should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[70]

J. Matthew DeLesDernier,

Assistant Secretary.

APPENDIX A

Limited Liability Company Agreement of Consolidated Audit Trail, LLC

* * * * *

Article XII

[proposed additions]

* * * * *

Section 12.15. *Limitation of Liability.* Each CAT Reporter shall be required to execute an amended Consolidated Audit Trail Reporter Agreement containing, in substance, the limitation of liability provisions in Appendix E to this Agreement. Each Person engaged by a CAT Reporter to report CAT Data to the Central Repository on behalf of such CAT Reporter shall be required to execute an amended Consolidated Audit Trail Reporting Agent Agreement containing, in substance, the limitation of liability provisions in Appendix F to this Agreement. The Operating Committee shall have authority in its sole discretion to make non-substantive amendments to the limitation of liability provisions in the Consolidated Audit Trail Reporter Agreement and the Consolidated Audit Trail Reporting Agent Agreement.

* * * * *

Appendix E

[proposed additions]

* * * * *

Limitation of Liability Provisions in the CAT Reporter Agreement

5.4. *Disclaimer.* EXCEPT AS EXPRESSLY SET FORTH IN SECTION 5.1 OF THIS AGREEMENT, CATLLC MAKES NO REPRESENTATIONS OR WARRANTIES, ORAL OR WRITTEN, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, QUALITY, FITNESS FOR A PARTICULAR PURPOSE, COMPLIANCE WITH APPLICABLE LAWS, NON-INFRINGEMENT OR TITLE, SEQUENCING, TIMELINESS, ACCURACY OR COMPLETENESS OF INFORMATION, OR THOSE ARISING BY STATUTE OR OTHERWISE IN LAW, OR FROM A COURSE OF DEALING OR USAGE OF TRADE, REGARDING THE CAT SYSTEM OR ANY OTHER MATTER PERTAINING TO THIS AGREEMENT. CAT REPORTER ACCEPTS SOLE RESPONSIBILITY FOR ITS ACCESS TO AND USE OF THE CAT SYSTEM.

5.5. *Limitation of Liability.* TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL THE TOTAL LIABILITY OF CATLLC OR ANY OF ITS REPRESENTATIVES TO CAT REPORTER UNDER THIS AGREEMENT FOR ANY CALENDAR YEAR EXCEED THE LESSER OF THE TOTAL OF THE FEES ACTUALLY PAID BY CAT REPORTER TO CATLLC FOR THE CALENDAR YEAR IN WHICH THE CLAIM AROSE OR FIVE HUNDRED DOLLARS ($500.00). FOR AVOIDANCE OF DOUBT, THE TERM ''REPRESENTATIVES'' IN SECTION 5 AND THROUGHOUT THIS AGREEMENT SHALL INCLUDE EACH OF THE PARTICIPANTS, THE PLAN PROCESSOR AND ANY OTHER SUBCONTRACTORS OF THE PLAN PROCESSOR OR CATLLC PROVIDING SOFTWARE OR SERVICES IN CONNECTION WITH THE CAT SYSTEM, AND ANY OF THEIR RESPECTIVE AFFILIATES AND ALL OF THEIR DIRECTORS, MANAGERS, OFFICERS, EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, ADVISORS AND AGENTS.

5.6. *Damage Exclusion.* TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL CATLLC OR ANY OF ITS REPRESENTATIVES BE LIABLE TO CAT REPORTER OR ANY OTHER PERSON FOR LOST REVENUES, LOST PROFITS, LOSS OF BUSINESS, OR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY, PUNITIVE OR OTHER DIRECT OR INDIRECT DAMAGES OF ANY KIND OR NATURE, INCLUDING, SUCH DAMAGES ARISING FROM ANY BREACH OF THIS AGREEMENT, OR ANY TERMINATION OF THIS AGREEMENT, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT OR OTHERWISE, WHETHER OR NOT FORESEEABLE, EVEN IF CAT REPORTER OR ANY OTHER PERSON HAS BEEN ADVISED OR WAS AWARE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES.

5.7. *Data Exclusion.* TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL CATLLC OR ANY OF ITS REPRESENTATIVES BE LIABLE FOR ANY INCONVENIENCE CAUSED BY THE LOSS OF ANY DATA, FOR THE LOSS OR CORRUPTION OF ANY CAT REPORTER DATA OR FOR ANY DELAYS OR INTERRUPTIONS IN THE OPERATION OF THE CAT SYSTEM FROM ANY CAUSE.

* * * * *

Appendix F

[proposed additions]

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Limitation of Liability Provisions in the CAT Reporting Agent Agreement

5.4 *Disclaimer.* EXCEPT AS EXPRESSLY SET FORTH IN SECTION 5.1 OF THIS AGREEMENT, CATLLC MAKES NO REPRESENTATIONS OR WARRANTIES, ORAL OR WRITTEN, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY, QUALITY, FITNESS FOR A PARTICULAR PURPOSE, COMPLIANCE WITH APPLICABLE LAWS, NON-INFRINGEMENT OR TITLE, SEQUENCING, TIMELINESS, ACCURACY OR COMPLETENESS OF INFORMATION, OR THOSE ARISING BY STATUTE OR OTHERWISE IN LAW, OR FROM A COURSE OF DEALING OR USAGE OF TRADE, REGARDING THE CAT SYSTEM OR ANY OTHER MATTER PERTAINING TO THIS AGREEMENT. CAT REPORTING AGENT ACCEPTS SOLE RESPONSIBILITY FOR ITS ACCESS TO AND USE OF THE CAT SYSTEM.

[70] 17 CFR 200.30–3(a)(85).

5.5 *Limitation of Liability.* TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL THE TOTAL LIABILITY OF CATLLC OR ANY OF ITS REPRESENTATIVES TO CAT REPORTING AGENT UNDER THIS AGREEMENT FOR ANY CALENDAR YEAR EXCEED THE LESSER OF THE TOTAL OF THE FEES ACTUALLY PAID TO CATLLC BY THE CAT REPORTER THAT ENGAGED CAT REPORTING AGENT FOR THE CALENDAR YEAR IN WHICH THE CLAIM AROSE OR FIVE HUNDRED DOLLARS ($500.00). FOR AVOIDANCE OF DOUBT, THE TERM ''REPRESENTATIVES'' IN SECTION 5 AND THROUGHOUT THIS AGREEMENT SHALL INCLUDE EACH OF THE PARTICIPANTS, THE PLAN PROCESSOR AND ANY OTHER SUBCONTRACTORS OF THE PLAN PROCESSOR OR CATLLC PROVIDING SOFTWARE OR SERVICES IN CONNECTION WITH THE CAT SYSTEM, AND ANY OF THEIR RESPECTIVE AFFILIATES AND ALL OF THEIR DIRECTORS, MANAGERS, OFFICERS, EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, ADVISORS AND AGENTS.

5.6 *Damage Exclusion.* TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL CATLLC OR ANY OF ITS REPRESENTATIVES BE LIABLE TO CAT REPORTING AGENT OR ANY OTHER PERSON FOR LOST REVENUES, LOST PROFITS, LOSS OF BUSINESS, OR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY, PUNITIVE OR OTHER DIRECT OR INDIRECT DAMAGES OF ANY KIND OR NATURE, INCLUDING, SUCH DAMAGES ARISING FROM ANY BREACH OF THIS AGREEMENT, OR ANY TERMINATION OF THIS AGREEMENT, WHETHER SUCH LIABILITY IS ASSERTED ON THE BASIS OF CONTRACT, TORT OR OTHERWISE, WHETHER OR NOT FORESEEABLE, EVEN IF CAT REPORTING AGENT OR ANY OTHER PERSON HAS BEEN ADVISED OR WAS AWARE OF THE POSSIBILITY OF SUCH LOSS OR DAMAGES.

5.7 *Data Exclusion.* TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL CATLLC OR ANY OF ITS REPRESENTATIVES BE LIABLE FOR ANY INCONVENIENCE CAUSED BY THE LOSS OF ANY DATA, FOR THE LOSS OR CORRUPTION OF ANY DATA SUBMITTED BY CAT REPORTING AGENT OR FOR ANY DELAYS OR INTERRUPTIONS IN THE OPERATION OF THE CAT SYSTEM FROM ANY CAUSE.

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Appendix B

White Paper: Analysis of Economic Issues Attending the Cyber Security of the Consolidated Audit Trail

Date: December 18, 2020

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I. Introduction

Charles River Associates (''CRA'') [1] has been asked by a group of national securities exchanges [2] and the Financial Industry Regulatory Authority, Inc. (''FINRA'') (collectively ''Participants'' or ''SROs'') to assess the economic aspects of a potential cyber breach as a result of the operation of the Consolidated Audit Trail (''CAT''). The CAT is being implemented by the Participants in response to Rule 613, which the SEC adopted in 2012. Rule 613 was adopted to improve the regulation of U.S. equity and option markets by requiring the collection, storage, and access to a wide range of equity and option transactions and orders. The CAT exists so that the SEC and the SROs can more effectively monitor and regulate the subject securities markets to improve their transparency, robustness, and efficiency for the benefit of the investing public and capital markets as a whole.

The Participants and the securities industry agree that the CAT database contains sensitive information and the SEC has mandated extensive security requirements be implemented to protect the data from a wide range of cyber breaches. After considering the overall costs and benefits of the CAT, the SEC already has concluded that the cyber security requirements it imposed on the CAT sufficiently serve the public interest.[3]

The analyses presented in this paper support the Participants' proposal to adopt a limitation of liability provision in the CAT Reporter Agreement. Based on (1) an examination of specific potential breach scenarios and (2) a consideration of the economic and public policy elements of various regulatory and litigation approaches to mitigate cyber risk for the CAT, this paper concludes that a limitation on liability provision would serve the public interest in several ways. *First,* such a provision would facilitate the regulation of the U.S. equity and option markets at lower overall costs and higher economic efficacy than other approaches, such as allowing Industry Members [4] to litigate against CAT LLC. *Second,* the proposed limitation on liability would not undermine CAT LLC's existing and significant incentives to protect the data stored in the CAT system.

Summary: Cyber Breach Analysis. The first analysis we present is to identify specific potential breach scenarios and assess the relative difficulty of implementation, relative frequency, and conditional severity of each. As part of this assessment, we identified eight potential scenarios in which bad actors could attempt to unlawfully obtain, utilize, and monetize CAT data. Of course, we recognize that cyber-attacks on the CAT could vary from the scenarios we hypothesize, but we offer them to provide a framework to assess the economic exposures that flow from the gathering, storage, and use of CAT data. Our risk analysis indicates that most of these scenarios are relatively low frequency events because they are either difficult to implement, unlikely to be meaningfully profitable for a bad actor, or both.

The scenario analysis also indicates that three types of breaches—reverse engineering of trading algorithms, inserting fake data to

[1] The identification and qualifications of CRA's authors/principal investigators for this White Paper are presented in Section V below.

[2] As of January 2020, these consisted of: (1) BOX Exchange LLC, (2) Cboe BYX Exchange, Inc., (3) Cboe BZX Exchange, Inc., (4) Cboe EDGA Exchange, Inc., (5) Cboe EDGX Exchange, Inc., (6) Cboe C2 Exchange, Inc., (7) Cboe Exchange, Inc., (8) Investors Exchange LLC, (9) Long Term Stock Exchange, Inc., (10) Miami International Securities Exchange LLC, (11) MIAX Emerald, LLC, (12) MIAX PEARL, LLC, (13) NASDAQ BX, Inc., (14) Nasdaq GEMX, LLC, (15) Nasdaq ISE, LLC, (16) Nasdaq MRX, LLC, (17) NASDAQ PHLX LLC, (18) The NASDAQ Stock Market LLC, (19) New York Stock Exchange LLC, (20) NYSE American LLC, (21) NYSE Arca, Inc., (22) NYSE Chicago, Inc., and (23) NYSE National, Inc. In addition, a new member-owned equities trading platform, Members Exchange (''MEMX LLC'') launched in September 2020. These entities plus FINRA have been designated as ''Participants'' of the CAT NMS Plan and are self-regulatory organizations (''SROs'') under the Securities Exchange Act of 1934. See Securities and Exchange Commission, *Order Granting Conditional Exemptive Relief, Pursuant to Section 36 and Rule 608(e) of the Securities Exchange Act of 1934, from Section 6.4(d)(ii)(C) and Appendix D Sections 4.1.6, 6.2, 8.1.1, 8.2, 9.1, 9.2, 9.4, 10.1, and 10.3 of the National Market System Plan Governing the Consolidated Audit Trail,* Release No. 34–88393, March 17, 2020, p. 1, hereafter ''SEC, *March 17, 2020 Order.*''

[3] Securities and Exchange Commission, *Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail,* Release No. 34–79318, November 15, 2016, hereafter ''SEC, *Order Approving CAT,*'' Section IV. Discussion and Commission Findings, pp. 126–127.

[4] ''Industry Member'' is defined as, ''a member of a national securities exchange or a member of a national securities association'' in the ''Limited Liability Company Agreement of CAT NMS, LLC,'' p.5. The Securities Industry and Financial Markets Association (''SIFMA'') has represented their interests in this SEC rule-making endeavor.

wrongfully incriminate individuals or entities, and removing data to conceal misconduct—could result in ''extremely'' severe economic consequences (which we define as potentially greater than $100 million in damages). We conclude that all three of these types of breaches are relatively low frequency events.

Summary: Regulation vs. Litigation to Mitigate Cyber Risk for the CAT. The second analysis we present focuses on whether the cyber risk posed by CAT should be addressed through *ex-ante* regulation, *ex post* litigation, or a combination of both approaches. In a prior version of the CAT Reporter Agreement, CAT LLC included a limitation of liability provision, which memorialized the Participants' view that Industry Members should not be able to litigate against CAT LLC or the Participants to recover damages sustained as a result of a cyber breach. Although the current operative version of the Reporter Agreement does not contain a limitation of liability, we understand that CAT LLC is submitting this White Paper in connection with CAT LLC's request that the SEC amend the CAT NMS Plan to authorize such a provision. We understand that the Industry Members have opposed any limitation of liability provision and contend that CAT LLC, as the party holding the CAT data, should be subject to litigation by the Industry Members in the event of a cyber breach.

In deciding whether to approve Participants' proposed plan amendment, an important question for the SEC to address is whether, in light of the extensive cyber requirements already imposed on CAT LLC through regulation, the SEC-mandated nature of the CAT, and the ability of the SEC to bring enforcement actions to compel compliance, it is appropriate to *also* allow Industry Members to sue CAT LLC and the Participants. As part of our analysis, we specifically assess whether including a limitation of liability provision in the CAT Reporter Agreement is appropriate from the perspective of economic theory as applied to the specifics of this situation.

By applying the economic principles of liability and regulation as a means of motivating risk-minimizing behavior and considering the crucial role of the SEC's mandates regarding cyber security for the CAT (which already incorporate the concerns of entities involved in the National Market System as a whole), we conclude that the regulatory approach leads to the socially desirable level of investment in cyber security and protection of CAT data. We further conclude that SIFMA's position, which advocates allowing Industry Members to litigate against CAT LLC and the Participants in the event of a cyber breach, would result in increased costs for various economic actors—including CAT LLC, the Participants, Industry Members, and retail investors—without any meaningful benefit to the CAT's cyber security. At a high level (and as discussed in extensive detail below), we therefore conclude that CAT LLC's proposal to limit its liability and the liability of the Participants is well supported by applicable economic principles in the framework of the SEC's mission and its mandates regarding the CAT.

As a general matter, economic theory provides that society can motivate economic actors to take appropriate precautions to minimize the likelihood and consequences of accidents and misconduct through: (a) A regulatory approach (*i.e.,* dictating specific precautions, requirements, and standards in advance), (b) a litigation approach (*i.e.,* civil liability for damages caused by failing to adhere to a general standard of care), or (c) a combination of (a) and (b). At the outset, we note that we do not address this question in a vacuum. Rather, we conduct our examination in the context of an extensive regulatory program that the SEC has enacted mandating specific cyber standards, policies, procedures, systems, and controls that CAT LLC and the Plan Processor must implement. This regulatory regime was developed with extensive feedback from the securities industry (*e.g.,* through the Development Advisory Group and the Advisory Committee) and is subject to ongoing review and modification through a public review and comment process. Moreover, CAT LLC's compliance with the requirements of this regulatory regime can be policed by the SEC's Enforcement Division. We also note that in adopting the CAT NMS Plan, the SEC concluded that the regulatory approach to cyber security was sufficient when it stated that ''the extensive, robust security requirements in the adopted [CAT NMS] Plan . . . provide appropriate, adequate protection for the CAT Data.'' [5]

In light of this existing regulatory regime, the relevant question is whether the benefits of allowing Industry Members to litigate against their regulators in the event of a CAT data breach outweigh the costs. An application of economic principles indicates that they do not. As heavily regulated entities, the Participants are obligated to comply with all SEC requirements and maintain an effective cyber security program. And to the extent that CAT LLC and the Participants fail to comply with the SEC's regulatory regime, the SEC could compel compliance by bringing enforcement actions. Moreover, regulatory systems are particularly appropriate where, as here, the regulator (*i.e.,* the Commission) is enacting rules that are designed to govern one entity (*i.e.,* CAT LLC). Further, the SEC's regulatory process for the CAT permits parties affected by the operation of the CAT to stay informed of the operation of the CAT's cyber risk program and to advocate for and incorporate any broader security concerns that may arise. Indeed, there already exist examples where Industry Members have exercised these rights and successfully sought changes in the CAT's cyber security program. Under these circumstances, allowing Industry Members to further litigate against the Participants for damages resulting from cyber breaches would not better align the incentives or meaningfully increase the motivation of CAT LLC, the Plan Processor, or the Participants to pursue additional economically appropriate measures to reduce the frequency and severity of cyber breaches. Allowing these lawsuits would, however, increase costs to the Participants and Industry Members, much of which would be passed on to underlying investors. Where, as here, the costs of adding a litigation regime to an existing regulatory regime are high, and the expected benefits are low, there is no economic justification for allowing additional litigation.

It is also important to note that the CAT has no paying customers and is fully funded by Participants and Industry Members who, ultimately, pass those costs on to the investing public. CAT LLC's funding is designed to cover costs only, and its balance sheet is not intended to develop and hold assets available to compensate Industry Members or others who may be harmed in the event of a cyber breach.

We conclude, therefore, that the risk presented by a cyber breach of the CAT should be addressed through the regulatory approach that the SEC has already adopted. The limitation of liability provision in CAT LLC's proposed amended Reporter Agreement is therefore appropriate. In this regard, we note that limitations of liability are ubiquitous in the securities industry and have effectively governed the economic relationships between the Participants and Industry Members for decades. We also observe that although SIFMA has objected to a limitation of liability on behalf of Industry Members, Industry Members generally require their respective customers—many of whom are retail investors—to agree to analogous limitation of liability provisions.

An unfortunate fact of the cyber world is that the best standards, policies, and procedures all executed with perfection may not thwart every conceivable breach attempt. A successful cyber-attack on the CAT could result in injury to Industry Members. Even in a purely regulated regime, it is appropriate to consider mechanisms that provide compensation to parties injured by a cyber-attack on the regulated activity. It is worth noting that CAT LLC and the Plan Processer purchase insurance designed to provide compensation to harmed parties, up to pre-defined economically feasible limits. The cyber insurance program also provides the benefit of engaging additional third parties (*i.e.,* the insurance carriers) who have incentives and abilities to monitor cyber security hygiene at the CAT and the Plan Processor.

CAT LLC, the Participants, and the SEC could consider additional mechanisms beyond cyber insurance to compensate potentially harmed parties, including mechanisms similar to those used by federal vaccine programs or insolvency protections for pension funds or financial institutions. However, a careful evaluation of the costs, benefits, and incentives among the various parties associated with the CAT would need to be conducted to ensure that any new arrangement enhances economic welfare before any decision to further extend the current compensation scheme (*i.e.,* CAT LLC's insurance) is made.

Section II below examines a list of potential cyber threats, identifies those that may apply to the CAT, and provides an initial quantification of the harms that may

[5] SEC, *Order Approving CAT,* Section V.F.4. *Economic Analysis, Expected Costs of Security Breaches,* p. 715.

befall the CAT and others should a cyber threat be successful. Section III addresses the economic theory behind liability assignment and the roles that markets, contracts, litigation, and regulation play. It highlights the duplicative and overall cost-raising nature of the Industry Members' litigation proposal. It explains how the SEC's regulatory approach along with the efforts of the CAT, the Plan Processor, and the Advisory Committee, work to align the incentives of the CAT and the Plan Processor to mitigate the cyber risks and ensure the fairness of the Participants' proposed limitation on liability. Section IV contains some concluding comments. Section V presents the qualifications of the authors/principal investigators of this White Paper. Section VI summarizes the research undertaken for this White Paper and contains the bibliography.

II. Cyber Security Risk Analysis

In this section we discuss the economic risk associated with bad actors wrongfully accessing the CAT system to monetize the data or to disrupt market surveillance. The CAT will store massive quantities of data that is unavailable anywhere else on a single system, which as Commissioner Pierce recently recognized, will ''undoubtedly'' be a target for hackers.[6] The CAT is the only data repository that collects and holds Customer and Customer Account Information[7] along with all trading data from the participating U.S. securities exchanges.[8] The compromise of this data, as discussed in further detail below, could harm broker/dealers, and exchanges, or undermine investor confidence in the markets themselves.

Given the importance of the CAT data, there are a variety of cyber security breach scenarios that, hypothetically, could occur and harm the CAT, the Plan Processor, the Participants, Industry Members, the investing public, the SEC's ability to surveil activity in the markets, and (conceivably) the functioning of U.S. securities markets.

Below, we posit a range of potential cyber risk scenarios attendant to the CAT and derive estimated ranges of potential financial consequences arising from these exposures. We recognize cyber attacks on the CAT could vary from the scenarios we hypothesize, but we offer them to provide a framework to assess the economic exposures that flow from the gathering of a massive amount of sensitive trading, financial, and identifying data. Some of the scenarios present relatively small economic risk, while others present significant risk in terms of both financial consequence and the potential to undermine faith in the efficiency and fairness of U.S. markets.

Overall, this section is organized as follows:

A. Overall Cost of Cybercrime
B. Parties Harmed by Cybercrime
C. Types of Bad Actors, Motivations, and Methods
D. Cyber Breaches Relevant to CAT, LLC Including Relative Difficulty of Implementation, Frequency and Severity
E. Summary

A. Overall Cost of Cybercrime

''Cybercrime is a growth industry'' and ''produces high returns at low risk and (relatively) low cost for the hackers.''[9]

Estimates of the worldwide cost of cybercrime are in the trillions of dollars per year and continuing to grow.

(a) $3 trillion per year in 2015 and $6 trillion annually by 2021 according to Cybersecurity Ventures.[10]

(b) $3 trillion per year in 2019 to $5 trillion by 2024 according to Juniper Research.[11]

In the United States, according to the Council of Economic Advisers, malicious cybercrime cost the U.S. economy between $57 billion and $109 billion in 2016.[12]

The size of the premiums paid for cyber insurance also provides a sense of the size of the cybercrime market. A recent report stated that $4.85 billion in cyber risk premiums were paid in 2018 and projected that figure to reach $28.6 billion by 2026.[13] A recent report from the A.M. Best insurance credit rating agency found that ''U.S. cyber insurance premiums grew again in 2019, up by 11% . . .'' ''Cyber insurance premiums will likely continue to rise . . . due to both rising claims costs and heightened risks . . . Over the past three years the number of cyber claims has doubled to 18,000 in 2019, from 9,000 in 2017.''[14]

B. Parties Harmed by Cybercrime

Generally, we think of parties harmed by cybercrime falling into two groups. The first group are the parties whose system was breached, and the second are the other parties affected by the breach—the clients, customers, and vendors of the parties directly suffering the breach.[15] CAT LLC and the Plan Processor, FINRA CAT, clearly fall in the first group as they collect and store the information subject to cyber breach risk. It is their system that is subject to the cyber risk. Industry Members (and their investor clients) fall into the second group of affected parties as it is information about them and their activities that is supplied to the CAT.

But that simple delineation does not cover all significant parties involved with supplying or accessing information from the CAT. The SROs also provide information to the CAT (some of the same information that is supplied by the Industry Members). As suppliers of information to the CAT, the interests of the SROs in cyber security at the CAT align with those of the Industry Members—a successful breach would compromise information on the CAT no matter if the original source were the Industry Members or the SROs. The SROs also, however, own and (through the CAT LLC Operating Committee) run the CAT. The SROs, therefore, face two risks arising from a cyber breach at the CAT: (1) Directly from the breach of the CAT as owners of CAT LLC; and (2) indirectly from the exposure of information they supplied to the CAT (similar to the Industry Members).

The SEC is also a major user of the CAT in its efforts to regulate U.S. equity and option markets. The SEC's access to and use of CAT data is similar to that of the SROs and constitutes another source of cyber risk to CAT LLC. While the SEC does not own or directly operate the CAT, the CAT would not exist or operate absent the SEC's regulatory authority and associated oversight. The CAT, therefore, serves the regulatory needs of both the SROs and the SEC with the same functionality. In other words, the SEC's access to the CAT is every bit as broad as the SROs, who own and operate CAT LLC.

In the context of the CAT, therefore, a simple delineation of two types of affected parties is not adequate to describe and understand the parties potentially affected by a cyber breach at the CAT. In addition, there are some important atypical economic relations and regulatory considerations that

[6] Commissioner Pierce Statement on Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security, Aug. 21, 2020, *https://www.sec.gov/news/public-statement/peirce-nms-cat-2020-08-21* accessed September 2020.

[7] The SEC proposes to ''delete the term ''PII'' from the CAT NMS Plan and replace that term with ''Customer and Account Attributes'' as that would more accurately describe the attributes that must be reported to the CAT, now that ITINs/SSNs, dates of birth and account numbers would no longer be required to be reported to the CAT pursuant to the amendments being proposed by the Commission.'' Additionally, the SEC proposes to delete the defined term ''PII'' from the CAT NMS Plan given the reporting of the most sensitive PII will no longer be required. The SEC proposes that ''Customer and Account Attributes'' refer collectively to all the attributes in ''Customer Attributes'' and ''Account Attributes.'' The SEC proposes that ''Customer Attributes'' would include name, address, year of birth, the individual's role in the account or if a legal entity, the name, address, and Employer Identification Number and Legal Entity Identifier. The SEC proposes that ''Account Attributes'' would include account type, customer type, date account opened, and large trader identifier (if applicable). Securities and Exchange Commission, *Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security,* RIN 3235–AM62, Release No. 34–89632, File No. S7–10–20, August 21, 2020, pp. 103–106.

[8] See SEC website, ''Rule 613 (Consolidated Audit Trail),'' *https://www.sec.gov/divisions/marketreg/rule613-info.htm* accessed September 2020.

[9] The Center for Strategic and International Studies, ''Net Losses: Estimating the Global Cost of Cybercrime,'' June 2014, pp. 2 and 4.

[10] Cybersecurity Ventures, ''Global Cybercrime Damages Predicted to Reach $6 Trillion Annually By 2021,'' Copyright 2020, *https://cybersecurityventures.com/cybercrime-damages-6-trillion-by-2021/* accessed August 2020.

[11] Juniper Research, ''Business Losses to Cybercrime Data Breaches to Exceed $5 Trillion By 2024,'' August 27, 2019, *https://www.juniperresearch.com/press/press-releases/business-losses-cybercrime-data-breaches.*

[12] The Council of Economic Advisers, ''The Cost of Malicious Cyber Activity to the U.S. Economy, February 2018, p. 1, *https://www.whitehouse.gov/wp-content/uploads/2018/03/The-Cost-of-Malicious-Cyber-Activity-to-the-U.S.-Economy.pdf.*

[13] Allied Market Research website, *Cyber Insurance Market by Company Size and Industry Vertical: Global Opportunity Analysis and Industry Forecast, 2019–2026,* March 2020, *https://www.alliedmarketresearch.com/cyber-insurance-market* accessed August 2020.

[14] Erin Ayers, ''US cyber market keeps growing, but pace slowed: AM Best,'' Advisen Front Page News, July 22, 2020 accessed August 2020.

[15] See, for example, Camico website, ''Understanding First-Party and Third-Party Cyber Exposures,'' *https://www.camico.com/blog/understanding-cyber-exposures* accessed September 2020.

affect the liability decisions associated with the CAT and its operations.

First, given that CAT and its activities are a regulatory mandate of the SEC, standard liability and indemnity approaches regarding the CAT's and the Plan Processor's scope and scale for decision-making cannot be straightforwardly applied. The CAT and the Plan Processor are substantially constrained in their cyber security program by mandates from the SEC that, in turn, involve significant input and advocacy on the part of other parties, including Industry Members.

Second, related parties include the Participants/SROs. While these parties are legally distinct from CAT and the Plan Processor, their involvement and economic linkage is substantial. For example, the Participants have ownership interests in CAT LLC and the Operating Committee of CAT LLC, on which the Participants are all members, chooses the Plan Processor. In addition, operational funding for the CAT (and therefore, the Plan Processor) comes entirely from Participants and Industry Members. Although there are regulatory users who access CAT, there are no ''customers'' for CAT's services in a conventional sense.

Third, CAT related decisions and actions of Industry Members are also mandated by the SEC and constrained by the SEC's oversight. There is a level of participation and information flow from and to the Industry Members (and other potentially interested groups) through the Advisory Committee, and previously the Development Advisory Group, and an attendant ability to influence the business operation and cyber security investments and practices that is not typically found in conventional business relationships.

The typical economic distinctions between harms to parties with standard commercial relationships are much more amorphous with respect to the parties involved in the CAT. Any comprehensive analysis, therefore, requires careful distinctions and delineations between standard commercial relationships and parties involved in the CAT to understand the CAT's economic considerations of cyber security.

C. Types of Bad Actors, Motivations, and Methods

Cybercrimes are conducted by both internal and external threat actors. According to a 2020 report by Verizon, approximately 70% of breaches in 2019 were caused by external actors with the other 30% being initiated by internal actors.[16] The motivations of these actors are often financial, but cyber breaches also happen for ideological or personal reasons. Nation-states, for example, have used cyber breaches to advance regime goals (often focusing on impeding the efforts of their geopolitical rivals) and obtaining information that might benefit them politically or economically.[17] Cybercriminals steal information to sell or extort payments from their targets. ''Hacktivists'' want to cause mayhem and influence the public. Sometimes, individuals are out for revenge against an entity or just want the bragging rights associated with a particularly brazen attack. At times, the malicious actors have multiple motivations—for example, ideology or revenge and financial remuneration. The 2020 Verizon report estimated that 90% of cyber breaches were motivated by financial considerations and 10% were initiated for espionage.[18] The bad actors were 55% organized crime, with the next highest type being nation-state or state-affiliated actors at around 10%. System administrators and end-users also comprised around 10% each of the bad actors.[19]

The methods used by the bad actors to perpetrate cyber breaches (alone or in combination) were around 45% hacking (use of stolen credentials), 22% error (*e.g.,* mis-delivery), 22% social (*e.g.,* phishing), 17% malware (*e.g.,* password dumper), 8% misuse (privilege abuse), and 4% physical stealing (*e.g.,* theft).[20]

D. Cyber Breaches Relevant to CAT, LLC Including Frequency, Severity, and Relative Difficulty of Implementation

There are several firms that provide summary level data on the types of cybercrime events, along with information on how frequently they occur and the associated severity of economic losses. One entity, Advisen, maintains a database of over 90,000 cyber events, and allows subscribers to perform customized searches.[21] In this paper, we have used the Advisen database to research frequency and severity for breaches we deemed specifically relevant to the types of data held on the CAT (Customer and Account Attributes and trade data).[22] We further refined the types of cyber events we believe could potentially affect the CAT by using Advisen data, other publicly available sources, and our own experience.

We have posited scenarios where malicious actors could make use of the CAT data should they successfully gain access to the data. These scenarios, while not exhaustive of every type of potential cyber breach, are the product of our understanding of the data available in the CAT and how it might be used to generate wrongful benefits for threat actors.[23] Some of the scenarios we discuss are more likely to be attempted, while others are more improbable. By their nature, the scenarios are general and therefore it is impossible to quantify the exact losses that could be generated by an unauthorized attack. As a frame of reference, based on the breach related losses experienced by Fortune 250 companies over the past decade, the losses range from the thousands of dollars to several billion.[24] Therefore, our approach for each scenario is to determine the relative ease of implementing the scenario, the relative frequency of how often it could be successfully carried out, and the conditional severity of the financial loss that could stem from the event (assuming the scenario was carried out successfully).

Relative Difficulty of Implementation: With respect to our assessment of the relative difficulty of implementation, we begin with an assumption that threat actors could breach the system, but then consider the number of databases the threat actors would need to breach, the extent to which the data would need to be manipulated for it to be useful, and the level of difficulty they would face in making use of that ill-gotten data to implement the strategy in the scenario.

Relative Frequency: The frequency assessment is based on our review of Advisen data for companies in the Fortune 250 for hacks similar to the ones we posit. We do not directly opine on the likelihood of successful hacks of the CAT, but instead use the Advisen data on successful hacks at large corporations to provide a subjective assessment of the relative frequency of a successful hack for each scenario we posit the CAT could face. We also consider the structural design of the CAT and the hurdles it presents to success of the strategy, as well as the attractiveness of the strategy because it could lead to a significant financial gain or achievement of a disruptive goal.

Conditional Severity: The severity of the financial loss (based on our review of Advisen data) that could stem from the event assuming the scenario was carried out successfully. We deem the loss severity for a particular type of breach to be *extreme* if we consider the exposure to be more than $100 million per event (95th percentile loss in the Advisen data), *high* if we consider the exposure to be approximately $5–50 million, *medium* if we consider the exposure to be approximately $500,000, and *low* if we consider the exposure to be approximately $50,000 or less.[25]

Below we first discuss summary descriptive statistics regarding cyber

[16] Verizon, *2020 Data Breach Investigations Report,* p. 10, Figure 7.

[17] See ScienceDirect website, ''Hacktivists,'' *https://www.sciencedirect.com/topics/computer-science/hacktivists* accessed September 2020. Also see, Department of Homeland Security, ''Commodification of Cyber Capabilities: A Grand Cyber Bazaar,'' 2019, p. 1 *https://www.dhs.gov/sites/default/files/publications/ia/ia_geopolitical-impact-cyber-threats-nation-state-actors.pdf* accessed August 2020.

[18] Verizon, *2020 Data Breach Investigations Report,* p. 10, Figure 8.

[19] Verizon, *2020 Data Breach Investigations Report,* p. 11, Figure 10.

[20] The total exceeds 100% because the bad actors could use one or more methods for each breach. See Verizon, *2020 Data Breach Investigations Report,* p. 7, Figure 2.

[21] See Advisen website, *https://www.advisenltd.com/data/cyber-loss-data/* accessed August 2020.

[22] The PII that exists in the CAT is name, address, and birth year. This PII data will be in a ''secure database physically separated from the transactional database. . .'' See SEC, *March 17, 2020 Order,* pp. 12 and 20.

[23] We believe that the scenarios we have posited are a useful way to characterize the economic risks facing the operation of the CAT, but we also recognize that any real-world hack could differ substantially from our scenarios in substantial ways.

[24] The distribution of breach losses for the Fortune 250 extends from less than $1,000 to above $1 billion. The ''Typical'' breach loss is $471,000 while the ''Extreme'' breach loss is $93 million. See Cyentia Institute, *Information Risk Insights Study, A Clearer Vision for Assessing the Risk of Cyber Incidents,* p. 21, Figure 15.

[25] These amounts are based on the distribution of breach losses for the Fortune 250 over the past 10 years. See Cyentia Institute, *Information Risk Insights Study, A Clearer Vision for Assessing the Risk of Cyber Incidents,* 2020, p. 21, Figure 15.

breaches and then the types of breaches we believe are specific risks faced by the CAT.

1. Summary Level Data

Our review of available information on various aspects of cyber breaches led us to focus on periodic reports prepared by Ponemon Institute/IBM Security, Verizon, and Cyentia. While these entities do not report the same information in the same way, there appears to be a consensus that malicious attacks are the primary reasons for cyber breaches, and that the risk of a breach increases with firm size. The Fortune 250 are particularly frequent targets.[26] Furthermore, the costs[27] associated with dealing with large, mega, and extreme[28] breaches, as shown in the table below, run from $10 million to $100 million or more. The costs of a breach include such items as detection and escalation costs, notification costs, post-data-breach response costs, and lost business costs.[29]

Figure 1[30]

Summary of Cyber Breach Report Data

			Reason for Breaches			Cost of a Breach		
Reporting Entity	Report year	Sample	Malicious Attacks	Insider Errors	Observed Breach Frequency	Large Breach > 1 million records	Mega Breach > 50 million records	Extreme Event 95th percentile cost
IBM Security	2020	Study of 524 organizations	52%	48%	N/A	$50 million for a breach of more than 1 million records	$392 million for a breach of more than 50 million records	N/A
Verizon	2020	Study of 157,525 incidents, 32,002 met quality standards and 3,950 were confirmed data breaches	78%	22%	N/A	N/A	N/A	N/A
Cyentia/Advisen	2020	Study of 56,000 cyber events experienced by 35,000 organizations over the last decade	N/A	N/A	114 of the Fortune 250 experienced a breach in a twelve-month period	N/A	Better than 50% chance of at least $10 million with the exposure of 100 million records	The cost of extreme events (95th percentile) in the Fortune 250 approaches $100 million or more

2. Breach Data Specifically Relevant to CAT, LLC

The CAT data is unique and valuable because it is the only data repository that collects and holds Customer and Account Attribute data and all trading data from all the U.S. equity and option exchanges.[31] The compromise of this data, as discussed in further detail below, could cause harm in the form of investor losses, reputational harm, interference with market surveillance by the SROs and the SEC, and loss of investor confidence in the markets themselves. For the exchanges, the scale of potential liability could significantly financially harm those entities that constitute the national market system in the U.S. securities markets.[32]

More specifically, the CAT Customer and Account Attributes database (the CAIS database) is the only database that exists that aggregates, across all U.S. stock exchanges, elements of PII (name, address, birth year)[33] for the over 100 million people, companies,

[26] The top 250 firms of the Fortune 1000 are nearly five times more likely to have a breach than the bottom 250. See Cyentia Institute, *Information Risk Insights Study, A Clearer Vision for Assessing the Risk of Cyber Incidents,* 2020, p. 8.

[27] The costs in the IBM Security report include both the direct and indirect expenses incurred by the organization. Direct expenses include engaging forensic experts, legal fees, outsourcing hotline support and providing free credit monitoring subscriptions and discounts for future products and services. Indirect costs include in-house investigations and communication, as well as the extrapolated value of customer loss resulting from turnover or diminished customer acquisition rates. See Ponemon Institute and IBM Security, *Cost of a Data Breach Report 2020,* p. 72. The costs in the Cyentia/Advisen report include losses related to productivity, response, replacement, competitive advantage, fines and judgments (including legal fees), and reputation. See Cyentia Institute *Information Risk Insights Study, A Clearer Vision for Assessing the Risk of Cyber Incidents,* 2020, p. 16. Also see, Teresa Suarez, ''A Crash Course on Capturing Loss Magnitude with the FAIR model,'' *Fair Institute* website, October 20, 2017, *https://www.fairinstitute.org/blog/a-crash-course-on-capturing-loss-magnitude-with-the-fair-model* accessed August 2020.

[28] The IBM Security report notes several levels of a mega breach, the first is 1 million to 10 million records and the largest is 50 million or more records. We refer to the first as a large breach (1 million to 10 million records) and the other as a mega breach (more than 50 million records). See Ponemon Institute and IBM Security, *Cost of a Data Breach Report 2020,* pp. 10 and 67. The Cyentia/Advisen report does not use the term ''mega breach'' but does note the cost of a breach of 100 million records. We label this as a ''mega breach'' to compare to the data in the IBM Security report. In addition, the Cyentia/Advisen also provides an ''extreme event'' figure on a cost basis alone, no records mentioned. Thus, we provided this information in its own column. See *Cyentia Institute Information Risk Insights Study, A Clearer Vision for Assessing the Risk of Cyber Incidents,* 2020, p. 3.

[29] See Ponemon Institute and IBM Security, *Cost of a Data Breach Report 2020,* p. 7.

[30] See Ponemon Institute and IBM Security, *Cost of a Data Breach Report 2020,* pp. 3, 30, 66–67, Verizon *2020 Data Breach Investigations Report,* pp. 6–7, Figure 2, and Cyentia Institute *Information Risk Insights Study, A Clearer Vision for Assessing the Risk of Cyber Incidents,* 2020, pp. 3, 4, and 8.

[31] See SEC website, ''Rule 613 (Consolidated Audit Trail),'' *https://www.sec.gov/divisions/marketreg/rule613-info.htm.*

[32] The Securities Exchange Act of 1934 (Exchange Act) codified the legal status of exchanges as self-regulatory entities (SROs) under federal law. The Exchange Act vested exchanges with the responsibility to oversee trading on their respective markets and to regulate conduct of their members, including the responsibility to enforce compliance by their members with the Exchange Act. Thus, the Exchange Act reflected Congress' determination to rely upon self-regulation as a fundamental component of the oversight and supervision of U.S. securities markets and their members. See Memorandum from SEC Division of Trading and Markets to SEC Market Structure Advisory Committee dated October 20, 2015 with the subject ''Current Regulatory Model for Trading Venues and for Market Data Dissemination,'' pp. 1–2, *https://www.sec.gov/spotlight/emsac/memo-regulatory-model-for-trading-venues.pdf.*

[33] The PII that exists in the CAT is name, address, and birth year. This PII data will be in a ''secure database physically separated from the transactional database. . .'' See SEC, *March 17, 2020 Order,* pp. 12 and 20.

and trusts,[34] that hold accounts trading U.S. equities and options. The CAT trade database (the MDS database)[35] is the only database that aggregates, across all U.S. exchanges, all of the exchange-based equity and option trades by customer ID for those persons and entities. Further, the data in the CAT CAIS database is stored and processed in a separate, independent system from the MDS database. These systems are operated by different personnel. The data in the CAIS and MDS databases are encrypted independently of each other using different keys. The trade data (MDS database) is anonymized; there is no PII data present. Customer and Account Attributes data (CAIS database) is only accessible with limited permission and no data extraction is allowed, only interactive queries. Queries of any CAT data can only be done by the SEC and SROs via private line access; no public internet access.[36]

Figure 2[37]

Overview of the CAT Databases and How They Can be Accessed

Type of Data	PII Related		Trade Related
System / Database	CAT Customer ID (CCID) Subsystem	Customer and Account Information System (CAIS)	Market Data System (MDS)
Purpose	Receives Transformed Identifiers (TIDs) from Industry Members and generates a corresponding CAT Customer ID (CCID) for each TID. A received TID may be a transformed value of an ITIN, SSN, or EIN associated with an account holder or authorized trader. The generated CCID is a globally unique value that is unknown to and not shared with the original Reporter of the customer information.	Collects the Customer and Account Attributes and other identifiers (e.g. Prime Broker ID and Clearing Broker) from the Industry Members and links this data with the corresponding unique CCID provided by the CCID Subsystem.	Collects all order event information for National Market System securities and OTC equity securities, across all markets, from the time of order inception through routing, cancellation, modification, execution, and allocation. The Participants and Industry Members (i.e. brokers) handling the orders are also collected.
Data Contained	TID collected from the Industry Member and the corresponding CCID generated for each TID.	CCID Customer Attributes include name, address, year of birth, and the individual's role in the account. For legal entities, it includes name, address, employee identification number, and legal entity identifier. Account Attributes include account type, customer type, date account opened, and large trader identifier.	All Market Data, including the Firm Designated Identifier (FDID) for the Industry Member account associated with each event. CCIDs associated with each FDID (mapping provided to the MDS by CAIS) are also available.
Access	Regulators (SEC and SROs) have limited and monitored ability to submit a TID of interest and obtain the corresponding CCID. All CAT query interfaces are designed to be accessed only via private lines established with the SROs and the SEC; query via the internet is not supported.	Access to data is tiered and authorized based on role. Only a limited number of appropriately authorized users determined to have a need to know by their regulatory organization are entitled to the most sensitive information (e.g. name, address, birth year). Access is guided by "need to know" and "least privilege" principles. All CAT query interfaces are designed to be accessed only via private lines established with the SROs and the SEC; query via the internet is not supported.	Authorized users of the SROs and the SEC have access to all trade data via an online targeted query tool, a user-defined direct query tool, and bulk extracts. Extraction of CAT Data is based on permissions granted by the Plan Processor. All CAT query interfaces are designed to be accessed only via private lines established with the SROs and the SEC; query via the internet is not supported.

[34] There are approximately 330 million people in the United States. See United States Census Bureau website, the U.S. and World Population Clock, *https://www.census.gov/popclock/* accessed September 2020. According to a FINRA study, around 32% of the national population have investments in non-retirement accounts (330 million times 32% = 105.6 million non-retirement accounts. See FINRA Investor Education Foundation, ''Investors in the United States, A Report of the National Financial Capability Study,'' FINRA Investor Education Foundation, December, 2019, p. 3.

[35] See SEC, *March 17, 2020 Order,* p. 12. SEC., *Order Approving CAT, The Limited Liability Company Agreement of CAT LLC,* Appendix C–4 and Appendix D–14.

[36] All CAT Data must be encrypted at rest and in flight using industry standard best practices. See SEC, *Order Approving CAT, The Limited Liability Company Agreement of CAT LLC,* p. 62, Appendix D–11, and D–14.

Given the unique nature of the CAT data set, we are unable to find cyber breach events that exactly mirror potential CAT data breaches. However, we believe review of cyber breach events related to Finance and Insurance companies with greater than $1 billion revenue can serve as a helpful proxy. We used the Advisen database and other public sources to search for information on cyber breach events related to such companies.

The summary chart below displays the results of filtering the Advisen database to obtain cyber breach data over the past 10 years associated with companies with $1 billion revenue or greater that are classified as Finance and Insurance companies in the North American Industry Classification system.[38]

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Figure 3[39]

Advisen Cyber Breach Data: Finance and Insurance Companies with $1 Billion Plus in Revenue

NAICS 52 Finance and Insurance + Equifax -- Revenue $1B or Greater -- Last 10 Years				
	Frequency (# of Incidents per Company)		Severity ($M Lost Per Company)	
Incidents/Assets Compromised	Average	Median	Average	Median
All Cyber Incidents				
Total	13.3	3	24.5	3.6
Type of Cyber Incident				
Data Privacy	13.4	3	23.1	3.6
Data - Malicious Breach	8.8	2	23.0	3.2
Data - Physically Lost or Stolen	4.1	2	4.1	1.7
Data - Unintentional Disclosure	7.5	2	6.0	2.7
Identity - Fraudulent Use/Account Access	3.4	2	1.1	0.6
Phishing, Spoofing, Social Engineering	1.6	1	1.6	0.9
Privacy - Unauthorized Data Collection	1.8	1	15.6	2.0
Skimming, Physical Tampering	3.7	1	2.8	0.9
Network Security	1.6	1	4.1	3.1
Network/Website Disruption	1.6	1	4.3	3.3
Cyber Extortion	No data	No data	No data	No data
Industrial Controls & Operations	1.0	1	2.8	2.8
Tech E&O	2.0	1	13.0	2.0
Network/Website Disruption	1.5	1	21.8	3.8
Cyber Extortion	1.8	1	4.1	1.9
	Frequency (# of Incidents per Company)		Severity ($M Lost Per Top 10 Companies)	
Type of Asset Compromised	Average	Median	Lowest	Highest
Personal Information	13.7	3		
Personal Identifiable Information (PII)	3.4	1	9.1	21.6
Personal Financial Information (PFI)	13.2	3	11.7	2470.1
Personal Health Information (PHI)	4.4	2		
			($M Lost Per Top 2 Companies)	
Corporate Losses	1.8	1	Lowest	Highest
Corporate Loss of Digital Assets	1.2	1	8.8	22.9
Corporate Loss of Business Income/Services	1.8	1	373.5	472.0
Corporate Loss of Financial Assets	1.0	1		

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Malicious breaches are the most common and the most expensive.[40] Correspondingly, the Advisen data shows that for Finance and Insurance companies with $1 billion or

[37] Please note this is based on the CAT NMS Plan and amendments. See, SEC, *Order Approving CAT,* pp. 47–48, SEC, *Order Approving CAT, The Limited Liability Company Agreement of CAT LLC,* p. 62, Appendix C–7 to C–9, Appendix D–14, and D–33 to D–34, SEC, *March 17, 2020 Order,* pp. 2, 4–5, 12, 15 and 20 and *CAT Reporting Technical Specifications for Industry Members,* Version 3.1.0 r2, April 21, 2020, p. 1 and 5–6.

[38] We deemed application of these filters to be reasonable since the CAT will hold more records than most large (>$1 Billion) corporations, and because the data the CAT stores is from companies that fall into the Finance and Insurance classification.

[39] Data pulled from Advisen Cyber OverVue, *https://insite20twenty.advisen.com,* on September 11, 2020.

[40] See Ponemon Institute and IBM Security, *Cost of a Data Breach Report 2020,* pp. 29 and 31.

greater in revenue that had a malicious cyber breach, those firms had 8.8 malicious cyber breaches, on average (median of 2), over the past 10 years.[41] The average cost of these malicious breaches was $23.0 million with a median of $3.2 million.[42]

The asset most frequently compromised was personal financial information (''PFI'').[43] We examined the top 10 PFI loss breaches from the Advisen database and found that the top 10 losses ranged from $11.7 million to $2.5 billion (Equifax).[44] The second highest loss for PFI after Equifax was $188.7 million (Wells Fargo).[45]

The data in the table above also includes frequency and losses from internal cyber related errors. These events typically include things like software errors or a when a human mistake involving a computer is made. For example, the top ten largest error-related cyber loss events from the events underlying the table above (in the corporate losses section) ranged from $472.0 million down to $7.3 million. The top two were $472.0 million for Knight Capital Group and $373.5 million for TSB Bank. Both were caused by IT errors. For Knight Capital Group, a glitch in new trading software caused Knight Capital Group's order router to send more than four million orders into the market when it was supposed to fill in just 212 customer orders.[46] For TSB Bank, customers lost access to their accounts or saw information of accounts owned by others after TSB Bank transferred the records and accounts of its 5.2 million customers from one system to another. All of the top ten error-related cyber loss events impacted a company's ability to conduct business and generate revenues.[47] While the CAT does not support a specific company's ability to conduct business and generate revenues it does affect the ability of the SEC and the SROs to oversee and regulate market activities. However, it is our understanding that if the CAT has appropriate backups that have not been maliciously encrypted, this type of attack can be recovered from.[48] While regulatory oversight could be delayed by the error, the oversight activities can be resumed after a relatively brief period devoted to bringing up the backup systems. Overall, we note that internal cyber related errors can lead to very large losses that represent additional liability exposure to the CAT.

To further refine the types of cyber breaches we believe could potentially affect the CAT, we searched public sources and relied upon our experience to posit scenarios we believe reflect how data from possible cyber breach attacks/events could be misused.

We believe threat actors could seek to breach the CAT to attempt the following:

(1) Hold Data Hostage
(2) Identity Theft
(3) Algorithm Reverse Engineering
(4) Fake Data Insertion to Wrongfully Incriminate
(5) Data Removal or Insertion to Hide Fraud
(6) Trading on Non-Public Information
(7) Competitive Intelligence—Customer Lists
(8) Discovery of Regulatory Investigation that Could be Used to Harm Someone's Reputation

We address the scenarios below and describe our estimation of the ease of implementation, frequency and severity risk of each.

(1) Hold Data Hostage

A bad actor could seek to ransom CAT data in several ways. Many of them are derivative of the other scenarios we posit later in this report.

(a) Threaten to publicly release confidential Customer and Account Attribute data or trade data to harm a firm's or investor's reputation
(b) Threaten to keep data encrypted (denial of service) to prevent its use by regulators
(c) Threaten to sell trading data regarding an account that could allow reverse engineering a trading algorithm
(d) Threaten to make short position data public

Each of these is discussed in further detail:

(a) Threaten to publicly release confidential Customer and Account Attribute data or trade data to harm a firm's or investor's reputation

Under this scenario, if a bad actor obtained either Customer and Account Attribute data or trade data from the CAT it would be difficult for the bad actor to monetize the information without the ability to associate the trade data with the Customer and Account Attribute data to identify the parties involved in the trade as bad actors historically have done.

To limit the potential value of the information, the SEC mandated that the CAT limit the identifying information it stores. Information such as a social security number, brokerage account number, and other high value PFI items are not stored by the CAT. The CAT stores only less sensitive PII information including name, address, and birth year within the CAT Customer and Account Attributes database (CAIS).[49] Also, the trade data stored by the CAT does not disclose the name of the person or company behind the trade. Rather, the account owner behind the trade is identified by a CAT Customer ID (CCID) that is a globally unique CCID for each account owner that is unknown to and not shared with the original CAT Reporter Industry Member. This CCID is held within the CAT's CCID and CAIS databases.[50] To determine the account owner, one would need access to the system that links the CCID to the Customer and Account Attributes data, the CAT Customer and Account Information System (CAIS). The trade data and the CAIS data are stored on separate encrypted systems. Thus, a bad actor would need access to the trade data and the CAIS data for each individual/company in order to find out which trades related to which individuals/companies and which brokers were used by these individuals/companies. Therefore, we see limited possibility or value in a hacker seeking to threaten a brokerage firm or other investor with the release of Customer and Account Attributes.

With respect to an attempt to hold hacked CAT trade data hostage, we note that all the trade data is encrypted with the client anonymized, making it unlikely that a hacker could successfully identify who to threaten. The bad actor would need to have the CAIS data and trade data to determine which clients and client trades were associated with a broker or investor. Given that the CAT keeps encrypted CAIS data and encrypted trade data in separate databases, a data incident to obtain and exploit both sets of data would be difficult. We recognize that

[41] The large difference between the median of 3 and average of 13.3 breaches for this data set is attributable to the large degree of variance in the number of breaches by firm. In other words, a few firms experienced a very large number of breaches, increasing the average relative to the median.

[42] The large difference between the median cost of $3.2 million and average cost of $23.0 million for a malicious breach in this data set is attributable to the large degree of variance in the cost per breach by firm. In other words, a few firms experienced a very large cost per breach, increasing the average relative to the median.

[43] Advisen defines PFI or personal financial information as credit/debit card details, social security numbers, banking financial records (account numbers, routing numbers, etc.). Advisen defines PII or personal identifiable information as data containing identifying information, including name, address, email, date of birth, gender, etc. See Advisen's Cyber OverVue User Guide, January 2020, p. 26. Also, ''The compromise of the Confidentiality of Personal data leads the pack among attributes affected in breaches,'' See Verizon *2020 Data Breach Investigations Report,* p. 29. ''More than half of all cybercrime incidents investigated by CyberScout involved financial fraud, one of the most common forms of identity theft.'' See Advisen, *Quarterly Cyber Risk Trends: Global Fraud is Still on the Rise,* sponsored by CyberScout, Q2 2019, p. 2.

[44] See the PFI Top 10 cyber loss events as of September 11, 2019 as obtained from Advisen Cyber OverVue, *insite20twenty.advisen.com.* Equifax is coded under NAICS 56 Administrative and Support and Waste and Management Remediation Services in Advisen's Cyber OverVue, but it is coded as NAICS 522320—Financial Transactions Processing, Reserve, and Clearinghouse Activities in Advisen's MSCAd database (see Advisen website, *www.advisenltd.com*). In speaking to Advisen's product manager, he stated that in Cyber OverVue, the NAICS code is taken directly from Advisen's company information provider, in this case S&P. In MSCAd, which is Advisen's legacy system that they are moving away from, the NAICS code is a translation of the SIC code. These differences in industry classification between the two systems can sometimes create misalignments, but rarely. CRA manually added Equifax to the NAICS 52 Finance and Insurance peer group based on its potential applicability in size and type of assets (PII or PFI) compromised.

[45] See the PFI Top 10 cyber loss events as of September 11, 2019 as obtained from Advisen Cyber OverVue, *insite20twenty.advisen.com.*

[46] See Corporate Business Income/Services Top 10 cyber event losses as of September 11, 2019 as obtained from Advisen Cyber OverVue, *insite20twenty.advisen.com.*

[47] See Corporate Business Income/Services Top 10 cyber event losses as of September 11, 2020 as obtained from Advisen Cyber OverVue, *insite20twenty.advisen.com.*

[48] Interview with William Hardin, VP, Charles River Associates, August 11, 2020.

[49] See SEC, *March 17, 2020 Order,* pp. 4–5 and SEC, *Order Approving CAT, The Limited Liability Company Agreement of CAT LLC,* p. 4, Appendix C–7 to C–9, Appendix D–14, and D–33 to D–34.

[50] See SEC, *March 17, 2020 Order,* pp. 2, 4–5.

crime syndicates are publishing information to their blogs,[51] and if they released even partial information to the public, this could damage the reputation of the CAT. The breach would show weaknesses in the security of the CAT and translate into potential reputational harm to not only the CAT, but also possibly the SEC and the SROs. Overall, we believe this scenario would be of average difficulty to implement, will occur infrequently (if at all), but have low to medium loss severity if successful.

(b) Threaten to keep data encrypted (denial of service) to prevent its use by regulators

If a hacker were able to disrupt the CAT and impose another level of unauthorized and malicious data encryption in an attempt to ransom its decryption, this could affect the SEC's ability to conduct investigations as well as the SROs' ability to meet their oversight obligations.[52] A particular concern for a system held by ransomware is the inability of the affected firms to access their information and maintain operations for their customers. However, it is our understanding that if the CAT has appropriate backups that have not been maliciously encrypted, this type of attack can be recovered from.[53] While regulatory oversight could be delayed by a ransomware attack, the oversight activities can be resumed after a relatively brief period devoted to bringing up the backup systems. We deem a successful ransomware scenario to be highly unlikely, assuming adequate backup systems and protocols, as a hacker is likely to perceive that collecting a ransom from the regulators has a very low probability. We believe this scenario would be of average difficulty to implement, will occur infrequently, and have low to medium severity if successful.

(c) Threaten to sell trading data regarding an account that could allow reverse engineering a trading algorithm

This scenario would be difficult to implement given the bad actor would need to access the trade data as well as the CAIS (assuming the bad actor could not otherwise determine the who the trade data was associated with [54]). Gaining access to multiple encrypted CAT databases to retrieve multiple categories of data, stored in separately secured areas would be difficult. It would also be difficult for the bad actor to figure out who the trade CCID account owner was without access to the CAIS. Overall, the bad actor would need to access the trade data, analyze the data for algorithmic trading, and determine who the CCID account owner is in order make the threat real. Next, they would have to credibly threaten that firm that their trades would be released or sold to someone that could reverse engineer their algorithms, which is a complex and difficult task. We think that, at worst, the threatened firm might pay a moderate ransom to prevent its trades from being in unknown hands. Thus, we believe this scenario would be very difficult to implement, will occur infrequently, and have high to extreme severity if successful.

(d) Threaten to make short position data public

If a bad actor were able to use the CAT trading and CAIS data to successfully determine that an investor holds a significant short position in a particular stock, in theory, that hacker could try to threaten that investor that their position information would be made public. We deem this scenario as improbable and unlikely. First, as discussed above, determining both the investor identity and the position held by that investor would be difficult. Second, there is a significant risk to the hacker that the investor would not care that their short position was made public. Thus, we believe this scenario would be of average difficulty to implement, will occur infrequently, and have medium severity if successful.

(2) Identity Theft

We believe that one of the most likely goals of wrong-doers seeking to hack the CAT would be to attempt to steal Customer and Account Attribute data (within the CAIS database) for the millions of account holders in the system. We note that significant effort has been made in designing the CAT to reduce this risk. This includes encrypting of the Customer and Account Attribute data and limiting the underlying PII to less sensitive information: Name, address and birth year (no PFI data—no social security numbers, no account numbers, and no dates of birth). Importantly, there are strict limitations on access to the CAIS database. Access to the CAIS is on a ''need to know'' and ''least privileged'' basis and cannot be obtained from public internet connectivity.[55]

An example of how a hacker could take advantage of less sensitive PII data (name, contact information, and a reservation) can be seen in the recent breach at the Ritz Carlton's London hotel. In August of 2020, the hotel suffered a cyber breach of its food and beverage system. The bad actor used the customer information in this system to pose as a Ritz employee to confirm the reservation and payment card details with individuals with the upcoming reservations. The card details received based on these calls were used to spend thousands of pounds of victims' money.[56] If a hacker were able to get CAT Customer and Account Attribute data and determine the brokerage firm at which a particular investor held their account, the hacker could call that investor posing as an employee of the broker and seek to ''confirm account information.'' This could lead to substantial investor losses. This scheme could then be repeated on large numbers of investors.

Had the CAT Customer and Account Attribute data included social security numbers and birth dates, this information could be even more easily monetized by either identity/credit theft or selling the data in bulk on the dark web. William Hardin, VP and leader of Charles River Associates Cybersecurity Incident Response Practice stated, ''the most readily available easily monetized form of hacked data on the dark web is PII.'' [57]

Verizon reported that the compromise of personal data occurs in 77% of the Finance and Insurance industry cyber breaches and that cyber-attacks are mostly carried out by external actors who are financially motivated to get easily monetized data.[58] According to the data in the Advisen database, personal information is the most common type of data compromised in a cyber breach. The Advisen database shows that Finance and Insurance companies with $1 billion or greater in revenue that had a PII breach had an average of 3.4 breaches (a median of 1) over the past 10 years.[59] The frequency and severity of PII breaches is much lower than PFI breaches. Thus, based upon this history, we believe the CAT substantially reduced its relative exposure to the frequency and severity of breaches related to personal information by not including PFI data in the CAT. While this design feature is appropriate, CAT remains a tempting target for cybercriminals as it will have one of the largest accumulations of personal data ever assembled. The possibility of an extreme event should not be ignored.

We reviewed the top 10 PII cyber breaches underlying these figures and summarized them in the table below. We found the lowest loss was $9.1 million while the highest was $21.6 million. While an imperfect measure, generally the more records exposed,[60] the

[51] Per William Hardin, VP Cybersecurity and Incident Response Services, Charles River Associates, Inc.

[52] Under the Exchange Act, a variety of SROs, including national securities exchanges and FINRA, exercise extensive oversight over securities broker-dealers, stock exchange members and listed companies, and other market intermediaries. Stock exchanges were the original SROs that governed the trading of securities and regulated their members well before the creation of the Securities and Exchange Commission and the current statutory framework formalizing their SRO status. See Commissioner Luis A. Aguilar, U.S. Securities and Exchange Commission, ''The Need for Robust SEC Oversight of SROs,'' May 8, 2013, footnote 2, *https://www.sec.gov/news/public-statement/2013-spch050813laahtm* accessed August 2020.

[53] Per William Hardin, VP Cybersecurity and Incident Response Services, Charles River Associates, Inc.

[54] We can envision that a bad actor might be able to deduce who the trade data was associated with based on certain characteristics of quantity, size, or through other means.

[55] See SEC, *March 17, 2020 Order,* pp. 12 and 20 and SEC, *Order Approving CAT, The Limited Liability Company Agreement of CAT LLC,* Appendix D–14.

[56] See Julian Hayes, ''Double extortion: An emerging trend in ransomware attacks,'' *Advisen Front Page* News, August 21, 2020, *https://www.advisen.com/tools/fpnproc/fpns/articles_new_35/P/375350842.html?rid=375350842&list_id=35* accessed August 2020.

[57] Interview with William Hardin, VP, Charles River Associates, August 11, 2020.

[58] Verizon, *2020 Data Breach Investigations Report,* p. 52.

[59] See Advisen Cyber OverVue, *insite20twenty.advisen.com.*

[60] The firms working in the cyber risk industry typically use the number of records exposed/stolen as a metric to describe the relative size and seriousness of a breach. While there is some correlation between the number of records exposed and the ultimate cost of the breach, this metric is imperfect as it does not consider the relative value of the records exposed or how they might be used. However, as long as one recognizes those limitations, we believe the number of records exposed can be a useful descriptor. We note that the

Continued

higher the loss amount. We note that Equifax is not included in the PII breach data because that breach included access to PFI (social security numbers). The Equifax loss was $2.5 billion and is the largest publicly disclosed PFI breach. It has been reported that this loss resulted from Equifax leaving itself significantly exposed to hacking because it failed to implement various software security patches in a timely manner. In relation to the Equifax breach, the number of records potentially exposed at the CAT could be even larger. But since the CAT will only include less sensitive PII (name, address, birth year) and not PFI (social security number, account numbers), we believe the Equifax loss of $2.5 billion can be seen as an upward bound of the exposure a Customer and Account Attribute data breach at the CAT could generate.

Based on the descriptions provided by Advisen, the most similar PII breach to what CAT might experience in the list below is the E*TRADE hack, where a bad actor accessed their customer database and exported stolen customer data including names, residential addresses, phone numbers, and email addresses. These addresses were allegedly taken so the bad actors could start their own securities brokerage. Overall, the hackers compromised customer databases containing the personal information of more than 5 million customers, leading to a $12.9 million loss.[61] While there will be fewer elements of PII stored at the CAT (name, address, and birth year) than at E*TRADE (name, address, phone number, and email address), we again note there will be orders of magnitude more individuals' records at the CAT.

Figure 4[62]

Advisen Top 10 PII Cyber Breaches for Finance and Insurance Companies with $1 Billion Plus in Revenue

	PII Top 10					
	* represents simulated values					
	Company Name	Type of Incident	Incident Date	Records Exposed	Loss Amount	Asset Compromised
1	Industrial & Commercial Bank of China Ltd	Data - Malicious Breach	1/1/2017	117	$21,602,135*	PII
2	Morgan Stanley	Data - Malicious Breach	3/1/2016	14,256,250	$18,571,612*	PII
3	Swedbank AB	Data - Malicious Breach	1/1/2016	178	$16,910,448*	PII
4	E*TRADE Financial Corporation	Data - Malicious Breach	11/1/2013	5,000,000	$12,856,871*	PII
5	Wells Fargo & Co	Data - Malicious Breach	7/1/2016	5	$11,187,547*	PII
6	Wells Fargo & Co	Data - Malicious Breach	5/22/2017	5	$10,225,135*	PII
7	Aetna Inc	Data - Malicious Breach	11/22/2016	5	$10,001,613*	PII
8	Wells Fargo & Co	Data - Malicious Breach	3/16/2016	4	$9,300,114*	PII
9	State Farm Mutual Automobile Insurance Company	Data - Malicious Breach	2/27/2017	2	$9,241,348*	PII
10	Wells Fargo & Co	Data - Malicious Breach	9/11/2015	26	$9,128,562*	PII

As noted above, the Advisen database showed that for Finance and Insurance companies with $1B in revenue or more that had a PII breach, these breaches occurred with a frequency of 3.4 times on average over a 10-year period (median of 1). The range for the top 10 PII breaches was $21.6 million to $9.1 million.

The second highest PFI breach, after Equifax, is the $188.7 million loss suffered by Wells Fargo & Co. (Wells Fargo), which resulted from the bank allowing its employees to access customers' personal information, and in some cases forging data, to subscribe them to products, such as credit cards. Lawyers representing aggrieved customers have said the bank may have opened about 3.5 million unauthorized accounts.[63]

If the CAT stored social security numbers and account numbers (as was originally planned before the amendments), the exposure on a successful hack would be extreme. But, because the CAT Customer and Account Attribute data is limited to name, address and birth year, we believe that risk is mitigated to some degree. In summary, we suggest CAT Customer and Account Attribute data will be of medium interest to hackers and conclude this scenario would be relatively less difficult to implement, will occur with moderate frequency, and likely have medium to high severity if successful. An extreme event cannot be ruled out primarily because of the quantity of Customer and Account Attribute data being held at the CAT.

(3) Algorithm Reverse Engineering

Algorithmic trading uses a computer program that follows a defined set of instructions (an algorithm) to execute a trade. The trades can be executed at a speed and frequency that is impossible for a human trader. The algorithmic trading market size was $11.1 billion in 2019 and expected to grow to $18.8 billion by 2024.[64] [65] Algorithmic trading is responsible for approximately 60–73% of all U.S. equity

CAT will contain massive amounts of data, including information on hundreds of millions of accounts, making it much bigger than some companies we review for comparison.

[61] See the PII Top 10 cyber loss events as of September 11, 2019 as obtained from Advisen Cyber OverVue, *insite20twenty.advisen.com.*

[62] "Advisen has developed a proprietary loss amount model to help users make more informed decisions on cyber risk by enhancing how it is being quantified. The resulting analytics, when viewed in tandem with our benchmarking analyses, will provide a comprehensive picture of an organization's potential cyber loss exposure, as well as better guidance on the type and amount of cyber insurance to purchase. The model looks at a combination of more than 70 different variables across more than 100,000 cyber events in Advisen's proprietary cyber loss data to calculate simulated financial loss amounts by incorporating quantile regression analyses that look at data relationships across different quantiles to establish a range of potential impacts. The model is recalibrated on an ongoing basis to account for changes in data relationships as Advisen's cyber loss database continues to grow." See Advisen's Cyber OverVue User Guide, January 2020, p. 22. See also the PII Top 10 cyber loss events as of September 11, 2019 as obtained from Advisen Cyber OverVue, *insite20twenty.advisen.com.*

[63] See the PFI Top 10 cyber loss events as of September 11, 2019 as obtained from Advisen Cyber OverVue, *insite20twenty.advisen.com.*

[64] Research and Markets, *Algorithmic Trading Market by Trading Type, Component, Deployment Mode, Enterprise Size, and Region—Global Forecast to 2024, https://www.researchandmarkets.com/reports/4770543/algorithmic-trading-market-by-trading-type#rela0-4833448* accessed November 2020.

[65] We note that high frequency trading (HFT), a major subset of algorithmic trading, has experienced higher costs and lower profitability in the past few years. See Gregory Meyer, Nicole Bullock and Joe Rennison, "How high-frequency trading hit a speed bump," *Financial Times,* January 1, 2018, *https://www.ft.com/content/d81f96ea-d43c-11e7-a303-9060cb1e5f44* accessed August 2020.

trading.[66] The two largest firms, Virtu Financial, Inc. (''Virtu'') and Citadel ''account for around 40 percent of daily U.S. trading flow.'' [67] Virtu is the largest public algorithmic trading firm, with a market cap of $4.56 billion.[68] [69] Furthermore, Citadel, the nation's biggest equity and options market maker, is responsible for one in every five stock trades in America and 40% of the retail volume.[70]

Algorithmic trading plays an important role in making the U.S. markets more efficient. Academic research has shown that algorithmic trading significantly reduces bid-ask spreads and speeds price discovery.[71]

Assuming the trading data of the CAT LLC was breached and decrypted, we assess that, while difficult, that data could be used to reverse engineer the proprietary trading algorithms of algorithmic trading firms. The loss to a firm whose algorithm was compromised in this way would be the cost of developing the algorithm plus any forgone profits that could have been expected to accrue to the firm over a reasonable period of time.

For example, as of January 2020, Citadel is suing a rival for allegedly taking details of a key Citadel trading strategy which Citadel has stated cost more than $100 million to develop and which generates many millions of dollars each year.[72]

Although we assess that using the CAT data to reverse engineer a trading algorithm would take significant expertise and time, the trading strategies that use these algorithms are highly valuable. In addition, the concentration of profitability among a small number of players in this space could increase the attractiveness of attempting this type of scheme. We ultimately deem it unlikely that a bad actor would seek to use CAT data in this way because of the difficulty in both achieving the hack as well as the effort to reverse engineer an algorithm. The separation and encryption of the Customer and Account Attribute data (in the CAIS database) and trade data (in the MDS database), the fact that the trade data is anonymized, and the limitations on ways in which one can get this data (CAT data can only be accessed by the SEC and SROs via private line access; there is no public internet access and access to the CAIS is on a ''need to know'' and ''least privileged'' basis) would make this scenario very difficult to achieve. The hacker would need to successfully access all this data, decrypt it, and reverse engineer the algorithms under which the trades were made. Given the potential value (severity) of this type of information, however, bad actors could be so motivated. In particular, a state sponsored hacker could have the resources to attempt to reverse engineer successful algorithms and steal intellectual property in this way. The bad actor could also seek to ransom the algorithm to the algorithmic trading firm as discussed above or seek to sell the data to a sophisticated trading firm that was able to do the reverse engineering.

An example of a parallel type of scenario can be seen in the breach of newswire services by a group of Ukrainian hackers during 2015. The hackers gained access to corporate earnings releases for dozens of companies as much as 12 hours prior to their being made public. The hackers knew the information was valuable but did not know how to trade based on it. They therefore set up a network of traders to whom they fed the data and either sold them the releases outright or struck a deal to share in the profits.[73] More than $100 million was allegedly earned on the wrongful trades.[74]

In summary, we believe that while the implementing this type of breach would be difficult and the frequency likely low, the severity of a breach leading to the reverse engineering of an algorithmic trading firm's strategy could be high. An estimate of exposure of at least $100 million per incident (based on the cost to develop a successful strategy at Citadel) seems reasonable. Given the role that algorithmic trading firms play in adding liquidity to the markets, we deem this scenario to pose both a risk to algorithmic trading firms themselves, as well as to the efficient operation of U.S. markets. Therefore, we believe this scenario would be very difficult to implement, will occur infrequently, but have extreme severity if successful.

(4) Fake Data Insertion To Wrongfully Incriminate

We posit that if a hacker were able to successfully insert false data into the CAT, they could use that ability to wrongfully incriminate an individual or company. For example, assume that a hacker inserts data into the CAT making it appear that the CEO of a company was wrongfully engaging in insider trading of its company's stock. Further assume that this data triggered an investigation at the SEC into the CEO's trading and that investigation led to a preliminary injunction hearing to prevent the CEO from further accessing his or her account. This SEC action would be public, and both the CEO's and company's reputation and value could be harmed.

According to a 2010 study, when the SEC announced an investigation on a company, the average abnormal return based on that announcement was at least negative 8%.[75] This would equate to a reduction in market value of $1.8 billion for the median company in the S&P 500.[76]

The negative return can be significantly larger than 8%. In November 2019, the Wall Street Journal announced that the SEC was investigating Under Armour. On the day of the announcement, Under Armour's stock fell 19%.[77] Correspondingly, the market capitalization of Under Armour fell from $9.04 billion to $7.35 billion, a drop of $1.69 billion.[78]

Given the expected negative market reaction to an SEC investigation, the hacker could position to benefit from a stock price drop. This type of trading would arguably be akin to insider trading (trading on material non-public information), where we have seen cases that have generally generated illicit profits ranging in the hundreds of thousands to tens of millions of dollars. The largest insider trading matters to date were

[66] Research and Markets, *Algorithmic Trading market—Growth, Trends, and Forecast (2020–2025), https://www.researchandmarkets.com/reports/4833448/algorithmic-trading-market-growth-trends-and#rela4-5125563* accessed August 2020.

[67] AllAboutAlpha, ''High-Frequency-Trading Firms: Fast, Faster, Fastest,'' April 2, 2019, *https://www.allaboutalpha.com/blog/2019/04/02/high-frequency-trading-firms-fast-faster-fastest/* accessed November 2020.

[68] See Capital IQ website, *https://www.capitaliq.com/CIQDotNet/Financial/Capitalization.aspx?CompanyId=133624510* accessed November 6, 2020.

[69] Interestingly, Virtu was the victim of a recent social engineering hack. A hacker seized control of the email account of one of its executives. The email account was used to send two fraudulent wire transfers totaling $10.8 million to bank accounts in China. See Alexander Osipovich, ''High Speed Trader Virtu Discloses $6.9 Million Hacking Loss,'' *Dow Jones News Service,* August 11, 2020 accessed December 2020.

[70] Nathan Vardi, ''Finance Billionaire Ken Griffin's Citadel Securities Trading Firm Is On A Silicon Valley Hiring Binge,'' June 3, 2019, *Forbes, https://www.forbes.com/sites/nathanvardi/2019/06/03/finance-billionaire-ken-griffins-citadel-securities-trading-firm-is-on-a-silicon-valley-hiring-binge/#34f23c9c6b36* accessed August 2020.

[71] Terrance Hendershott, Charles M. Jones, and Albert J. Menkveld, Does Algorithmic Trading Improve Liquidity?, *The Journal of Finance,* Volume 66, No. 1, February 2011, *http://faculty.haas.berkeley.edu/hender/Algo.pdf.*

[72] Jane Croft, ''Citadel Securities sues rival over alleged trading strategy leak,'' *Financial Times,* January 10, 2020, *https://www.ft.com/content/2cbf1738-33cd-11ea-9703-eea0cae3f0de* accessed December 2020.

[73] See SEC website, ''SEC Reaches Settlements with Traders in Newswire Hacking and Trading Scheme,'' Litigation Release No. 24833, June 10, 2020, *https://www.sec.gov/litigation/litreleases/2020/lr24833.htm* accessed November 2020. Also see SEC website, ''SEC Charges 32 Defendants in Scheme to Trade on Hacked News Releases,'' August 11, 2015, *https://www.sec.gov/news/pressrelease/2015-163.html* accessed November 2020.

[74] See SEC website, ''SEC Reaches Settlements with Traders in Newswire Hacking and Trading Scheme,'' Litigation Release No. 24833, June 10, 2020, *https://www.sec.gov/litigation/litreleases/2020/lr24833.htm* accessed November 2020. Also see SEC website, ''SEC Charges 32 Defendants in Scheme to Trade on Hacked News Releases,'' August 11, 2015, *https://www.sec.gov/news/pressrelease/2015-163.html* accessed November 2020.

[75] Journal of Forensic & Investigative Accounting, ''Market Efficiency and Investor Reactions to SEC Fraud Investigations,'' Vol. 2, Issue 3, Special Issue, 2010, p. 3.

[76] Using the total market value of the S&P 500, $30.24 trillion, a negative 8% return would be a reduction in market value of $1.8 billion for the median company in the S&P 500 (median market value of $22.1 billion). See Refinitiv website, a company that provides financial data, *https://www.refinitiv.com/en/about-us* accessed October 21, 2020.

[77] Wharton University of Pennsylvania, ''How Undisclosed SEC Investigations Lead to Insider Trading,'' March 2, 2020, *https://knowledge.wharton.upenn.edu/article/undisclosed-sec-investigations-lead-insider-trading/* accessed September 2020.

[78] This market value drop may not be fully attributable to the announcement and would require an event study to test that conclusion. See Refinitiv website, *https://www.refinitiv.com/en/about-us.*

Martoma/SAC[79] and Galleon/Rajaratnam,[80] with alleged wrongful profits of $275 million and $95 million respectively.

We recognize that this scenario seems attenuated and unlikely because the hacker would need to know information from the separately kept and encrypted CAIS and trade databases. The hacker would need gain access to the CAIS to obtain which CCID went with the person/company to be wrongfully incriminated. The hacker would then be able to search the trade data for trades related to that CCID. Other potential hacker impediments include CAT data only being accessed by the SEC and SROs via private line access; there is no public internet access and access to the CAIS is on a ''need to know'' and ''least privileged'' basis. Additionally, we believe that this false accusation would be relatively easy for the accused CEO to disprove based on simply producing his own account statements. However, this could potentially occur at or after the public injunction hearing, and the associated initial effects on stock price. We conclude that this scenario would be very difficult to implement, will occur infrequently, but have high to extreme severity if successful. The severity level is based on the potential to profit from wrongful accusations about a company and/or its management.

(5) Data Removal or Insertion To Hide Fraud

The SROs and the SEC monitor the securities markets for a range of wrongful activities, such as trading in a way that manipulates the market prices of securities and trading on inside information (material non-public information). If a hacker were to access the CAT and remove data relating to wrongful acts (or insert data to obfuscate their bad acts) and the wrongful acts were not detected by SRO monitoring, the hacker could successfully hide illegal trading activity from regulatory scrutiny. This has the potential to enable illegal activity to continue (and its related profits) and ultimately undermine the efficiency of the markets and public trust therein. Ultimately the investing public is harmed as they may overpay for a purchase or receive less for the sale of a security.

If a bad actor can continue to make millions of dollars on illegal activity due to the insertion of fake data or deletion of data in the CAT, those activities essentially cause those millions to come out of the accounts of investors who are following the rules. To the extent the illegal activity becomes widespread, investors could lose confidence in the market and ultimately take out their money and potentially invest it in foreign markets. This would essentially increase capital costs for all companies seeking to raise funds to grow, translating into a smaller economy.[81]

To execute such a scheme, the bad actor would need to know how to hack into the encrypted and anonymized CAT trade data or hire someone to do so. The bad actor would also have to override or bypass the existence of two separate data feeds into CAT (one from the execution venue and one from the CAT Industry Member reporter) to delete or add fake data or access the final corrected database.[82] Given the potential payoff (severity), such an arrangement between a hacker and a bad actor could occur. For example, and as mentioned above, the SEC charged 32 defendants (primarily based in Ukraine) in a scheme where hackers obtained data from press releases prior to their public release and conspired with experienced traders to trade on earnings announcements based on the hacked data. These acts allegedly occurred over a five-year period and the information from the yet-to-be issued news releases was used to generate more than $100 million in illegal profits.[83] If the trading data relating to these wrongful trades had been deleted, it is likely this scheme would never have been detected and stopped.

This type of criminal trading undermines both market efficiency and public confidence in the markets. The effects may be pernicious and, if left unchecked, could lead to catastrophic loss of investor confidence.

Given the nature of this scheme, including avoiding detection by SRO monitoring, we believe this scenario would be very difficult to implement, will occur infrequently, but have high to extreme severity if successful.

(6) Trading on Non-Public Information

We posit that the non-public trading data in the CAT could be used to determine if a company or individual might be making large multi-day purchases or sales of securities of various companies. This information could indicate a potential takeover, or, in the case of a high-profile investor, a significant new position is being taken.

For example, it is not unusual for Berkshire Hathaway (''Berkshire'') to purchase large amounts of stock of a company, and for the stock of that company to go up in value both because of share demand increase based on the size of the purchases made by Berkshire, as well as the perceived value of having Berkshire as an investor once that position is public. Once the position exceeds 5% of the target company, Berkshire (or any investor for that matter) has ten days to report its holding to the SEC.[84] If someone with access to CAT trading data were to see that a significant position was being bought in a particular stock, they could use that information to take a long position in that stock in anticipation of a stock price rise that would occur once that information was made public.

On November 14, 2016, Berkshire reported to the SEC, with the SEC making it public at 4:05 p.m. ET, a new investment in American Airlines[85] amounting to 4.2% of the stock, or 21,770,555 shares.[86] At this time, American Airlines' stock price was trading around $43.40 per share[87] making the position worth around $945 million. Hypothetically, if someone had been able to front run 10% of these shares and net $1.36 per share (which represents the one day increase in share price post the announcement), the gain would have been $3.0 million.[88]

The hacker also could access the CAT trade data to look for new stock positions being taken in an account in a particular company that approaches 5%. This is referred to as a ''toehold'' position and could be an indicator that a takeover bid is likely.[89] The hacker could then take a long position in the stock of the target firm to benefit from the takeover announcement, after which stock prices of the target can jump substantially.[90] The

[79] See Final Judgement as to Defendant CR Intrinsic Investors, LLC, United States District Court, Southern District of New York, 12 Civ. 8466 (VM), filed June 18, 2014, p. 3.

[80] *See Opinion and Order, SEC* v. *Raj Rajaratnam,* et al., United States District Court, Southern District of New York, 09 Civ. 8811 (JSR), filed November 8, 2011, pp. 1–2.

[81] ''America's historical approach to our capital markets—an approach focused on transparency, materiality, fairness and accountability—has produced a remarkably deep pool of capital with unprecedented participation. It is our Main Street investors and their willingness to entrust their hard-earned money to our capital markets for the long term that have provided the seeds for the deepest, most dynamic and most liquid capital markets in the world. Their capital provides businesses and municipalities with the opportunity to invest, grow and create jobs with an organic dynamism that stands apart both today and since the Commission was formed 85 years ago.'' See Chairman Jay Clayton, Testimony on ''Oversight of the Securities and Exchange Commission'' Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, December 10, 2019, *https://www.sec.gov/news/testimony/testimony-clayton-2019-12-10* accessed November 2020.

[82] Data can be accessed by regulators via a query on day one after initial data validation as well as on day 5 when all data has been corrected. See SEC, *Order Approving CAT,* pp. 100 and 538.

[83] SEC website, ''SEC Charges 32 Defendants in Scheme to Trade on Hacked News Releases,'' August 11, 2015, *https://www.sec.gov/news/pressrelease/2015-163.html* accessed November 2020.

[84] Fintel website, Berkshire Hathaway Inc—Warren Buffet—Activist 13D/13G Filings, *https://fintel.io/i13d/berkshire-hathaway.* This website contains a list of Berkshire Hathaway SEC 13D/13G filings accessed November 2020.

[85] Berkshire's SEC Form 13F filing shows that Berkshire acquired 21,770,555 (13,355,099 plus 8,415,456) shares of American Airlines stock. See SEC's Edgar website, Berkshire Hathaway Inc filings, *https://www.sec.gov/Archives/edgar/data/1067983/000095012316022377/0000950123-16-022377-index.htm,* SEC's Edgar website, Berkshire Hathaway Inc filings, *https://www.sec.gov/Archives/edgar/data/1067983/000095012316022377/xslForm13F_X01/primary_doc.xml* and SEC's Edgar website, Berkshire Hathaway Inc filings, *https://www.sec.gov/Archives/edgar/data/1067983/000095012316022377/xslForm13F_X01/form13fInfoTable.xml* accessed November 2020.

[86] American Airlines had 518,130,000 shares of stock outstanding as of November 14, 2016. See Refinitiv website, *https://www.refinitiv.com/en/about-us.* 21,770,555/518,130,000 = 4.2%.

[87] American Airlines stock price closed at $43.40 on November 14, 2016, just prior to the SEC making Berkshire's American Airlines stock acquisition public. See Refinitiv website, *https://www.refinitiv.com/en/about-us.*

[88] 21,770,555 shares times 10% times $1.36 = $2,960,795. American Airlines stock price close prior to the announcement was $43.40 (November 14, 2016) and $44.76 after the announcement (November 15, 2016). $44.76 − $43.40 = $1.36. This is an illustration, and we did not perform an event study to determine whether the full price increase is attributable to the announcement.

[89] Investopedia website, Toehold Purchase definition, *https://www.investopedia.com/terms/t/toeholdpurchase.asp* accessed November 2020.

[90] Jensen and Ruback (1983) review several empirical papers that empirically estimate the

hacker would not know with certainty that the entity building the position will continue to make purchases but by pursuing this strategy across multiple examples, they have a high likelihood of success.

As discussed above, we know hackers are motivated to find and monetize non-public information (earnings announcements hacked from press release services). Such non-public information has also been obtained by hackers on the SEC's company filing website, Edgar. In 2016, bad actors hacked into the SEC's Edgar company filing system to access the data in company filings before the SEC made then public.[91] Such filings include earnings releases and the filings related to stock positions that exceeds 5% of the stock of the company being purchased (discussed above).[92]

In summary, we believe that a hacker could use CAT trade data to successfully trade on non-public information. The payoffs could be high enough to motivate a bad actor. Of course, the hacker would need to gain access to the encrypted and anonymized CAT trade data. If the trade data was obtained, it would be relatively easy to determine if an account was building a position in a particular stock. Thus, we believe this scenario would be relatively less difficult to implement, could occur relatively frequently across multiple stocks, and have medium to high severity if successful.

(7) Competitive Intelligence—Customer Lists

Another possible use of hacked CAT data would be to gather competitive information. A bad actor could hack into the CAT trade data and CAT CAIS data to determine which brokerage firms had which clients. For example, it could be useful to firm A to know that most of a particular pension fund's trading activity is being done at firm B, and how much trading that comprises. With that information, trading firm A could target the most profitable clients and avoid spending time on others. Access to CAT information could notably increase the scope and precision of competitive intelligence above that already available from other, more standard sources.

While this information could provide an advantage, we deem this scenario unlikely. First, as discussed above, there is difficulty in hacking two sources of encrypted and separately kept data, the CAIS (for the account owner associated with the CCID used in the trade database) and trade data as well as associating all of this to learn who the best customers are. Second, merely knowing who is working with whom does not, in and of itself, generate profits; therefore, the incentive to pursue this activity is low. In addition, taking advantage of this information would need to be undertaken by a regulated firm, and if the hacking was uncovered it would lead to severe consequences for that firm. Therefore, the combination of low value of the information and high risk for the user leads us to conclude this scenario is very unlikely. What seems a little more plausible is a bad actor asking the brokerage firm for a ransom and, if not received, the bad actor releasing the information into a public forum. Thus, we believe this scenario would be very difficult to implement, will occur infrequently, and have medium to high severity if successful.

(8) Discovery of Regulatory Investigation That Could be Used To Harm Someone's Reputation

It is our understanding that queries made by regulators on the CAT system will be saved, and that the party (*e.g.,* the SEC) making the query will be associated with the query.[93] If a hacker were able to view those queries and also had the Customer and Account Attribute data to identify the firm that is the subject of the query, he or she would be able to determine which firms were under regulatory scrutiny.

This information could be used to ransom the firm as well as purchase or sell securities to take advantage of a potential announcement of an investigation (or a resolution of an investigation) later in time. To accomplish this scheme, the hacker would need to gain access to the queries as well as the encrypted CAIS database (Customer and Account Attribute data). Importantly, access to the CAIS is on a ''need to know'' and ''least privileged'' basis and cannot be obtained from public internet connectivity. Additionally, the hacker would not know with certainty that the queries would turn into a publicly announced SEC investigation, but by pursuing this strategy across multiple examples, they have a higher likelihood of success. A hacker with access to the queries would likely need to implement a trading strategy across multiple companies to ensure at least one or more investigations were ultimately disclosed. We conclude this scenario will be of average difficulty to implement, will be of average frequency, and have medium to high severity.

abnormal returns that accrued to the shareholders of the target firms around the announcement dates associated with unexpected tender offers to be approximately 30%. See Jensen and Ruback, ''The Market for Corporate Control,'' Journal of Financial Economics, 11, (1983).

[91] See NPR website, Barbara Campbell, ''SEC Says Cybercriminals Hacked Its Files, May Have Used Secret Data for Trading,'' September 20, 2017, *https://www.npr.org/sections/thetwo-way/2017/09/20/552500948/sec-says-cybercriminals-hacked-its-files-may-have-used-secret-data-for-trading* accessed September 2020.

[92] See SEC website, *https://www.sec.gov/forms* accessed September 2020.

[93] See SEC, *Order Approving CAT, The Limited Liability Company Agreement of CAT LLC,* Appendix D–25 to D–27.

E. **Summary**[94]

	Potential Outcomes of CAT Related Cyber Breaches	Relative Difficulty of Implementation	Relative Frequency	Conditional Severity
1	Holding Data Hostage			
	a Threaten to publicly release confidential Customer and Account Attribute data or trade data to harm a firm's or investor's reputation	Medium	Low	Low to Medium
	b Threaten to keep data encrypted (denial of service) to prevent its use by regulators	Medium	Low	Low to Medium
	c Threaten to sell trading data regarding an account that could allow reverse engineering a trading algorithm	High	Low	High to Extreme
	d Threaten to make short position data public	Medium	Low	Medium
2	Identify Theft	Low	Medium	Medium to High
3	Algorithm Reverse Engineering	High	Low	Extreme
4	Fake Data Insertion to Wrongfully Incriminate	High	Low	High to Extreme
5	Data Removal or Insertion to Hide Fraud	High	Low	High to Extreme
6	Trading on Non-Public Information	Low	Medium to High	Medium to High
7	Competitive Intelligence - Customer Lists	High	Low	Medium to High
8	Discovery of Regulatory Investigation that Could be Used to harm Someone's Reputation	Medium	Medium	Medium to High

III. Economic and Public Policy Analysis of Cyber Security for CAT LLC

In this section, we review the law and economics literature that provides normative analysis of whether the preferred method to influence the management of risky activities is via regulation or litigation. Our goal is to apply the lessons from this literature to address the question of whether it is economically optimal to mitigate CAT LLC's cyber risk exposure (and the potential resulting harm to third parties) through regulation or through litigation, or through some combination of the two methods. We start by providing a rationale for why one would want to influence the loss-producing behavior of economic agents. We then characterize the differences between regulation as an *ex-ante* method of exercising control versus litigation as a method that influences behaviors before the loss-producing event occurs by assigning liability *ex post.* The discussion proceeds by comparing the relative advantages of disadvantages of each method, contrasting one relative to the other.

In reviewing CAT LLC's proposed plan amendment for a limitation of liability, the Commission is faced with the choice of whether to supplement the cyber regulatory regime that the Commission has already imposed by affording Industry Members the ability to bring private litigation against CAT LLC and the Participants. Based on our application of the economic literature, we conclude that regulation alone is preferable to regulation plus litigation. As discussed below, the approach that relies largely on regulation alone would be an improvement in economic efficiency and a benefit to the investing public over a regulation plus litigation approach as proposed by Industry Members. Accordingly, the limitation on liability proposed by the Participants is appropriate from the perspective of economic theory.

A. The Choice Between Regulation and Litigation

The standard (legal, economic, and moral) reason for seeking to control the actions of economic agents who engage in risky activities is to maximize the social welfare of the activity. Steven Shavell, the Samuel R. Rosenthal Professor of Law and Economics at Harvard Law School, provides a useful definition of social welfare as ''the benefits [each] party derives from engaging in their activities, less the sum of the costs of precautions, the harms done, and the administrative expenses associated with the means of social control.'' [95]

Regulation is one of the primary ''means of social control'' referenced in Shavell's definition. Regulatory control is characterized by its reliance upon rules designed to reduce to some acceptable level the likelihood of occurrence of a loss, or to minimize the size of the loss, should one occur. These rules are most often defined by professionals who are experts in the underlying risk exposure, and they are promulgated before the economic activity commences. Each party to the activity is required to follow the rules and enforcement is typically conducted using publicly observable mechanisms.

Litigation is a second ''means of social control.'' Economists (and others) have long recognized that the prospect of being held legally liable for harm *ex post* provides incentives for the relevant parties to take care *ex-ante,* thereby reducing the likelihood or the expected severity of an adverse event injuring either the first party or third parties. Litigation is characterized by the use of legal

[94] See discussion in Section D for an explanation of each column.

[95] Steven Shavell, ''Liability for Harm Versus Regulation of Safety,'' *The Journal of Legal Studies,* Vol. 13, No. 2 (June 1984), pp. 357–374.

standards to assign liability after the loss producing event has occurred that are applied and adjudicated by non-experts in the underlying risk using private enforcement mechanisms (*e.g.,* civil lawsuits involving private lawyers, judges and jurors) that may involve informing the non-experts using testimony provided by experts (*i.e.,* by expert witnesses, professionals, etc.).

One-way economists examine which method of social control may be preferable is in the context of ''incentive alignment'' among the parties to the economic activity. That is, how do you get each party to recognize and address not only the damages they might suffer, but the damages that other parties (customers, vendors, employees, etc.) might incur because the first party suffered an adverse event?

We focus on comparing regulation vs. litigation and on systems of social control that employ the joint use of each tool for the purposes of this White Paper.

B. Economic Determinants of the Relative Attractiveness of Regulation or Litigation To Control Risk

A well-established literature has developed over several decades that discusses the circumstances when regulation or litigation will be the preferred means of control to minimize the social cost of loss producing events.[96] This subsection examines general economic considerations underlying a mix of regulation and litigation that minimizes the overall expected costs of adverse events such as cyber breaches. Subsequently, we apply the insights of this literature to the issue at hand—the optimal control of cyber risk for CAT LLC, and whether the Commission should supplement the existing regulatory regime by allowing Industry Members to sue CAT LLC and the Participants in the event of a breach.

A first consideration relates to the rules-based nature of regulation. Regulation relies upon each party having a clear understanding of the legal obligation they must perform before they conduct the economic activity. Regulation tends to be preferred to litigation in circumstances where the rules can be written with precision, when the marginal compliance costs associated with the rules are low, and when compliance can be transparently verified by all parties, including the first party, all third parties, and by the regulator.[97]

One way that the reliance upon rules becomes problematic is when it is difficult to write a precise *ex-ante* rule that considers all possible circumstances that might be associated with the context of the loss. In such cases, it is likely the resulting standard will either be vague, highly complex, or will not consider every possible situation that might arise when the loss producing event occurs. *Ex post* litigation may be preferred in these situations so that judgement regarding the circumstances of the loss can be more easily considered as part of the adjudication process.

Regulatory rules that cannot be precisely written are also problematic to the extent they cause the parties to the activity to inadvertently not follow the rule or to have different interpretations of the rule. In either circumstance, it may be possible that all parties incur the administrative costs of designing the rule and of attempting to comply with the vague rule, and then also incur the administrative costs associated with interpreting the application of the vague rule once the loss has occurred. This duplication of administrative costs, both *ex-ante* and *ex post,* reduces the attractiveness of regulation in favor of litigation where the administrative costs are borne only once.

Regulatory systems tend to dominate when compliance with the rule(s) can be monitored by the regulator with low marginal cost and there is high transparency regarding the effort taken to comply with the rules. Litigation dominates in situations when there are significant informational asymmetries between the parties or between the parties and the regulator to determine compliance. The adversarial nature of proceedings where courts can compel the parties to reveal private case-specific information that has already taken place leads to more accurate liability assignment *ex post* and, therefore, incentives to mitigate the risk *ex-ante.* As a result, a litigation regime provides stronger incentives for each party to internalize the private information they have about the effort they take to minimize losses about the damages they might suffer, or about the damages they might impose on the third party relative in situations where it is costly for the parties to become informed about each other's actions *ex-ante* or in real-time.

Regulatory systems are preferable when the activity can result in so-called ''judgment proof problems.'' A judgment proof problem is synonymous with the classic externality where the actions of a responsible party imposes costs on a third party (or parties) that the responsible party is unable or unlikely to pay despite being the source of those costs. Agents can be judgement proof for several reasons. A responsible party may be judgment proof if the losses it produces are spread amongst many third parties and no single entity has a large enough incentive to hold the first party accountable for the damages it produced—the so-called ''disappearing defendant'' problem. A responsible party may also be judgment proof when the adverse event produces a catastrophic loss that exceeds the first party's available assets to provide compensation. Litigation systems, by definition, allow for the possibility that the catastrophic loss may happen and thereby permit the prospect that full recovery by the injured party may not be possible. Knowing the effects of a possible catastrophic event will not be fully realized by the first party reduces the first party's up-front incentives to take care.

The *ex-ante* approach of regulation mitigates judgement proof problems by seeking to avoid the loss itself. Appropriately designed, regulations can compel the first party to internalize expected social costs of losses suffered by third parties, incorporating those third-party costs into the first-party's decision making.

It is also important to consider the joint use of each policy tool. For example, drug manufacturers are subject to testing regimes (*ex-ante* regulation) before a new drug can be licensed and sold on the market and can be held liable for damages (*ex post* litigation) for drugs that cause injury to consumers, sometimes even in cases where the manufacturer followed all the up-front testing regimes.

From an economic perspective, the joint use of both regulation and litigation should be considered only when there is sufficient incremental efficiency that can be gained by using both methods of social control collectively. In these situations, one method—either or regulation or litigation—will be the primary method, and the relevant question is whether adding the other method will improve incremental efficiency. For example, an article in the leading economics journal argues litigation supplemented by regulation can resolve a form a judgment proof problem that arises when it is possible a third party may be unable to recover damages because courts can make errors by incorrectly applying a negligence standard. Adding regulation, *ex-ante,* to the *ex post* liability regime can help mitigate the litigation uncertainty by ensuring the negligence standard established by the court is not too low.[98]

Similarly, there are circumstances where it is advantageous to add litigation to mitigate the informational limitations of the regulatory policy tool. For example, the efficacy of regulation declines when a regulator monitoring a firm can observe compliance with certain rules but not others. In this case, adding liability through litigation to the regulatory regime can increase the efficiency of the entire system because *ex post* litigation is better suited to consider context-specific information after the loss has occurred focused on the rules for which compliance cannot easily be verified *ex-ante.*[99] A second area where regulatory

[96] In addition to the 1984 Shavell article referenced in the prior footnote, the following articles are of particular note: Ronald H. Coase, ''The Problem of Social Cost,'' *Journal of Law and Economics,* Vol 3 (1960), pp. 1–44; Harold Demsetz, ''When Does the Rule of Liability Matter?'' *Journal of Legal Studies,* Vol. 1, No. 1, (January 1972) pp. 13–28; and Steven Shavell, ''Liability for Accidents,'' Chapter 2 in *Handbook of Law and Economics, Vol. 1,* Mitchell Polinsky and Steven Shavell, eds., Elsevier, 2007. There are many additional references in the latter chapter.

[97] The compliance transparency condition is complicated in the case of cyber security by the need to prevent cyber criminals from understanding and evading cyber defenses and by the fact that cyber criminals themselves operate with great secrecy to avoid detection. A litigation approach, however, offers no advantage over regulation in compliance transparency and may actually increase the risk of cybercrime elsewhere by inadvertently disclosing information on cyber defenses. It is also germane to note that Industry Members sit on the Advisory Committee and SEC representatives have substantial visibility into the operations of the CAT and the Plan Processor. We discuss this latter point in detail later in the White Paper.

[98] Kolstad, Charles D., Thomas S. Ulen, and Gary V. Johnson, ''Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?'' *The American Economic Review* Vol. 80, No. 4 (Sep. 1990), pp. 888–901.

[99] Bhole, Bharat, and Jeffrey Wagner, ''The Joint Use of Regulation and Strict Liability with

Continued

systems suffer is when the regulator faces differential ability to monitor the firms in the industry it is overseeing or the firms have heterogenous assets such that it is difficult to write precise rules and standards. Both circumstances can create *ex post* judgement proof problems. In this case, using a regulation approach with relatively low compliance standards helps to avoid some of the losses while adding the liability regime can serve to provide additional incentives to mitigate the risks that are tailored to the specific circumstances of the individual loss-producing entity.[100]

Financial services and health and safety are two areas where the informational limitations and differential ability to monitor has corroborated the co-existence of regulation and litigation as means of *ex-ante* risk control. Financial institutions, for example, are regulated regarding the risk they might pose in the areas of solvency and consumer disclosure. But they are still subject to litigation over specific transactions where the information requirements to make certain decisions are high. We see similar strategies employed in the food and drug industries. There exist baseline regulatory requirements, but harmed parties are still permitted to sue based on specific circumstances giving rise to their harm.

The CAT is different from the examples cited here that support the co-existence of regulation and litigation to control risky behavior. The CAT does not face numerous customers with different fact-specific conditions. There are a relatively small handful of parties involved, all of whom are already regulated by the SEC. In the situation faced by the CAT, the SEC has already concluded that the existing cyber security framework is adequate and they can amend the regulatory scheme to require additional cyber security measures to enhance the *ex-ante* protection against cyber breaches, to the extent permitted by applicable laws and regulations. Indeed, the SEC has pursued this path on multiple occasions.[101] The Industry Members, even though they do not run the day-to-day operations of CAT, have the opportunity to comment on this proposal (as they do with all proposed CAT NMS Plan amendments). Similarly, in May 2020 the SEC amended the CAT NMS Plan with the goal of increasing operational transparency and financial accountability.[102]

The SEC can also file enforcement actions to compel compliance with the extensive cyber security requirements for the CAT. Enforcement action brought by the SEC against the CAT would be highly informed by the SEC's pre-existing regulatory supervision and is potentially informed by Industry Members through their ability to monitor CAT via their role on the Advisory Committee. The SEC, therefore, is uniquely positioned to consider the costs and benefits of taking enforcement action, and to tailor the scope and nature of enforcement proceedings in a way that best balances the competing stakeholder and public interests the CAT is designed to serve. The SEC is also able to use information that it acquires through multiple sources including its own examinations and, potentially, investigations of the CAT in conducting that cost-benefit analysis.

The litigation ability sought by Industry Members, however, is of a substantially different nature than that held by the SEC. The possibility of the CAT being forced by Industry Member initiated litigation to take actions either in conflict with or uncoordinated with the SEC's regulatory requirements is not trivial.[103] Furthermore, adding litigation to regulation does not resolve judgement proof problems, and in fact, for some judgment proof problems, it may not be the preferred solution.

Shavell suggests compulsory insurance is a potential solution to the judgment proof problem of inadequate assets as a way to compensate injured victims.[104] He cautions, however, the problem of inadequate assets that leads to inadequate incentives to take care will not be ameliorated if the insurer is unable to design an insurance contract where the insurance premium reflects the insurer's ability to monitor the insured's readiness (the premium recognizes investments by the policyholder to reduce the likelihood of loss), if the insurance is only available at limits well below the potential loss, or if the insurance is priced above the actuarially fair premium.

C. Special Considerations Arising for the CAT's Cyber Security

There are certain special considerations when examining the roles of regulation and litigation in aligning incentives appropriately for CAT's cyber risk. While regulation has a long history in public policy towards economic activity, cyber risk presents features that transcend prior regulatory endeavors. Much of regulation, for example, addresses relations between regulated entities and their customers or vendors—parties that enter into legal transactions willingly. Health and safety regulation, as another example, focuses on decisions and actions that are solely under the control of the regulated entities. Safety regulation of nuclear power plants, for example, is designed to avoid accidents that would create considerable harm to those living within the vicinity of the plant but for which there does not exist a contractual relationship between the parties.

The question of how best to encourage investment in protection against cybercrime is challenging because the parties harmed are varied, there exist circumstances where it may not immediately be known that a loss has occurred, and holding the perpetrators liable for their actions, even if they can be identified, is often not possible. On a very general level, entities that may be targets of cybercriminals have incentives to invest in cyber security measures up to the point where the last dollar of expenditures is expected to prevent at least that level of cyber loss to the entity. Cyber losses consist of direct costs to the breached entity and the costs that the entity expects it would pay to other parties harmed by the entity's cyber breach. The concern, therefore, is that entities may choose to not invest at a socially optimal level of protection if they do not internalize the expected direct costs of the potentially breached entity as well as the costs of all other affected parties. System administrators who have the responsibility to maintain and enhance the integrity of information assets and the systems that protect them may face situations where the benefits that might accrue from an investment in security may accrue to others outside the firm but may not be fully internalized to the firm. In these cases, markets do not provide sufficient incentive for the optimal investment in protection. Without an intervention of some sort to correct the externality, such as the cyber security regulatory regime mandated by the SEC, there may be insufficient incentive to invest in security at the economically optimal level.

Regulation of cyber security adds an additional dimension that is novel and difficult to manage—protection against malicious actors that have incentives and abilities to wreak havoc against parties with whom they have no consensual relationship while simultaneously avoiding legal sanction. Importantly, litigation against the first-party breach victims by third-party victims of cybercrime adds little, if any, incentive or ability to mitigate the frequency or severity of cybercrime when the first party is subject to an extensive, transparent, and well-functioning regulatory approach to overseeing cyber security.

For the reasons discussed in Section II, possible cyber breaches of the CAT can cause the CAT, the Plan Processor, and the Participants themselves to all experience significant harm (*e.g.,* loss of data or access to regulatory capabilities). The adverse effects on this group as first-party operators are already incorporated into the decisions the CAT and the Plan Processor regarding cyber security. Moreover given the fact that: The SEC is another party affected by the CAT's cyber risk, the Plan Processor is required to comply with the SEC's cyber mandates, and the Industry Member's role on the Advisory Committee,[105] there is little, if

Multidimensional Care and Uncertain Conviction,'' *International Review of Law and Economics* Vol. 28 (2008) pp. 123–132.

[100] De Geest, Gerrit, Giusseppe Dari-Mattiacci, ''Soft Regulators, Tough Judges,'' *Supreme Court Economic Review* Vol. 15 (2007) pp. 119–140.

[101] For a recent proposal, see SEC, *Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security,* RIN 3235–AM62, Release No. 34–89632, File No. S7–10–20, August 21, 2020.

[102] SEC, *Amendments to the National Market System Plan Governing the Consolidated Audit Trail,* RIN 3235–AM60, Release No. 34–88890, File No. S7–13–19, May 15, 2020.

[103] Litigation on the part of Industry Members, if successful, could result in a court decision that addresses one type of risk but then distorts cyber hygiene for the CAT away from other, now more pressing risks. The court decision, by its nature, remediates past problems with little, or no, regard to the problems arising in the future. A litigated solution could address a particular risk, but then inhibit the adoption of newer cyber hygiene methods.

[104] Shavell, Steven, ''The Judgement Proof Problem,'' *International Review of Law and Economics* Vol. 6, No. 1 (June 1 1986), pp. 45–48.

[105] ''Members of the Advisory Committee shall have the right to attend meetings of the Operating

any, additional harm to third parties that is not already incorporated into the decision making of the CAT and the Plan Processor. In economic terms, adding the threat of litigation would do nothing to further internalize into the CAT's decision making the possible losses suffered by the Industry Members. Indeed, it is possible that efforts to reduce the cyber risks that most concern Industry Members in an effort to avoid litigation may take resources from the CAT that would be better used to improve overall cyber hygiene.

Another notable information asymmetry in the cyber security arena is the ability of perpetrators to hide methods, intentions, and targets from scrutiny. Even with diligent cyber security efforts on the part of potential targets, cyber breaches may not be detected promptly enough, and first-party breach victims may not know they have been breached. Even though there are now extensive breach notification requirements (including in the CAT NMS Plan), it takes time and effort to understand the scope of the breach and the scale of the required notifications. Relatedly, breached entities may have incentives to not reveal they have been hacked. Cyber breaches occur often because of weaknesses in software design and implementation that are then exploited by the bad actors. Relevant software is most often purchased from non-parties and affected parties rely on the integrity of the purchased software. There is also a public goods nature for information about cyber breaches. Knowledge of a particular cyber breach at one victim can help other targets avoid becoming victims. The incentive to disclose a breach to support others for no private gain is a classic common goods problem.

The concerns about disclosing a cyber breach with the CAT are substantially, if not completely, mitigated. CAT LLC exists only because of an SEC mandate that a centralized database is essential to improving the monitoring and supervision of U.S. securities trading activity. The SEC has closely supervised the formation and operation of the CAT, and there are no other entities similar to the CAT to diffuse the SEC's attention. The SEC has imposed extensive and specific requirements on the CAT regarding its cyber security operations. ''The security and confidentiality of CAT Data has been—and continues to be—a top priority of the Commission. The CAT NMS Plan approved by the Commission already sets forth a number of requirements regarding the security and confidentiality of CAT Data.'' [106] Numerous SEC personnel and regulatory personnel at the Participants will access the CAT's Central Repository on a daily basis. The SEC's knowledge of the CAT's cyber security standards and operations is extensive and precise. Finally, CAT is a not a for-profit entity and its fundamental mission is to serve the public good as defined by the SEC. As a result, its incentives to withhold information are minimized relative to for-profit entities.

These considerations present challenging obstacles to an effective litigation approach to cyber security for the CAT. An advantage of the regulatory approach to the CAT's cyber security is the ability of the SEC to require the CAT and the Plan Processor to implement cyber security initiatives, standards, policies, and procedures promulgated by entities with deep knowledge and experience in cyber matters—thereby internalizing the social benefits of investing in cyber security into their decision making. The SEC can also require CAT LLC and the Participants to amend their cyber policies, procedures, systems and controls in response to subsequent developments or newly identified vulnerabilities, to the extent consistent with applicable laws and regulations. In addition, it is important to recognize that the SEC may bring enforcement actions against Participants and the CAT should they fail to comply with best practices embodied in the CAT NMS Plan or SEC regulations, including Regulation SCI.[107] An SEC enforcement action (litigation) would likely be settled with the non-complying party(ies). This has the benefit of penalizing non-compliance without the added cost of protracted litigation. Adding a third-party litigation approach as proposed by Industry Members on top of existing regulation and potential enforcement action runs the risk of incurring marginal costs without adding any incremental benefit. We elaborate on this point in Section D.2 below.

D. Assessment of Regulation and Litigation Approaches as Applied to a Potential CAT LLC Cyber Breach

In this section, we apply the economic considerations discussed in Sections A through C above to analyze whether CAT's cyber security risk should be addressed through regulation, litigation, or a combination of both methods. We conclude that affording Industry Members the ability to sue CAT LLC and the Participants for damages suffered as a result of a potential CAT data breach would not meaningfully increase the incentives for CAT LLC to take appropriate cyber precautions but would increase the costs to various market participants, including the Participants, Industry Members, and individual investors. Under these circumstances, the Participants' proposed limitation of liability amendment to the CAT Reporter Agreement would serve important policy goals.

1. Recapitulation of CAT's Risks, Standards, Policies, and Practices

The potential for cyber breaches at the CAT exists and can result in harm to some parties is acknowledged by all, including the SEC. ''The Commission acknowledges that the costs of a breach, including breach management, could be quite high, especially during periods of market stress. Furthermore, the Commission understands that a breach could seriously harm not only investors and institutions but also the broader financial markets.'' [108] In its *Order Approving CAT,* the SEC ''explained its belief that it is difficult to form reliable economic expectations for the costs of security breaches'' [109] and that ''the form of the direct costs resulting from a security breach will vary across market participants and could be significant.'' [110] The SEC continued, ''The Commission is unable to provide quantitative estimates of those costs because there are few examples of security breaches analogous to the type that could occur under the Plan and because the Plan Processor has some discretion in developing its breach management plan.'' [111]

The SEC has mandated that the CAT and the Plan Processor (FINRA CAT) implement a number of specific cyber security protocols.[112] The SEC's regulation of the CAT, therefore, focuses appropriately on *ex-ante* risk reduction requiring a variety of cyber best practices by the CAT and its users.

The SEC can employ a variety of regulatory enforcement measures to compel the CAT (and other market participants) to establish and maintain a high level of cyber security. With these and other protocols, practices, and procedures in place, ''[t]he Commission discussed . . . its belief that the risks of a security breach may not be significant because certain provisions of Rule 613 and the CAT NMS Plan appear reasonably designed to mitigate these risks.'' [113] In its *Order Approving CAT,* the SEC anticipated and resolved many of SIFMA's concerns regarding the public interest aspect of the proposed CAT Report Agreement amendment.[114] It is worth quoting

Committee or any Subcommittee, to receive information concerning the operation of the Central Repository (subject to Section 4.13(e)), and to submit their views to the Operating Committee or any Subcommittee on matters pursuant to this Agreement prior to a decision by the Operating Committee on such matters. . . .'' See SEC, *Order Approving CAT, The Limited Liability Company Agreement of CAT LLC,* Section 4.13(d).

[106] SEC, *Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security,* RIN 3235–AM62, Release No. 34–89632, File No. S7–10–20, August 21, 2020, I. Background, pp. 9–10.

[107] Regulation SCI (Regulation Systems Compliance and Integrity and Form SCI) was adopted by the SEC in November 2014 ''to strengthen the technology infrastructure of the U.S. securities markets.'' Regulation SCI applies to the Participants and is designed to ''Reduce the occurrence of systems issues; Improve resiliency when systems problems do occur; [and] Enhance the Commission's oversight and enforcement of securities market technology infrastructure.'' See SEC website, ''Spotlight on Regulation SCI,'' *https://www.sec.gov/spotlight/regulation-sci.shtml* accessed November 2020.

[108] SEC, *Order Approving CAT,* Section V.F.4. *Economic Analysis, Expected Costs of Security Breaches,* p. 708.

[109] SEC, *Order Approving CAT,* Section V.F.4. *Economic Analysis, Expected Costs of Security Breaches,* p. 704.

[110] SEC, *Order Approving CAT,* Section V.F.4. *Economic Analysis, Expected Costs of Security Breaches,* p. 705.

[111] SEC, *Order Approving CAT,* Section V.F.4. *Economic Analysis, Expected Costs of Security Breaches,* p. 708.

[112] Consolidated Audit Trail website, Security: FAQs, *https://www.catnmsplan.com/faq.* Response to questions S1, S10, and S11 accessed August 2020.

[113] SEC, *Order Approving CAT,* Section V.F.4. *Economic Analysis, Expected Costs of Security Breaches,* p. 708.

[114] *The Commission notes that the Participants' proposed governance structure—with both an Operating Committee and an Advisory Committee—*

Continued

extensively from the SEC's *Discussion and Commission Findings* section in the *Order Approving CAT* to understand the approach adopted by the SEC.

Rule 613 tasks the Participants with the responsibility to develop a CAT NMS Plan that achieves the goals set forth by the Commission. Because the Participants will be more directly responsible for the implementation of the CAT NMS Plan, in the Commission's view, it is appropriate that they make the judgment as to how to obtain the benefits of a consolidated audit trail in a way that is practicable and cost-effective in the first instance. The Commission's review of an NMS plan is governed by Rule 608 and, under that rule, approval is conditioned upon a finding that the proposed plan is ''necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system, or otherwise in furtherance of the purposes of the Act.'' Further, Rule 608 provides the Commission with the authority to approve an NMS plan, ''with such changes or subject to such conditions as the Commission may deem necessary or appropriate.'' In reviewing the policy choices made by the Participants in developing the CAT NMS Plan, the Commission has sought to ensure that they are supported by an adequate rationale, do not call into question the Plan's satisfaction of the approval standard in Rule 608, and reasonably achieve the benefits of a consolidated audit trail without imposing unnecessary burdens. In addition, because of the evolving nature of the data captured by the CAT and the technology used, as well as the number of decisions still to be made in the process of implementing the CAT NMS Plan, the Commission has paid particular attention to the structures in place to guide decision-making going forward. These include the governance of the Company, the provisions made for Commission and other oversight, the standards established, and the development milestones provided for in the Plan.[115]

The SEC, therefore, after an extensive consideration of the overall costs and benefits of the CAT, already has expressed its judgment that the cyber security requirements it imposed on the CAT sufficiently serve the public interest. In its November 15, 2016 *Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail, Supplementary Information,* the SEC concluded, ''[T]hat the [CAT NMS] Plan, as amended, is *necessary and appropriate in the public interest,* for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the [Securities Exchange] Act [of 1934].''[116]

2. Alignment of Incentives

As explained in Sections A through C above, and mentioned in SIFMA's *Memorandum of Law,* the issue here is the ''allocation of risk (and resulting incentives) relating to a potential CAT data breach to ensure that data is not misused, misappropriated or lost.''[117] Industry Members, through SIFMA, assert that the Participants' proposed limitation on liability would impose significant burdens on them. In essence, by advocating against the inclusion of a limitation of liability provision in the Reporter Agreement, Industry Members have argued that the risks associated with a CAT cyber breach are best addressed through litigation they can initiate as opposed to regulation and, if necessary, enforcement action by the SEC. But an application of the economic principles discussed above to an examination of the CAT fundamentally challenges Industry Members' interpretation.

Relying primarily upon a regulatory regime, as proposed by Participants, is reasonable based upon our analysis for several reasons.

- CAT LLC is a legal entity jointly owned by the Participants. The Participants, as SROs, are already overseen by the SEC and are therefore subject to significant regulatory requirements to limit their exposure to cyber risk. The SROs also use the CAT to fulfill their regulatory functions under supervision of the SEC. A cyber breach at the CAT would affect the SROs' ability to perform their regulatory function—meaning that the SROs, as users of the CAT, have a strong interest in the CAT's cyber security. As discussed above, the SEC can impose—and has in fact imposed—additional cyber regulations in response to subsequent developments or to address newly identified threats. As meaningfully regulated entities, the Participants are obligated to comply with regulatory requirements or face consequences. The Participants have already implemented cyber security standards, policies and procedures to protect their information from successful attack. Further, similar to the CAT, SROs have in place liability limitations with Industry Members for cyber loss.[118] If Industry Members have already accepted limitations on liability for cyber loss with individual SROs, imposing limitations on liability for cyber loss applied to an SEC-mandated consortium composed of those individual SROs substantially works to negate the pre-existing individual limitations on liability.
- CAT LLC's funding principles seek to cover the annual operating costs of the company, and the financial assets are designed to be minimal and substantially lower than the maximum possible loss due to several extreme possible cyber breach scenarios. There is presently no asset reserve, and no plans to build one, on the balance sheet of CAT LLC that could cover a substantial cyber loss. Dispensing with the liability exposure will, therefore, not likely change CAT LLC's incentive to avoid losses beyond its existing minimal asset base.
- The efficiency of regulatory systems to achieve economically optimal outcomes declines when the monitor is required to oversee an industry consisting of heterogeneous firms where it is difficult to promulgate rules that apply with equal precision to all firms. As discussed in Section B above, efficiency gains may be possible in such an industry by supplementing the regulatory system with a liability system that can add context-specific information should a loss occur. In this case, however, CAT LLC is the only firm being overseen. As a result, the regulatory system is tailored specifically on an *ex-ante* basis with rules targeted to this particular firm. Thus, adding litigation initiated by Industry Members in this case, where context specific information can be considered *ex post,* is difficult to justify as there is an ongoing dialogue where the regulatory rules can be revised and tailored as circumstances change over time through the monitoring mechanisms available to the Industry Members and to the SEC through its examination of the CAT by the Office of Compliance Inspections and Examinations.
- Regulatory arrangements can also be enhanced in situations where the monitoring costs associated with compliance are high and when the regulated activity is composed of heterogenous firms. Again, this circumstance is unique, however, as CAT LLC is the only firm being monitored. Importantly, representatives of the SEC attend all Operating Committee meetings, participate in the Security Working Group and Interpretations Working Group, and receive updates regarding various aspects of the project and system on a daily basis. In addition, the Industry Members are designated members of the Advisory Committee, which gives them access to substantial information about the cyber security circumstances at the CAT and the Plan Processor. The Industry Members' role on the Advisory Committee also provides them an ability to attend all Operating Committee meetings as well as meetings of other subcommittees and working groups and, therefore, the ability to advocate for their interests on the cyber security policy and procedures and other issues related to CAT LLC. While the Industry Members' role is advisory in nature, there is no restriction that prevents any Industry Member from raising specific concerns regarding CAT LLC's cyber security directly with the SEC. In addition, Industry Members transfer large amounts of data into the CAT, thereby contributing to the risk of a breach (*e.g.,*

is similar to the governance structure used today by other NMS plans, and the Commission believes that this general structure is reasonably designed to allow the Participants to fulfill their regulatory obligations and, at the same time, provide an opportunity for meaningful input from the industry and other stakeholders.

SEC, *Order Approving CAT,* Section IV.B.1, pp. 139–140, emphasis added.

[115] SEC, *Order Approving CAT,* Section IV., *Discussion and Commission Findings,* pp. 126–127, emphasis added, internal footnotes omitted.

[116] SEC, *Order Approving CAT,* Section I. *Introduction,* p. 8, emphasis added. Nearly identical wording was repeated in Section IV. *Discussion and Commission Findings,* p. 129 and Section VII. *Conclusion,* p. 979.

[117] *Memorandum of Law in Support of SIFMA's Motion to Stay SRO Action Pending Commission Review of SIFMA's Application Pursuant to Exchange Act Sections 19(d) and 19(f),* April 22, 2020, p. 15.

[118] See the discussion in Section 4 for some useful examples.

malicious data could be inserted, knowingly or not, through an Industry Member data upload). Thus, Industry Members are active participants in the cyber mitigation activities of CAT LLC and active enforcement monitors of the Plan Processor and the Participants.

The SEC has required that CAT LLC and the Plan Processor implement and maintain an extensive cyber security regimen. Importantly, both the SEC and Industry Members can monitor and provide input on the cyber security hygiene of the CAT and the Plan Processor, and the SEC can bring enforcement actions against the Participants if they fail to meet the standards in the regulatory regime. Under these conditions, adding an ability for Industry Members to sue CAT LLC or the Plan Processor in the event of a cyber breach will not meaningfully improve the incentives to implement and maintain the security of the data residing at CAT. Those incentives already exist based on *ex-ante* regulation. Consequently, our analysis suggests removing the limitation of liability provision will not lead to increases in the safety of the cyber security program or reductions in expected losses due to successful cyber-attacks.

3. Additional Costs of Litigation

In addition to considering the potential benefits of litigation (which appear to be minimal for the reasons discussed above), an economic analysis must also consider costs of allowing litigation by Industry Members.

At a minimum, any means of social control of a risky activity comes with administrative expense. It is important, therefore, to determine if the incremental control that comes with the associated set of benefits justifies the additional expense. The additional costs of cyber security protection or remediation (or of compensation paid to adversely affected parties who successfully litigate should a loss occur) that would be funded by CAT LLC need to be examined relative to the expected marginal benefits.

More substantively, the threat of litigation without concomitant benefits can lead to significant extra-marginal costs that reduce social welfare. For example, the threat of medical malpractice litigation has been cited as a motivation for excess medical testing.[119] In this case, the prospect of litigation arising from the absence of the limitation on liability provision has the prospect for prompting overpayment for cyber security on the part of the CAT and the Plan Processor beyond the economically optimal level of protection, despite the analysis we present above suggesting that such litigation would provide no incremental benefit. The prospect of third-party litigation may prompt CAT LLC to expend resources on cyber security systems that supplement the detailed (and regularly updated) framework implemented by the Commission, but that do not reduce the cyber risk commensurate with the costs. The threat of litigation from Industry Members arising from a cyber breach at the CAT could also affect decisions on the implementation of new protocols at CAT. One can easily imagine the Plan Processor, responding to perceived concerns from Industry Members, might adopt an overly risk averse posture and not pursue new opportunities to decrease costs or increase efficiencies at the CAT as new technologies become available given an overemphasis on certain courses of action and underinvestment in others. It could actually result in an overinvestment in cyber security and an underinvestment in productivity-enhancing projects where the costs of these decisions would ultimately be passed on to the investors in the form of higher costs of trading, higher costs of securing capital, etc.

An over-investment in cyber security, moreover, could make the CAT less effective in achieving the Commission's goals. A CAT system burdened by excess security measures could slow down database searches, surveillance programs, and other essential functions. Security measures added to hedge against litigation risk, for example, might limit the number of records that could be returned in a single query, restrict access to a less-than-optimal pool of regulatory personnel (at the SEC and the SROs), or require importation of outside data into CAT environments that would expand the CAT's overall attack surface. Indeed, as noted above, allowing third-party litigation would run the risk that a court would mandate security protocols that conflict or interfere with those adopted by the SEC.

Extending the CAT's asset base (*i.e.,* increasing CAT LLC's assets or broadening the number of firms potentially liable in the event of a loss) may have the theoretical advantages of reducing the judgment proof problem discussed earlier and provide compensation to those negatively impacted by a cyber event. However, as conceived, CAT LLC is run on a cost-only basis, so there is currently no mechanism to establish safety reserves that might allow the it to build up a cash to pre-fund losses from a cyber breach. One could imagine adopting an alternative funding principle that would permit those harmed by a cyber loss to seek compensation from a fund that could be established on the CAT's balance sheet. Policies and procedures could be developed that would prescribe the source that would finance the fund, that would describe how those funds would be invested, that would define a covered loss, that promulgate how approved claims would be settled, etc.

Although building a pool of capital in this manner might provide some level of compensation to a few entities who could suffer a loss supplying the CAT with the required information, we caution that this course of action has notable possible disadvantages. Beyond the administrative expenses associated with establishing such a business function within CAT, there are well known challenges associated with creating a largely unencumbered pool of capital within organizations as there is considerable evidence doing so can lead to substantially misaligned incentives between managers and the providers of that capital that ultimately lead to significant costs.[120] We provide several alternative ways that would allow the CAT to pre-fund cyber losses in Section E below that we judge would lead to substantially better outcomes than establishing a cyber loss pool on CAT LLC's own balance sheet.

It is well-understood that litigation in general is an expensive and highly uncertain process. This holds with particular persuasiveness for the new, highly technical, and rapidly changing area of cyber security. The level of expertise required to establish what went wrong, who was responsible, and then the calculation of relevant losses is extremely high, placing large information burdens on the triers-of-fact. In the case of CAT LLC, there would be an additional burden of demonstrating either that the SEC's cyber security mandates were inadequately implemented or were insufficient to the task. Discovery in such litigation also runs the risk of revealing crucial cyber security information to malicious actors. There are, therefore, substantial unquantifiable direct costs associated with litigating cyber security breaches at the CAT.

We identified several marginal operating costs that would likely emanate (with no corresponding marginal benefits) if the limitation of liability provision were eliminated. These extra costs are either associated with inefficient litigation, with extra-marginal defensive investments in cyber risk protection, with reduced efficacy of the CAT system due to excess, litigation-driven security measures, or a cash build-up scheme that would be borne by the Participants/SROs and Industry Members who would ultimately pass those higher costs on to their customers, employees or owners. Research on the incidence of extra-marginal costs and taxes on organizations generally shows that these higher costs tend to fall on employees and customers rather than the owners of the organization.[121] The Industry

[119] By one estimate, Mello, Chandra, Gawande, and Studdert (2010) suggest between 2–3 percent of health care spending in the United States, or $55.6 billion (in 2008), is related to the costs of defensive medicine. See Mello, Michelle M., Amitabh Chandra, Atul A. Gawande, and David M. Studdert, ''National Costs of the Medical Liability System,'' *Health Affairs* Vol. 8, No. 29 (Sep. 2010) pp. 1569–1577.

[120] See Jensen, Michael, ''Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers,'' *American Economic Review,* Vol. 76, No. 2 (May 1986) pp. 323–329. If the capital pool exists within regulated entities, that, at least potentially, raises additional complications. See, for example, the regulation of insurance company general accounts.

[121] There is an extensive literature on the incidence of the corporate income tax supporting this proposition. In this literature, owners have a greater ability to adjust their decisions (especially how they invest their capital) than employees or customers. See, for example, William M. Gentry, ''A Review of the Evidence on the Incidence of the Corporate Income Tax,'' *U.S. Department of the Treasury OTA Paper 101,* December 2007 (*https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-101.pdf* accessed August 2020); Jennifer C. Gravelle, ''Corporate Tax Incidence: A Review of Empirical Estimates and Analysis,'' *Congressional Budget Office Working Paper 2011–01,* June 2001 (*https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/122xx/doc12239/06-14-2011-corporatetaxincidence.pdf* accessed August 2020); and Stephen Entin, ''Labor Bears Much of the Cost of the Corporate Tax,'' *Tax Foundation Special Report No. 238,* October 2017 (*https://files.taxfoundation.org/20181107145034/Tax-Foundation-SR2382.pdf* accessed August 2020). For a more comprehensive treatment of tax

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Members' desire to dispense with the limitation of liability provision may, at best, result in avoiding some losses or, possibly, providing compensation for cyber breaches to a handful of Industry Members and their clients. But our analysis suggests the costs will likely be far higher and spread throughout the system as a whole, likely leading to reduced trading levels, reduced participation in markets by investors, or increased costs of raising capital. Moreover, since any benefits, if they exist at all, will be negligible, the lifting the limitation on liability will likely lead to less socially desirable outcomes.

4. Examples of Existing Limitation on Liability Provisions

Limitations on liability provisions are ubiquitous in commercial relations and in the securities and finance businesses. While the SEC-regulated relationship between the SROs and the Industry Members limit the applicability of general commercial contractual considerations to limitations on liability regarding cyber security at CAT, there are multiple examples where public (and private) interests have been served by limitations on liability provisions imposed by regulation. Some of these instances are common in the investment business while others are in areas remote from investment but exhibit informative parallels.

Perhaps most relevant are the limitations of liability provision imposed by existing trade reporting facilities, regulatory reporting systems, and Industry Member agreements with their customers. Here, the Industry Members routinely (and unremarkably) specifically limit their liability to their respective customers, even though Industry Members hold important and sensitive customer information in their systems. The May 6, 2020 *Consolidated Audit Trail, LLC's and Participants' Memorandum of Law in Opposition to SIFMA's Motion to Stay* documents,

[T]he Limitation of Liability Provision is similar in substance and scope to provisions that Industry Members routinely use when they are in possession of customer data (including order and trade data). Finally, each exchange has rules, approved by the Commission, that broadly provide that the Participants shall not be liable to Industry Members.[122]

One finds limitations of liability elsewhere in the U.S. economy where the threat of litigation would raise costs and regulation exists. The examples presented below limit liability while simultaneously providing another mechanism to compensate injured parties.

The federal government, for example, has established a limitation of liability for vaccine producers. The National Childhood Vaccine Injury Act of 1986 [123] established the National Vaccine Injury Compensation Program ''after lawsuits against vaccine manufacturers and healthcare providers threatened to cause vaccine shortages and reduce vaccination rates.'' [124] This legislation limited the liability of vaccine manufacturers for unavoidable adverse side effects and for failure to provide direct warnings.[125] The liability limitation was intended ''[t]o ensure a stable vaccine supply by limiting liability for vaccine manufacturers and vaccine administrators.'' [126]

In 2005, Congress passed the ''Public Readiness and Emergency Preparedness Act'' (''PREP Act'').[127] This act extended targeted liability protections for pandemic and epidemic products and security countermeasures:

Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.[128]

In a declaration effective February 4, 2020, the Secretary of Health and Human Services ''invoked the PREP Act and declared Coronavirus Disease 2019 (COVID–19) to be a public health emergency warranting liability protections for covered countermeasures.'' [129] There is currently substantial discussion regarding a legislative proposal to limit the liability of entities recommencing operations in the face of the COVID–19 pandemic.[130]

The parallel between the public policy for vaccines and the role of CAT LLC to improve investor protection and promote market integrity, particularly during times of market stress, while not exact, is useful. In this metaphor, cyber criminals play the role of viruses. Society has an interest to promote the development of a vaccine to combat the pandemic or to use the CAT to help regulate financial markets to promote the public good. Limiting liability is one way to do so.

There is a third, simultaneously more expansive and more focused example—financial solvency regulation. This is again ubiquitous and multifaceted—deposit insurance, pension guaranty coverage, insurance guaranty associations, etc. working across many types of financial institutions and products. These programs provide various customers and other stakeholders the

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incidence, see Don Fullerton and Gilbert E. Metcalf, ''Tax Incidence,'' Chapter 26 (pp. 1787–1872) in Alan Auerbach and Martin Feldstein, *Handbook of Public Economics,* 2002. A working paper version of this chapter can be found at *https://www.nber.org/papers/w8829.pdf* accessed August 2020.

We contend that this literature is applicable to adding litigation exposure from cyber breaches to CAT and the Plan Processor with minor modifications in the analysis. As noted above, litigation is an additional expense for CAT and the Plan Processor. For CAT and the Plan Processor to operate, expenses must be paid. By CAT's funding principles, the extra funds will be passed along as higher fees to the Participants and the Industry Members.

[122] *Consolidated Audit Trail, LLC's and Participants' Memorandum of Law in Opposition to SIFMA's Motion to Stay,* May 6, 2020, pp. 6–7. Also see, pp. 16–17 and *Appendix A: Limitation of Liability Provisions.* Internal references to Exhibit A containing the specific examples are omitted.

[123] Public Health Service Act, January 5, 2017, As Amended Through Public Law 114–255, Enacted December 13, 2016, *https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/about/title-xxi-phs-vaccines-1517.pdf* accessed July 2020.

[124] Health Resources & Services Administration, *About the National Vaccine Injury Compensation Program, https://www.hrsa.gov/vaccine-compensation/about/index.html* accessed July 2020.

[125] *No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.*

No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, solely due to the manufacturer's failure to provide direct warnings to the injured party (or the injured party's legal representative) of the potential dangers resulting from the administration of the vaccine manufactured by the manufacturer.

42 U.S. Code § 300aa–22, *https://www.law.cornell.edu/uscode/text/42/300aa-22* accessed November 2020.

[126] Health Resources & Services Administration, *The National Vaccine Injury Compensation Program (VICP), https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/vaccine-injury-infographic-2017.pdf* accessed August 2020.

[127] 42 U.S. Code § 247d–6d at Health Resources & Services Administration, *https://www.hrsa.gov/sites/default/files/gethealthcare/conditions/countermeasurescomp/covered_countermeasures_and_prep_act.pdf* accessed July 2020.

[128] 42 U.S. Code § 247d–6d at Health Resources & Services Administration, *https://www.hrsa.gov/sites/default/files/gethealthcare/conditions/countermeasurescomp/covered_countermeasures_and_prep_act.pdf* accessed July 2020.

[129] Congressional Research Service, *The PREP Act and COVID–19: Limiting Liability for Medical Countermeasures,* at *https://crsreports.congress.gov/product/pdf/LSB/LSB10443* accessed July 2020.

[130] See, for example, Andrew Duehren, ''Senate GOP Aims to Funnel Covid Liability Cases to Federal Courts,'' *The Wall Street Journal,* July 16, 2020, *https://www.wsj.com/articles/gop-senators-move-ahead-with-coronavirus-liability-plan-11594929198?mod=searchresults&page=1&pos=3* (accessed December 2020) and a version of this article on page A4 of the July 17, 2020 print.

The proposal, which the White House is reviewing, temporarily offers schools, businesses, health-care providers and nonprofit organizations legal protections when people allegedly exposed to the coronavirus sue them, according to a summary seen by The Wall Street Journal.

Under the proposal, defendants in those cases would only be held liable if they didn't make reasonable efforts to comply with public-health guidelines and instead demonstrated gross negligence or intentional misconduct, according to the summary. The defendants would have the right to move the case to federal court if they so choose, offering a potentially more favorable alternative to state courts.

For coronavirus-related personal injury and medical liability cases, the plan also sets a clear-and-convincing-evidence burden of proof, places a cap on damages and heightens pleading standards. . . .

The legislation from Messrs. McConnell and Cornyn also shields employers from lawsuits arising from coronavirus testing in the workplace and from agency probes for steps they took to comply with stay-at-home orders. The Republicans also want to limit liability for new types of personal protective equipment if the equipment meets certain federal standards.

ability to seek compensation for claims they have against the assets of a financial institution that is declared insolvent by the regulator overseeing the firm. Bank deposit insurance is a pre-funded plan financed through fees paid by regulated entity. State insurance guaranty funds are generally financed by *ex post* assessments required of insurers still solvent in a state after another insurer is declared insolvent by the regulator. Several other programs exist with varying details. It is possible a mechanism could be established that would create a pool of funds that could be used to compensate those who suffer losses due to a cyber breach of CAT. While developing a specific recommendation is beyond the scope of this assignment, we present several initial ideas in the next section of this White Paper.

Finally, there are risks that are just part of doing business that cannot be avoided or transferred to other parties through contract or insurance. The mere act of investing entails risk, for example, and the SEC is charged with managing and mitigating this risk for investors and the economy while simultaneously obtaining the benefits of the capital markets. Industry Members, for example, assume risks associated with transacting with their customers. While most are legal and legitimate, malicious parties do transact in the securities markets. The SEC has mandated that broker-dealers ''know their customer'' and although broker-dealers make extensive efforts to comply with this mandate, bad actors slip through. Industry Members also assume counterparty risk. There are mechanisms in place to mitigate and remediate this risk, but it can never be completely eliminated. There are also other legislative, regulatory, and political risks associated with the securities markets.

A certain level of cyber risk is already present in the normal business operations of the Industry Members. They accept (and manage) these risks in the expectation that they will obtain a profit from the activities that embed the risks. They have expressed concern over a possible expansion of those cyber risks to themselves and their clients as a result of the mandated transmission of information to the CAT. This transmission was mandated, and is governed, by the primary federal regulator of the Industry Members' activities. The CAT does not exist to serve customers and obtain a profit, but to help the SEC and the SROs in their regulation of the U.S. equity and option markets. While the Industry Members' concern over a possible increase in cyber risk exposure may be understandable in certain contexts, their position that the CAT and the Plan Processor be denied a limitation on liability essentially shifts the burden of cyber risk onto the regulators and regulatory process. As explained above, the SEC has already implemented standards, policies, and practices to mitigate cyber risk in the system as a whole.

E. Initial Thoughts on Funding Compensation Mechanisms

While we have concluded above that the regulatory approach to the CAT's cyber security is preferred over a litigation approach because overall social costs of control would be lower and there is no meaningful benefit from adding a litigation option as proposed by Industry Members, there is still a risk that Industry Members or their customers could be harmed in the case of a significant cyber breach. The current regulatory approach is generally silent on the possibility of compensating third parties in the case of a CAT cyber breach. Of concern here is the possibility of a previously unseen cyber event that results in a high damage/severity ''black swan'' type event.

There are, however, several approaches to designing and funding potential compensation mechanisms.

The use of cyber insurance, for example, could be advantageous. Cyber coverage can be purchased as part of a package of business insurance (property-casualty and liability) or as a stand-alone policy. According to information supplied to state regulatory authorities in the U.S., in 2019 stand-alone cyber policies exhibited somewhat higher premium receipts than cyber coverage included in broader packages—$1.26 billion and $1 billion, respectively.[131] This was an 11 percent increase from 2018, with 192 insurers reporting direct cyber written premium in 2019.[132] Between 2017 and 2019, the number of cyber claims doubled to 18,000.[133] Over the 2015 through 2019 period, paid losses plus defense costs ranged from just under 30% to just above 50% of premiums.[134] The reported 2019 expense ratio for cyber coverage averaged just under 30% of premiums.[135] In 2019, almost two-thirds of the cyber claims were for first-party losses with the remaining being for third-party losses.[136]

The use of cyber insurance extends the assets available to compensate injured parties and therefore mitigates some of the judgement-proof problem discussed above. While the cyber insurance market is relatively new and undeveloped compared to a number of other coverages,[137] it focuses on understanding and quantifying the frequency and severity of cyber breaches along with efforts to identify and promote methods to mitigate those risks. Reinsurance companies, in particular, ''can help to develop products and share underwriting know-how, including modeling experience. . . Reinsurers can also play a role in establishing cyber ecosystems by offering holistic cyber solutions through services and relationships with cybersecurity companies, specialized managing general agents, or insurtech companies.'' [138] Assuming that an insurer's cyber coverage premium to the CAT and the Plan Processor is related to an informed evaluation of the risks posed, cyber premiums can provide additional incentives to the CAT and the Plan Processor to internalize the cost of its security decisions and actions.[139] If cyber insurance rates reflect anticipated costs of the cyber risks, and CAT LLC and FINRA CAT pay the premiums, then the CAT's costs incorporate (internalize) the expected costs of a cyber breach under the terms of the coverage.

For many insurers, cyber coverage entails a relatively high degree of monitoring of the insureds. The insurers also have on retainer cyber mitigation and remediation experts that are independent of the insureds and focused on reducing the risk of cyber incursion. A 2017 publication by the Organisation for Economic Co-operation and Development (''OECD'') noted the following:

In addition to providing insurance coverage for the expenses incurred as a result of a cyber incident, many insurance companies

[131] Aon plc, *US Cyber Market Update: 2019 US Cyber Insurance Profits and Performance,* June 2020, p. 3, Exhibit 2, *http://thoughtleadership.aon.com/Documents/202006-us-cyber-market-update.pdf* accessed July 2020. Very similar figures were reported by A.M Best—$1.26 billion for stand-alone and $988 million for package policies. Erin Ayers, ''US cyber market keeps growing, but pace slowed: AM Best,'' *Advisen Front Page News,* July 22, 2020 accesed August 2020.

[132] Aon plc, *US Cyber Market Update: 2019 US Cyber Insurance Profits and Performance,* June 2020, p. 3, Exhibit 1, *http://thoughtleadership.aon.com/Documents/202006-us-cyber-market-update.pdf* accessed July 2020.

[133] Erin Ayers, ''US cyber market keeps growing, but pace slowed: AM Best,'' *Advisen Front Page News,* July 22, 2020 accessed August 2020.

[134] Aon plc, *US Cyber Market Update: 2019 US Cyber Insurance Profits and Performance,* June 2020, pp. 4–5, Exhibits 3 and 4, *http://thoughtleadership.aon.com/Documents/202006-us-cyber-market-update.pdf* accessed July 2020.

[135] Aon plc, *US Cyber Market Update: 2019 US Cyber Insurance Profits and Performance,* June 2020, p. 7, Exhibit 7, *http://thoughtleadership.aon.com/Documents/202006-us-cyber-market-update.pdf* accessed July 2020. The expense ratio combines the selling and underwriting costs of a coverage and divides that by the premium receipts associated with that coverage.

[136] Aon plc, *US Cyber Market Update: 2019 US Cyber Insurance Profits and Performance,* June 2020, p. 9, Exhibit 10, *http://thoughtleadership.aon.com/Documents/202006-us-cyber-market-update.pdf* accessed July 2020. The expense ratio combines the selling and underwriting costs of a coverage and divides that by the premium receipts associated with that coverage.

[137] ''Insured cyber losses remain a fraction of total economic cyber losses caused by cybercrime, with about $6 billion of insured losses in total (affirmative and nonaffirmative [*e.g.,* ''silent''] cyber losses), versus $600 billion of economic losses in 2018.'' S&P Global Ratings, *Global Reinsurance Highlights 2019,* p. 29. See also, Sasha Romanosky, Lillian Ablon, Andreas Kuehn and Therese Jones, ''Content Analysis of Cyber Insurance Policies: How Do Carriers Price Cyber Risk?'' *Journal of Cybersecurity,* 2019, pp. 1–19.

[138] S&P Global Ratings, *Global Reinsurance Highlights 2019,* p. 31.

[139] Romanosky *et al* (2019) report that while some insurers currently employ sophisticated pricing algorithms and incorporate specific security information to determine the premiums they charge for cyber insurance, at present the majority of the market uses relatively simple rate forms and generic self-assessed risk vulnerability categorizations (*e.g.,* low, medium, high). As recent demand growth has been high and profitability strong, we expect more insurers will continue to enter this market that will then attract additional industry vendors, capital markets risk intermediaries, risk modeling firms, reinsurers, and brokers, etc., to also enter the market. The increased competition will bring increasing levels of sophistication and with it we expect insurance premiums will become more and more risk sensitive over time. See Sasha Romanosky, Lillian Ablon, Andreas Kuehn and Therese Jones, ''Content Analysis of Cyber Insurance Policies: How Do Carriers Price Cyber Risk?'' *Journal of Cybersecurity,* 2019, pp. 1–19.

provide additional services with their policies, either as risk management advice during the underwriting process, as a means to reduce vulnerability to cyber incidents during the period of coverage or in order to reduce the impact of cyber incidents that occur. The first two types of services are often referred to as pre-breach services or risk mitigation services while the latter type is identified as post-breach or response services. Some insurance companies have developed significant internal expertise and offer these types of services directly, while others have developed networks and/or partnerships with a variety of service providers, often involving some form of discounted pricing for its policyholders (e.g. information technology security consultants, legal firms, public relations firms, etc.)

. . . [S]ome insurance companies provide specific risk assessment services as part of the underwriting process (sometimes even if no insurance coverage is entered into) ranging from online or onsite security assessments to advice on security policies and practices, to vulnerability scans and penetration testing which should benefit both the insurance company and the company's risk management (omitted internal cites). Insurance companies are also offering an assortment of risk mitigation services during the coverage period, including threat and intelligence warnings and detection, access to specialised protection technologies, preparation and testing of contingency plans, helplines or information portals and employee training (omitted internal cites).

A range of services for managing the impact of a cyber incident are also being offered, including forensic investigative services necessary to identify the source of any breach, legal assistance to help manage legal and regulatory requirements and potential liability, providers of call centre capacity, notification services, credit monitoring and/or identity theft protection to support interaction with affected clients, and public relations companies to minimise the reputational impact of cyber incidents (omitted internal cites).

According to one survey, 70% of insurers provide (or plan to provide) cyber risk mitigation or response services . . . . Seventeen of the 23 policies reviewed by the OECD advertised access to risk mitigation and/or response services. . . .[140]

A manuscripted (*i.e.,* customized), stand-alone cyber insurance policy for CAT could be combined with other approaches. If the SEC were to approve such an arrangement, the CAT and/or the Plan Processor could issue insurance linked securities, such as industry loss warranties or catastrophe bonds that could attract capital market investors to underwrite the losses in addition to insurers and reinsurers. Industry loss warranties are insurance or reinsurance contracts in which coverage is triggered by an industry-wide loss or by an index exceeding some pre-specified amount. Catastrophe bonds are fixed income instruments where the ''debtor'' (the CAT or the Plan Processor) pays ''interest'' (similar to premiums) to the ''creditor'' (the ''insurer'' or the ''capital market investor''), who does not lend the money but promises to pay the funds should a specified cyber event happen.[141]

At present, we are aware of a few cyber-related industry loss warranties that have been issued.[142] No cyber catastrophe bond has yet been issued, but industry observers suggest now may be the time to see such an advance. Commenting on the state of the cyber insurance market, the enormous potential size of the economic losses due to cyber events, and the recent growth of cyber-related insurance premiums, Standard & Poor's believes it is only a matter of time before industry capacity will be insufficient alone to satisfy demand and that governments and capital markets will come together with the industry to create markets that can meet the capacity requirements for cyber coverage.[143]

We mentioned earlier in the White Paper that several funding mechanisms exist to compensate the customers of financial intermediaries, subject to limits, including banks, credit unions, and insurance companies. Under the auspices of the SEC, one could also imagine self-funding a third-party compensation program. Some combination of any of these approaches, and others, might be considered. The goal here is to mitigate the damages of a cyber breach and compensate affected third parties in the lowest cost fashion. Industry Members should recognize that, ultimately, it is they, the SROs, and especially their customers that will pay all the costs of the CAT.

IV. Conclusion

This White Paper investigates the SEC's regulatory approach to the CAT's cyber security and conducts an economic analysis to examine whether adding an ability for Industry Members to litigate in the event of a CAT cyber breach creates socially optimal incentives for controlling the cyber risk exposures faced by CAT over a regulation alone approach.

As explained in this White Paper, the economic role of litigation is to provide meaningful *ex-ante* incentives for first parties to internalize the harms potentially caused to third parties by their economic activities through the threat they may face *ex post* litigation filed by the injured third parties. Regulation, however, also provides meaningful incentives for first parties to internalize the harms they may potentially cause to third parties by compelling first parties to follow a set of rules and procedures proscribed by a regulator before the economic activity commences.

An economic analysis of the circumstances attending the CAT shows that regulation by the SEC already properly incentivizes the Participants to recognize and address the risks that a CAT cyber breach poses to third parties such as Industry Members. We further show that the possibility of permitting litigation by Industry Members in addition to the regulatory regime will not meaningfully increase CAT's incentives to manage its exposure to cyber risk, yet it will significantly increase the costs (which will ultimately be passed on to retail investors) that it bears to do so. Our analysis suggests that the *ex-ante* regulation approach *alone* leads to the socially optimal outcome.

Accordingly, our analysis of the respective benefits of *ex-ante regulation* compared with *ex post litigation* indicate that the limitation of liability in the proposed CAT Reporter Agreement will serve the public interest.

The authors of this paper are employed by, or affiliated with, Charles River Associates (CRA). The conclusions set forth herein are based on independent research and publicly available material. The views expressed herein are the views and opinions of the authors only and do not reflect or represent the views of Charles River Associates or any of the organizations with which the authors are affiliated. Any opinion expressed herein shall not amount to any form of guarantee that the authors or Charles River Associates has determined or predicted future events or circumstances and no such reliance may be inferred or implied. The authors and Charles River Associates accept no duty of care or liability of any kind whatsoever to any party, and no responsibility for damages, if any, suffered by any party as a result of decisions made, or not made, or actions taken, or not taken, based on this paper. Detailed information about Charles River Associates, a registered tradename of CRA International, Inc., is available at www.crai.com.

V. Qualifications of Authors/Investigators

Michael G. Mayer, CFA, CFE
Vice President, Charles River Associates
M.B.A. Finance and Management Policy, Kellogg Graduate School of Management, Northwestern University
B.S. Marketing and Management Policy, Indiana University School of Business

Michael G. Mayer is a Vice President of Charles River Associates. He has performed numerous business valuation assignments and has evaluated numerous claims for economic loss in a range of business, banking, securities, derivatives and insurance disputes. He has also performed financial investigations of brokerage firms, hedge

[140] Organisation for Economic Co-operation and Development, *Enhancing the Role of Insurance in Cyber Risk Management,* (2017), Chapter 3, ''The cyber insurance market,'' pp. 75–76, *https://www.oecd-ilibrary.org/docserver/9789264282148-5-en.pdf?expires=1595620895&id=id&accname=guest&checksum=84A71DC31B31AD5ADA3B29E4BCA3BD62* accessed July 2020.

[141] ''The Singaporean government's plans to introduce a commercial cyber pool with re/insurers and insurance-linked security (ILS) backing capacity is a recent example. However, before ILS investors will accept cyber risk as a potential investment opportunity, the market will need to enhance its ability to model this risk as well as have a longer track record.'' S&P Global Ratings, *Global Reinsurance Highlights 2019,* p. 31.

[142] Shah, Syed Salman, and Ben Dyson, ''Cyber insurance-linked securities have arrived, but market still in infancy,'' *S&P Global Market Intelligence, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/cyber-insurance-linked-securities-have-arrived-but-market-still-in-infancy-46915334* accessed September 2020.

[143] Bender, Johannes, Manuel Adam, Robert J Greensted, Jean Paul Huby Klein, Milan Kakkad, and Tracy Dolin, ''Global Reinsurers Face the Iceberg Threat Of Cyber Risk,'' *Global Reinsurance Highlights 2019* (2019) pp. 28–31.

funds, savings & loans, banks, and insurance companies as well as in whistleblower, insider trading, and FCPA matters. He has testified as an expert in International Arbitration forums, US Federal and State Courts, AAA and FINRA arbitrations, and the Bahamian Supreme Court. Mr. Mayer's testimony has addressed financial and economic issues including investment suitability and trading, portfolio management, valuation, lost profits, loss of principal and prejudgment interest.

In litigation matters, Mr. Mayer has been most actively involved in the determination of damages in securities fraud and breach of fiduciary duty cases, broker/dealer litigation, failed mergers/acquisitions, bankruptcy, lender liability, and shareholder disputes. He is regularly called upon to analyze complex securities and explain their structures. Additionally, he has significant experience in other areas of commercial litigation including antitrust, accountant's liability, breach of contract, business interruption, and insurance. He has assisted counsel with respect to discovery and document management, deposition and cross-examination assistance and trial exhibit preparation.

Outside of litigation, Mr. Mayer regularly consults on financial issues relating to mergers, acquisitions, joint ventures, and licensing. He has analyzed and negotiated deal structures on behalf of clients in a broad range of industries ranging from pharmaceuticals to industrial rubber products. Additionally, he has performed business and intangible asset valuations for some of the largest companies in the country. Mr. Mayer has been widely quoted in the press including the Wall Street Journal, CFO Magazine, Inside Counsel Magazine, Securities Law360, and the Chicago Tribune, among others.

Mark F. Meyer
Vice President, Charles River Associates
PhD, Economics, University of Michigan
BSFS, International Economics, Georgetown University

Dr. Mark F. Meyer is a vice president and the co-leader of the Insurance Economics Practice of CRA. He has over 30 years of experience applying economic theory and quantitative methods to a range of complex business litigation and regulatory matters. Dr. Meyer's experience includes assessing liability and damages for litigations involving firms engaged in financial markets, especially insurance; investigations of insurer insolvencies; antitrust analysis of monopolization, mergers, and price discrimination in a wide range of industries; work in the economics of product distribution and marketing; analysis of regulatory initiatives involving insurance and other industries; and statistical and econometric applications to liability determination, market definition, class certification, and economic damages.

Prior to joining CRA, Dr. Meyer was a senior economist at the Princeton Economics Group, Inc.; senior managing economist and a director in the New York office of the Law & Economics Consulting Group, Inc.; and an economist at the law firm of Skadden, Arps, Slate, Meagher & Flom in New York.

Prof. Richard D. Phillips
Senior Consultant to Charles River Associates
Dean, J. Mack Robinson College of Business, C.V. Starr Professor of Risk Management and Insurance, Georgia State University
PhD, Insurance and Finance, University of Pennsylvania
MA, Insurance and Finance, University of Pennsylvania
BS, Mathematics, University of Minnesota

Richard D. Phillips is the dean of the J. Mack Robinson College of Business, Georgia State University, and the C.V. Starr Professor of Risk Management and Insurance. He has served as a Senior Consultant to CRA since 2010.

Dr. Phillips was the associate dean for academic initiatives and innovations from 2012 until 2014 and from 2006 to 2012 he was the Kenneth Black Jr. Chair of the Department of Risk Management and Insurance. From 1997 until 2014 he held the appointment of Fellow of the Wharton Financial Institutions Center at the University of Pennsylvania. He has held visiting appointments at the Federal Reserve Bank of Atlanta (1996–1997), at the Wharton School (2003), at the Federal Reserve Bank of New York (2007–2008), and he was the Swiss Re Visiting Scholar at the University of Munich in 2008. Dr. Phillips joined Georgia State University after completing his doctoral studies at the University of Pennsylvania in 1994.

Professor Phillips' research interests lie at the intersection of corporate finance and insurance economics with specific focus on the effect of risk on corporate decision-making, and the functioning of insurance markets. He has published in academic and policy journals including the *Journal of Financial Economics,* the *Journal of Risk and Insurance,* the *Journal of Banking and Finance, Journal of Financial Services Research,* the *Journal of Law and Economics,* the *Journal of Insurance Regulation,* and the *North American Actuarial Journal,* among others. He has contributed scholarly articles to books published by Risk Publications, the University of Chicago Press, Kluwer Academic Publishers, and the Brookings Institute. Professor Phillips has received several awards for his research including the Robert I. Mehr Research Award (2008, 2009), the Robert C. Witt Research Award (1999), the ARIA/CAS Best Paper Award three times (1998, 1999, and 2006), and the James S. Kemper Best Paper Award (2003) among others. He served on the board of directors and is a Past President of the American Risk and Insurance Association, he is a Past President of the Risk Theory Society and is a Past Co-editor of the *Journal of Risk and Insurance.* He serves as an *ad hoc* referee for several academic journals.

Beyond the university, Professor Phillips has served as a consultant to numerous commercial and governmental organizations throughout his career including AIG, Allstate, ING, AXA, Deutsche Bank, Goldman Sachs, Tillinghast, Aon Capital Markets, the Casualty Actuarial Society, the Society of Actuaries, and the U.S. Office of Management and Budget. He is a member of the board of directors for the Munich American Reassurance Company. Within the non-profit sector, Professor Phillips was the Executive Director of Georgia State University's Risk Management Foundation from 2006–2012, he is a board member on the S.S. Huebner Foundation for Insurance Education Foundation, he is a board member of the World Affairs Council of Atlanta, and he is Chairman Emeritus of the Board of Trustees for the Swift School, one of the largest private-independent schools serving dyslexic students grades 1–8 in Georgia.

Rona T. Seams
Principal, Charles River Associates
M.B.A. Finance, Management and Strategy, Marketing, Kellogg Graduate School of Management, Northwestern University
B.B.A. Finance, University of Texas-Austin

Ms. Seams is a Principal at CRA and has testified as an economic damages expert in federal court and has been involved in and managed numerous other engagements involving financial investigations, economic damages, and business valuations.

Ms. Seams has performed financial investigation activities in many matters including the alleged mismanagement of bank investments by its management, the alleged breach of fiduciary duty of FNMA for not detecting fraud perpetrated on an entity selling mortgages to FNMA, the alleged acquisition of life settlement policies through bid rigging, and the alleged profit made by trading on inside information.

Ms. Seams' economic damages work includes the determination of damages related to the breach of a non-compete agreement in the equipment leasing industry, the assessment of damages related to the raiding of employees in the securities industry, the calculation of damages related to fraud perpetrated on a temporary staffing company, the damages analysis for the creditors of a large bankrupt energy trading company, the valuation of damages associated with securities fraud, the determination of early contract termination damages in the securities clearing industry, and the calculation of intellectual property damages across many industries.

Ms. Seams' business valuation work includes the net worth analysis of a company to pay an award of punitive damages, the solvency analysis of a regional acute care hospital, the solvency analysis of a temporary staffing company, and the valuation of an energy storage and distribution company.

Prior to joining Charles River Associates, Ms. Seams operated her own consulting firm specializing in project finance, contract analysis, and sales and risk management. Additionally, she worked in the energy industry in various roles ranging from rate analyst, market analyst, sales representative, and management consultant.

VI. Research Program and Bibliography

The authors of this White Paper have thoroughly reviewed extensive publicly available documents and obtained information from CAT LLC and FINRA CAT personnel to understand the circumstances surrounding the CAT and develop their findings. We also rely on longstanding bodies of economic literature regarding cyber breaches and creating socially optimal incentives to control risk (including risk of

cyber breaches). The following documents in the Securities and Exchange Commission record for the Consolidated Audit Trail, which we reviewed closely, were particularly informative on CAT LLC and the considerations and concerns of various interested parties.

- Securities and Exchange Commission, *Consolidated Audit Trail,* Release No. 34–67457.
- Securities and Exchange Commission, *Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail,* Release No. 34–79318, November 15, 2016. Attachments to this document included:
  - The March 3, 2014 CAT NMS Plan Request for Proposal,
  - The Limited Liability Company Agreement of CAT LLC,
  - The Participants' Discussion of Considerations, and
  - The CAT NMS Plan Processor Requirements.
- Securities and Exchange Commission, *Order Granting Conditional Exemptive Relief, Pursuant to Section 36 and Rule 608(e) of the Securities Exchange Act of 1934, from Section 6.4(d)(ii)(C) and Appendix D Sections 4.1.6, 6.2, 8.1.1, 8.2, 9.1, 9.2, 9.4, 10.1, and 10.3 of the National Market System Plan Governing the Consolidated Audit Trail,* Release No. 34–88393, March 17, 2020.
- Securities and Exchange Commission, *Amendments to the National Market System Plan Governing the Consolidated Audit Trail,* RIN 3235–AM60, Release No. 34–88890, File No. S7–13–19, May 15, 2020.
- Securities and Exchange Commission, *Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security,* RIN 3235–AM62, Release No. 34–89632, File No. S7–10–20, August 21, 2020.
- *Memorandum of Law in Support of SIFMA's Motion to Stay SRO Action Pending Commission Review of SIFMA's Application Pursuant to Exchange Act Sections 19(d) and 19(f),* April 22, 2020.

In addition to the documents listed above, the authors investigated the implementation of cyber security at the CAT by thoroughly reviewing the extensive document record listed below and by obtaining information from personnel at FINRA CAT responsible for compliance and cyber security.

- Consolidated Audit Trail, LLC and FINRA CAT, LLC, *Industry Webinar—Security of CAT Data,* April 1, 2020, at *https://www.catnmsplan.com/events/industry-webinar-security-cat-data-412020,* accessed September 2020.
- Amazon Web Services website, ''Cloud computing with AWS,'' at *https://aws.amazon.com/what-is-aws/?sc_icampaign=aware_what_is_ aws&sc_icontent=awssm-evergreen-prospects &sc_iplace=hero&trk=ha_awssm-evergreen-prospects &sc_i ichannel=ha,* visited September 2020.
- Amazon Web Services website, ''Cloud computing with AWS, Most secure'' at *https://aws.amazon.com/what-is-aws/?sc_icampaign =aware_ what_is_ aws&sc_icontent=awssm-evergreen-prospects &sc_iplace= hero&trk=ha_ awssm-evergreen-prospects &sc_ichannel=ha,* visited September 2020.

The other sources the authors relied upon to form their opinions are:

Cyber Security Risk Analysis

1. Advisen Cyber OverVue, *https://insite20twenty.advisen.com.*
2. Advisen's Cyber OverVue User Guide, January 2020.
3. Advisen, *Quarterly Cyber Risk Trends: Global Fraud is Still on the Rise,* sponsored by CyberScout, Q2 2019.
4. Advisen website, *https://www.advisenltd.com/data/cyber-loss-data/.*
5. Advisen website, *www.advisenltd.com.*
6. AllAboutAlpha, ''High-Frequency-Trading Firms: Fast, Faster, Fastest,'' April 2, 2019, *https://www.allaboutalpha.com/blog/2019/04/02/high-frequency-trading-firms-fast-faster-fastest/.*
7. Alexander Osipovich, ''High Speed Trader Virtu Discloses $6.9 Million Hacking Loss,'' *Dow Jones News Service,* August 11, 2020.
8. Allied Market Research website, *Cyber Insurance Market by Company Size and Industry Vertical: Global Opportunity Analysis and Industry Forecast, 2019–2026,* March 2020, *https://www.alliedmarketresearch.com/cyber-insurance-market.*
9. Camico website, ''Understanding First-Party and Third-Party Cyber Exposures,'' *https://www.camico.com/blog/understanding-cyber-exposures.*
10. Capital IQ website, *https://www.capitaliq.com/CIQDotNet/Financial/Capitalization .aspx?CompanyId=133624510.*
11. *CAT Reporting Technical Specifications for Industry Members,* Version 3.1.0 r2, April 21, 2020.
12. The Center for Strategic and International Studies, ''Net Losses: Estimating the Global Cost of Cybercrime,'' June 2014.
13. Chairman Jay Clayton, Testimony on ''Oversight of the Securities and Exchange Commission'' Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, December 10, 2019, *https://www.sec.gov/news/testimony/testimony-clayton-2019-12-10.*
14. Commissioner Luis A. Aguilar, U.S. Securities and Exchange Commission, ''The Need for Robust SEC Oversight of SROs,'' May 8, 2013, *https://www.sec.gov/news/public-statement/2013-spch050813laahtm.*
15. Commissioner Pierce Statement on Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security, Aug. 21, 2020, *https://www.sec.gov/news/public-statement/peirce-nms-cat-2020-08-21.*
16. The Council of Economic Advisers, ''The Cost of Malicious Cyber Activity to the U.S. Economy,'' February 2018, *https://www.whitehouse.gov/wp-content/uploads/2018/03/The-Cost-of-Malicious-Cyber-Activity-to-the-U.S.-Economy.pdf.*
17. Cybersecurity Ventures, ''Global Cybercrime Damages Predicted to Reach $6 Trillion Annually By 2021,'' Copyright 2020, *https://cybersecurityventures.com/cybercrime-damages-6-trillion-by-2021/.*
18. Cyentia Institute, *Information Risk Insights Study, A Clearer Vision for Assessing the Risk of Cyber Incidents,* 2020.
19. Department of Homeland Security, ''Commodification of Cyber Capabilities: A Grand Cyber Arms Bazaar,'' 2019, *https://www.dhs.gov/sites/default/files/publications/ia/ia_geopolitical-impact-cyber-threats-nation-state-actors.pdf.*
20. Erin Ayers, ''US cyber market keeps growing, but pace slowed: AM Best,'' Advisen Front Page News, July 22, 2020.
21. Final Judgement as to Defendant CR Intrinsic Investors, LLC, United States District Court, Southern District of New York, 12 Civ. 8466 (VM), filed June 18, 2014.
22. FINRA Investor Education Foundation, ''Investors in the United States, A Report of the National Financial Capability Study'' December 2019.
23. Fintel website, Berkshire Hathaway Inc—Warren Buffett—Activist 13D/13G Filings, *https://fintel.io/i13d/berkshire-hathaway.*
24. Gregory Meyer, Nicole Bullock and Joe Rennison, ''How high-frequency trading hit a speed bump,'' *Financial Times,* January 1, 2018, *https://www.ft.com/content/d81f96ea-d43c-11e7-a303-9060cb1e5f44.*
25. Interview with William Hardin, VP, Charles River Associates, August 11, 2020.
26. Investopedia website, Toehold Purchase definition, *https://www.investopedia.com/terms/t/toeholdpurchase.asp.*
27. Jane Croft, ''Citadel Securities sues rival over alleged trading strategy leak,'' *Financial Times,* January 10, 2020, *https://www.ft.com/content/2cbf1738-33cd-11ea-9703-eea0cae3f0de.*
28. Jensen and Ruback, ''The Market for Corporate Control,'' *Journal of Financial Economics,* 11, (1983).
29. Journal of Forensic & Investigative Accounting, ''Market Efficiency and Investor Reactions to SEC Fraud Investigations,'' Vol. 2, Issue 3, Special Issue, 2010.
30. Julian Hayes, ''Double extortion: An emerging trend in ransomware attacks,'' *Advisen Front Page News,* August 21, 2020, *https://www.advisen.com/tools/fpnproc/fpns/articles_new _35/P/375350842.html?rid= 375350842&list_id=35.*
31. Juniper Research, ''Business Losses to Cybercrime Data Breaches to Exceed $5 Trillion By 2024,'' August 27, 2019, *https://www.juniperresearch.com/press/press-releases/business-losses-cybercrime-data-breaches.*
32. Memorandum from SEC Division of Trading and Markets to SEC Market Structure Advisory Committee dated October 20, 2015 with the subject ''Current Regulatory Model for Trading Venues and for Market Data Dissemination,'' *https://www.sec.gov/spotlight/emsac/memo-regulatory-model-for-trading-venues.pdf.*

33. Nathan Vardi, ''Finance Billionaire Ken Griffin's Citadel Securities Trading Firm Is On A Silicon Valley Hiring Binge,'' *Forbes,* June 3, 2019, *https://www.forbes.com/sites/nathanvardi/2019/06/03/finance-billionaire-ken-griffins-citadel-securities-trading-firm-is-on-a-silicon-valley-hiring-binge/#34f23c9c6b36.*
34. NPR website, Barbara Campbell, ''SEC Says Cybercriminals Hacked Its Files, May Have Used Secret Data for Trading,'' September 20, 2017, *https://www.npr.org/sections/thetwo-way/2017/09/20/552500948/sec-says-cybercriminals-hacked-its-files-may-have-used-secret-data-for-trading.*
35. Opinion and Order, *SEC* v. *Raj Rajaratnam,* et al., United States District Court, Southern District of New York, 09 Civ. 8811 (JSR), filed November 8, 2011.
36. Ponemon Institute and IBM Security, *Cost of a Data Breach Report 2020.*
37. Refinitiv website, *https://www.refinitiv.com/en/about-us.*
38. Research and Markets, *Algorithmic Trading Market by Trading Type, Component, Deployment Mode, Enterprise Size, and Region—Global Forecast to 2024, https://www.researchandmarkets.com/reports/4770543/algorithmic-trading-market-by-trading-type#rela0-4833448.*
39. Research and Markets, *Algorithmic Trading market—Growth, Trends, and Forecast (2020–2025), https://www.researchandmarkets.com/reports/4833448/algorithmic-trading-market-growth-trends-and#rela4-5125563.*
40. ScienceDirect website, ''Hacktivists,'' *https://www.sciencedirect.com/topics/computer-science/hacktivists.*
41. SEC's Edgar website, Berkshire Hathaway Inc. filings, *https://www.sec.gov/Archives/edgar/data/1067983/000095012316022377/0000950123-16-022377-index.htm.*
42. SEC's Edgar website, Berkshire Hathaway Inc. filings, *https://www.sec.gov/Archives/edgar/data/1067983/000095012316022377/xslForm13F_X01/primary_doc.xml.*
43. SEC's Edgar website, Berkshire Hathaway Inc. filings, *https://www.sec.gov/Archives/edgar/data/1067983/000095012316022377/xslForm13F_X01/form13fInfoTable.xml.*
44. SEC website, *https://www.sec.gov/forms.*
45. SEC website, ''SEC Charges 32 Defendants in Scheme to Trade on Hacked News Releases,'' Press Release 2015–163, August 11, 2015, *https://www.sec.gov/news/pressrelease/2015-163.html.*
46. SEC website, ''SEC Reaches Settlements with Traders in Newswire Hacking and Trading Scheme,'' Litigation Release No. 24833, June 10, 2020, *https://www.sec.gov/litigation/litreleases/2020/lr24833.htm.*
47. SEC website, ''Rule 613 (Consolidated Audit Trail),'' *https://www.sec.gov/divisions/marketreg/rule613-info.htm.*
48. Teresa Suarez, ''A Crash Course on Capturing Loss Magnitude with the FAIR Model,'' *Fair Institute website,* October 20, 2017, *https://www.fairinstitute.org/blog/a-crash-course-on-capturing-loss-magnitude-with-the-fair-model.*
49. Terrence Hendershott, Charles M. Jones, and Albert J. Menkveld, Does Algorithmic Trading Improve Liquidity?, *The Journal of Finance,* Volume 66, No. 1, February 2011, *http://faculty.haas.berkeley.edu/hender/Algo.pdf.*
50. United States Census Bureau website, the U.S. and World Population Clock, *https://www.census.gov/popclock/.*
51. Verizon, *2020 Data Breach Investigations Report.*
52. Wharton University of Pennsylvania, ''How Undisclosed SEC Investigations Lead to Insider Trading,'' March 2, 2020, *https://knowledge.wharton.upenn.edu/article/undisclosed-sec-investigations-lead-insider-trading/.*

Economic and Public Policy Analysis of Cyber Security for CAT LLC

1. 42 U.S. Code § 247d–6d at Health Resources & Services Administration, *https://www.hrsa.gov/sites/default/files/gethealthcare/conditions/countermeasurescomp/covered_countermeasures_and_prep_act.pdf.*
2. 42 U.S. Code § 300aa–22, *https://www.law.cornell.edu/uscode/text/42/300aa-22.*
3. Andrew Duehren, ''Senate GOP Aims to Funnel Covid Liability Cases to Federal Courts,'' *The Wall Street Journal,* July 16, 2020, *https://www.wsj.com/articles/gop-senators-move-ahead-with-coronavirus-liability-plan-11594929198?mod=searchresults&page=1&pos=3.*
4. Aon plc, *US Cyber Market Update: 2019 US Cyber Insurance Profits and Performance,* June 2020, *http://thoughtleadership.aon.com/Documents/202006-us-cyber-market-update.pdf.*
5. Bhole, Bharat, and Jeffrey Wagner, ''The Joint Use of Regulation and Strict Liability with Multidimensional Care and Uncertain Conviction,'' *International Review of Law and Economics* Vol. 28 (2008).
6. Congressional Research Service, *The PREP Act and COVID–19: Limiting Liability for Medical Countermeasures, https://crsreports.congress.gov/product/pdf/LSB/LSB10443.*
7. *Consolidated Audit Trail, LLC's and Participants Memorandum of Law in Opposition to SIFMA's Motion to Stay,* May 6, 2020.
8. Consolidated Audit Trail website, FAQs, *https://www.catnmsplan.com/faq.*
9. Consolidated Audit Trail website, Security: FAQs, *https://www.catnmsplan.com/faq.*
10. De Geest, Gerrit, Giusseppe Dari-Mattiacci, ''Soft Regulators, Tough Judges,'' *Supreme Court Economic Review,* Vol. 15 (2007).
11. Don Fullerton and Gilbert E. Metcalf, ''Tax Incidence,'' Chapter 26 in Alan Auerbach and Martin Feldstein, *Handbook of Public Economics,* 2002. *https://www.nber.org/papers/w8829.pdf.*
12. Erin Ayers, ''US cyber market keeps growing, but pace slowed: AM Best,'' *Advisen Front Page News,* July 22, 2020.
13. Harold Demsetz, ''When Does the Rule of Liability Matter?'' *Journal of Legal Studies,* Vol. 1, No. 1, (January 1972).
14. Health Resources & Services Administration, *About the National Vaccine Injury Compensation Program, https://www.hrsa.gov/vaccine-compensation/about/index.html.*
15. Health Resources & Services Administration, *The National Vaccine Injury Compensation Program (VICP), https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/vaccine-injury-infographic-2017.pdf.*
16. Jennifer C. Gravelle, ''Corporate Tax Incidence: A Review of Empirical Estimates and Analysis,'' *Congressional Budget Office Working Paper 2011–01,* June 2001. *https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/122xx/doc12239/06-14-2011-corporatetaxincidence.pdf.*
17. Jensen, Michael, ''Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers,'' *American Economic Review,* Vol. 76, No. 2 (May 1986).
18. Kolstad, Charles D., Thomas S. Ulen, and Gary V. Johnson, ''Ex Post Liability for Harm vs. Ex Ante Safety Regulation: Substitutes or Complements?'' *The American Economic Review* Vol. 80, No. 4 (Sep. 1990).
19. Mello, Michelle M., Amitabh Chandra, Atul A. Gawande, and David M. Studdert, ''National Costs of the Medical Liability System,'' *Health Affairs,* Vol. 8, No. 9 (Sep. 2010).
20. Organisation for Economic Co-operation and Development, *Enhancing the Role of Insurance in Cyber Risk Management,* (2017), *https://www.oecd-ilibrary.org/docserver/9789264282148-5-en.pdf?expires=1595620895&id=id&accname=guest&checksum=84A71DC31B31AD5ADA3B29E4BCA3BD62.*
21. Public Health Service Act, January 5, 2017, As Amended Through Public Law 114–255, Enacted December 13, 2016, *https://www.hrsa.gov/sites/default/files/hrsa/vaccine-compensation/about/title-xxi-phs-vaccines-1517.pdf.*
22. Ronald H. Coase, ''The Problem of Social Cost,'' *Journal of Law and Economics,* Vol 3 (1960).
23. S&P Global Ratings, *Global Reinsurance Highlights 2019.*
24. Sasha Romanosky, Lillian Ablon, Andreas Kuehn and Therese Jones, ''Content Analysis of Cyber Insurance Policies: How Do Carriers Price Cyber Risk?'' *Journal of Cybersecurity,* 2019.
25. SEC Office of Compliance Inspections and Examinations, *Cybersecurity: Ransomware Alert,* July 10, 2020, *https://www.sec.gov/files/Risk%20Alert%20-%20Ransomware.pdf.*
26. SEC website, ''About the Office of Compliance Inspections and Examinations,'' *https://www.sec.gov/ocie/Article/ocie-about.html.*
27. SEC website, ''Spotlight on Cybersecurity, the SEC and You,'' *https://www.sec.gov/spotlight/cybersecurity.*
28. SEC website, ''Spotlight on Regulation

SCI,'' *https://www.sec.gov/spotlight/regulation-sci.shtml.*
29. Shah, Syed Salman, and Ben Dyson, ''Cyber insurance-linked securities have arrived, but market still in its infancy,'' *S&P Global Market Intelligence, https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/cyber-insurance-linked-securities-have-arrived-but-market-still-in-infancy-46915334.*
30. SIFMA website, About. *https://www.sifma.org/about/.*
31. Stephen Entin, ''Labor Bears Much of the Cost of the Corporate Tax,'' *Tax Foundation Special Report No. 238,* October 2017. *https://files.taxfoundation.org/20181107145034/Tax-Foundation-SR2382.pdf.*
32. Steven Shavell, ''Liability for Accidents,'' Chapter 2 in *Handbook of Law and Economics, Vol. 1,* Mitchell Polinsky and Steven Shavell, eds., Elsevier, 2007.
33. Steven Shavell, ''Liability for Harm Versus Regulation of Safety,'' *The Journal of Legal Studies,* Vol. 13, No. 2 (June 1984).
34. Steven Shavell, ''The Judgement Proof Problem,'' *International Review of Law and Economics* Vol. 6, No. 1 (June 1 1986).
35. U.S. Court of Appeals, 2nd Circuit, *Standard Investment Chartered, Inc. v. National Association of Securities Dealers, et al., https://caselaw.findlaw.com/us-2nd-circuit/1556297.html.*
36. William M. Gentry, ''A Review of the Evidence on the Incidence of the Corporate Income Tax,'' *U.S. Department of the Treasury OTA Paper 101,* December 2007, *https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-101.pdf.*

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90830; File No. SR–MIAX–2020–42]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 1900, Registration Requirements, To Adopt Temporary Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons To Function as Principals)

December 30, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 28, 2020, the Miami International Securities Exchange, LLC (''MIAX Options'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit 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 Exchange Rule 1900, Registration Requirements, to adopt temporary Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals).

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/,* at MIAX Options' 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) to Exchange Rule 1900, Registration Requirements. The proposed rule change would extend the 120-day period that certain individuals can function as principals without having successfully passed an appropriate qualification examination through April 30, 2021,[3] and would apply only to those individuals who were designated to function as principals prior to January 1, 2021. This proposed rule change is based on a filing recently submitted by the Financial Regulatory Authority, Inc. (''FINRA'') [4] and is intended to harmonize the Exchange's registration rules with those of FINRA so as to promote uniform standards across the securities industry.

In response to COVID–19, earlier this year FINRA began providing temporary relief by way of frequently asked questions (''FAQs'') [5] to address disruptions to the administration of FINRA qualification examinations caused by the pandemic that have significantly limited the ability of individuals to sit for examinations due to Prometric test center capacity issues.[6]

FINRA published the first FAQ on March 20, 2020, providing that individuals who were designated to function as principals under FINRA Rule 1210.04 [7] prior to February 2, 2020, would be given until May 31, 2020, to pass the appropriate principal qualification examination.[8] On May 19, 2020, FINRA extended the relief to pass the appropriate examination until June 30, 2020. On June 29, 2020, FINRA extended the temporary relief providing that individuals who were designated to function as principals under FINRA Rule 1210.04 prior to May 4, 2020, would be given until August 31, 2020, to pass the appropriate principal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 90617 (December 9, 2020), 85 FR 81258 (December 15, 2020) (SR–FINRA–2020–043) (''FINRA Filing''). The Exchange notes that the FINRA Filing also provides temporarily relief to individuals registered with FINRA as Operations Professionals under FINRA Rule 1220. The Exchange does not have a registration category for Operations Professionals and therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filing. If the Exchange seeks to provide additional temporary relief from the rule requirement identified in this proposal beyond April 30, 2021, it will submit a separate rule filing to further extend the temporary extension of time.

[4] *See id.*

[5] *See https://www.finra.org/rules-guidance/key-topics/covid-19/faq#qe.*

[6] At the outset of the COVID–19 pandemic, all FINRA qualification examinations were administered at test centers operated by Prometric. Based on the health and welfare concerns resulting from COVID–19, in March Prometric closed all of its test centers in the United States and Canada and began to slowly reopen some of them at limited capacity in May. At this time, not all of these Prometric test centers have reopened at full capacity.

[7] Exchange Rule 1900, Interpretation and Policy .04, is the corresponding rule to FINRA Rule 1210.04.

[8] FINRA Rule 1210.04 (Requirements for Registered Persons Functioning as Principals for a Limited Period) allows a FINRA-member firm to designate certain individuals to function in a principal capacity for 120 calendar days before having to pass an appropriate principal qualification examination. Exchange Rule 1900, Interpretation and Policy .04, provides the same allowance to Exchange Members.

qualification examination. On August 28, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness to extend the temporary relief provided via the two FAQs by adopting: (1) Temporary Supplementary Material .12 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under FINRA Rule 1210 (Registration Requirements), and (2) temporary Supplementary Material .07 (Temporary Extension of the Limited Period for Persons to Function as Operations Professionals) under FINRA Rule 1220 (Registration Categories).[9] Pursuant to this rule filing, individuals who were designated prior to September 3, 2020, to function as a principal under FINRA Rule 1210.04 would have until December 31, 2020, to pass the appropriate qualification examination.

Thereafter, on December 9, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness to extend the limited period for registered persons to function as a principal through April 30, 2021.[10] Pursuant to this rule filing, individuals who were designated prior to January 1, 2021 to function as a principal would have until April 30, 2021 to pass the appropriate qualifying examination.

The Exchange continues to closely monitor the impact of the COVID–19 pandemic on Members,[11] investors, and other stakeholders. The COVID–19 conditions necessitating the extension of relief provided in the FINRA's FAQs and rule amendments persist and, in fact, appear to be worsening.[12] One of the impacts of COVID–19 continues to be serious interruptions in the administration of FINRA qualification examinations at Prometric test centers and the limited ability of individuals to sit for the examinations.[13] Although Prometric has begun reopening test centers, Prometric's safety practices mean that currently not all test centers are open, some of the open test centers are at limited capacity, and some open test centers are delivering only certain examinations that have been deemed essential by the local government.[14] Furthermore, Prometric has had to close some reopened test centers due to incidents of COVID–19 cases. The initial nationwide closure in March along with the inability to fully reopen all Prometric test centers due to COVID–19 have led to a significant backlog of individuals who are waiting to sit for FINRA examinations.[15]

In addition, firms are continuing to experience operational challenges with much of their personnel working from home due to shelter-in-place orders, restrictions on businesses and social activity imposed in various states, and adherence to other social distancing guidelines consistent with the recommendations of public health officials.[16] As a result, firms continue to face potentially significant disruptions to their normal business operations that may include a limitation of in-person activities and staff absenteeism as a result of the health and welfare concerns stemming from COVID–19. Such potential disruptions may be further exacerbated and may even affect client services if firms cannot continue to keep principal positions filled as they may have difficulty finding other qualified individuals to transition into these roles or may need to reallocate employee time and resources away from other critical responsibilities at the firm.

These ongoing, extenuating circumstances make it impracticable for Members to ensure that the individuals whom they have designated to function in a principal capacity, as set forth in Exchange Rule 1900, Interpretation and Policy .04, are able to successfully sit for and pass an appropriate qualification examination within the 120-calendar day period required under the rule, or to find other qualified staff to fill this position. The ongoing circumstances also require individuals to be exposed to the health risks associated with taking an in-person examination, because the General Securities Principal examination is not available online. Therefore, the Exchange is proposing to provide the temporary relief provided through the FINRA FAQs by adopting Interpretation and Policy .13 to Exchange Rule 1900 to extend the 120-day period during which an individual can function as a principal before having to pass an applicable qualification examination until April 30, 2021.[17] The proposed rule change would apply only to those individuals who were designated to function as a principal prior to January 1, 2021. Any individuals designated to function as a principal on or after January 1, 2021, would need to successfully pass an appropriate qualification examination within 120 days.

The Exchange believes that this proposed extension of time is tailored to address the needs and constraints on a Member's operations during the COVID–19 pandemic, without significantly compromising critical investor protection. The proposed extension of time will help to minimize the impact of COVID–19 on Members by providing flexibility so that Members can ensure that principal positions remain filled. The potential risks from the proposed extension of the 120-day period are mitigated by the Member's requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as Exchange rules.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Exchange Act[18] in general, and furthers the objectives of Section 6(b)(5) of the Act[19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposed rule change is intended to minimize the impact of COVID–19 on Member operations by extending the 120-day period certain individuals may function as a principal without having successfully passed an appropriate qualification examination under Exchange Rule 1900, Interpretation and Policy .04, until April 30, 2021. The

[9] *See* Exchange Act Release No. 89732 (September 1, 2020), 85 FR 55535 (September 8, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–026).

[10] *See supra* note 3.

[11] 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.

[12] *See, e.g.,* Meryl Kornfield, Jacqueline Dupree, Marisa Iati, Paulina Villegas, Siobhan O'Grady and Hamza Shaban, New daily coronavirus cases in U.S. rise to 145,000, latest all-time high, Wash. Post, November 11, 2020, *https://www.washingtonpost.com/nation/2020/11/11/coronavirus-covid-live-updates-us/.*

[13] Information about the continued impact of COVID–19 on FINRA-administered examinations is available at *https://www.finra.org/rules-guidance/key-topics/covid-19/exams.*

[14] Information from Prometric about its safety practices and the impact of COVID–19 on its operations is available at *https://www.prometric.com/corona-virus-update.*

[15] Although an online test delivery service has been launched to help address the backlog, the General Securities Principal Exam (Series 24) is not available online. *See supra* note 13. FINRA is considering making additional qualifications examinations available remotely on a limited basis.

[16] *See, e.g.,* Centers for Disease Control and Prevention, How to Protect Yourself & Others, *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.*

[17] *See supra* note 3.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

proposed rule change does not relieve Members from maintaining, under the circumstances, a reasonably designed system to supervise the activities of their associated persons to achieve compliance with applicable securities laws and regulations, and with applicable Exchange rules that directly serve investor protection. In a time when faced with unique challenges resulting from the COVID–19 pandemic, the Exchange believes that the proposed rule change is a sensible accommodation that will continue to afford Members the ability to ensure that critical positions are filled and client services maintained, while continuing to serve and promote the protection of investors and the public interest in this unique environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is intended to provide temporary relief given the impacts of the COVID–19 pandemic crisis and to also maintain consistency with the rules of other self-regulatory organizations (''SROs'') with respect to the registration requirements applicable to Members and their registered personnel. In that regard, the Exchange believes that any burden on competition would be clearly outweighed by providing Members with temporary relief in this unique environment while also ensuring clear and consistent requirements applicable across SROs and mitigating any risk of SROs implementing different standards in these important areas. In its filing, FINRA provides an abbreviated economic impact assessment maintaining that the changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rule 1210 in response to the impacts of the COVID–19 pandemic that is equally applicable to the changes the Exchange proposes.[20] The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[20] *See supra* notes 3 and 9.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[21] and Rule 19b–4(f)(6) thereunder.[22]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange stated that the proposed extension of time will help minimize the impact of the COVID–19 outbreak on Members' operations by allowing them to keep principal positions filled and minimizing disruptions to client services and other critical responsibilities. The Exchange further stated that the ongoing extenuating circumstances of the COVID–19 pandemic make it impractical to ensure that individuals designated to act in these capacities are able to take and pass the appropriate qualification examination during the 120-calendar day period required under the rules. The Exchange also explained that shelter-in-place orders, quarantining, restrictions on business and social activity and adherence to social distancing guidelines consistent with the recommendations of public officials remain in place in various states.[23] In addition, the Exchange observed that, following a nationwide closure of all test centers earlier in the year, some test centers have re-opened, but are operating at limited capacity or are only delivering certain examinations that have been deemed essential by the local government.[24] Although, as the Exchange noted, FINRA has launched an online test delivery service to help address this backlog, the General Securities Principal (Series 24) Examination is not available online.[25] Nevertheless, the Exchange explained that the proposed rule change will provide needed flexibility to ensure that these positions remain filled and is tailored to address the constraints on Members' operations during the COVID–19 pandemic without significantly compromising critical investor protection.[26]

The Commission observed that the Exchange's proposal, like FINRA's analogous filing, provides only temporary relief from the requirement to pass certain qualification examinations within the 120-day period in the rules. As proposed, this relief would extend the 120-day period that certain individuals can function as principals through April 30, 2021. If a further extension of temporary relief from the rule requirements identified in this proposal beyond April 30, 2021 is required, the Exchange noted that it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.[27] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.[28] Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[29]

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

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[23] *See supra* note 16.

[24] *See supra* notes 13 and 14. The Exchange states that Prometric has also had to close some reopened test centers due to incidents of COVID–19 cases.

[25] *See supra* note 15. FINRA is considering making additional qualification examinations available remotely on a limited basis.

[26] The Exchange states that Members remain subject to the continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as MIAX Options rules.

[27] *See supra* note 3.

[28] As noted above by the Exchange, this proposed temporary change is based on a recent filing by FINRA that the Commission approved with a waiver of the 30-day operative delay. *See supra* note 3, FINRA Filing at 81260.

[29] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–2020–42 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–2020–42. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of MIAX Options. 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–2020–42 and should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

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[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90822; File No. SR–NYSENAT–2020–39]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Expiration Date of the Temporary Amendments to Rules 10.9261 and 10.9830 as Set Forth in SR–NYSENAT–2020–31 From December 31, 2020, to April 30, 2021

December 30, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 22, 2020, NYSE National, Inc. (''NYSE National'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes extending the expiration date of the temporary amendments to Rules 10.9261 and 10.9830 as set forth in SR–NYSENAT–2020–31 from December 31, 2020, to April 30, 2021, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA''). The proposed rule change would not make any changes to the text of NYSE National Rules 10.9261 and 10.9830. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes extending the expiration date of the temporary amendments as set forth in SR–NYSENAT–2020–31[4] to Rules 10.9261 (Evidence and Procedure in Hearing) and 10.9830 (Hearing) from December 31, 2020, to April 30, 2021 to harmonize with recent changes by FINRA to extend the expiration date of the temporary amendments to its Rules 9261 and 9830. SR–NYSENAT–2020–31 temporarily granted to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing COVID–19 pandemic. The proposed rule change would not make any changes to the text of Exchange Rules 10.9261 and 10.9830.[5]

Background

In 2018, NYSE National adopted disciplinary rules that are, with certain exceptions, substantially the same as the disciplinary rules of its affiliate NYSE American LLC, which are in turn substantially similar to the FINRA Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and enforcement actions.[6]

In adopting disciplinary rules modeled on FINRA's rules, NYSE National adopted the hearing and evidentiary processes set forth in Rule 10.9261 and in Rule 10.9830 for hearings in matters involving temporary and permanent cease and desist orders

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 90137 (October 8, 2020), 85 FR 65087 (October 14, 2020) (SR–NYSENAT–2020–31) (''SR–NYSENAT–2020–31'').

[5] The Exchange may submit a separate rule filing to extend the expiration date of the proposed extension beyond April 30, 2021 if the Exchange requires additional temporary relief from the rule requirements identified in SR–NYSENAT–2020–31. The amended NYSE National rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.

[6] *See* Securities Exchange Act Release No. 83289 (May 17, 2018), 83 FR 23968, 23976 (May 23, 2018) (SR–NYSENAT–2018–02) (''2018 Approval Order'').

under the Rule 10.9800 Series. As adopted, the text of Rule 10.9261 and Rule 10.9830 are substantially the same as the FINRA rules with certain modifications.[7]

In response to the spread of COVID–19, on August 31, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness, SR–FINRA–2020–027, to temporarily grant FINRA's Office of Hearing Officers (''OHO'') and the National Adjudicatory Council (''NAC'') the authority to conduct certain hearings by video conference, if warranted by the current COVID–19-related public health risks posed by in-person hearings. Among the rules FINRA amended were Rules 9261 and 9830.[8]

Given that FINRA and OHO administers disciplinary hearings on the Exchange's behalf, and that the public health concerns addressed by FINRA's amendments apply equally to Exchange disciplinary hearings, on September 29, 2020, the Exchange filed to temporarily amend Rule 10.9261 and Rule 10.9830 to permit FINRA to conduct virtual hearings on its behalf.[9] The temporary amendments to Rule 10.9261 and Rule 10.9830, as originally proposed, will expire on December 31, 2020, absent another proposed rule change filing by the Exchange.

The COVID–19 conditions necessitating these temporary amendments persist, with cases rapidly escalating nationwide. Based on its assessment of current COVID–19 conditions and the lack of certainty as to when COVID–19-related health concerns will subside, on December 1, 2020, FINRA filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from December 31, 2020, to April 30, 2021.[10]

Proposed Rule Change

Consistent with FINRA's recent proposal, the Exchange proposes to extend the expiration date of the temporary rule amendments to NYSE National Rules 10.9261 and 10.9830 as set forth in SR–NYSENAT–2020–31 from December 31, 2020, to April 30, 2021.

As set forth in SR–FINRA–2020–042, based on its assessment of current COVID–19 conditions, including the recent escalation in COVID–19 cases nationwide, FINRA does not believe that the COVID–19-related health concerns necessitating this relief will subside by December 31, 2020, and has determined that there will be a continued need for this temporary relief for several months beyond December 31, 2020.[11] FINRA accordingly proposed to extend the expiration date of the temporary rule amendments in the August 31 FINRA Filing from December 31, 2020, to April 30, 2021.

The Exchange proposes to similarly extend the expiration date of the temporary rule amendments to NYSE National Rules 10.9261 and 10.9830 as set forth in SR–NYSENAT–2020–31 from December 31, 2020, to April 30, 2021. With COVID–19 cases surging nationwide, the Exchange agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020. The proposed change will permit OHO to continue to assess, based on critical COVID–19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain fair process for the parties.[12] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee.

As noted below, the Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[13] in general, and furthers the objectives of Section 6(b)(5),[14] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[15]

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change, which extends the expiration date of the temporary amendments to Exchange rules consistent with FINRA's extension to its Rules 9261 and 9830 for four months as set forth in SR–FINRA–2020–042, will permit the Exchange to continue to effectively conduct hearings during the COVID–19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will permit the adjudicatory functions of the Exchange's disciplinary rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to continue to proceed without delay, thereby enabling the Exchange to continue to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

As set forth in detail in SR–NYSENAT–2020–31, the temporary relief to permit hearings to be conducted via video conference maintains fair process and will continue to provide fair process consistent with Sections 6(b)(7) and 6(d) of the Act[16] while striking an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and

[7] *See id.*

[8] *See* Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR–FINRA–2020–027) (the ''August 31 FINRA Filing'').

[9] *See supra* note 4.

[10] *See* Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR–FINRA–2020–042) (''SR–FINRA–2020–042'').

[11] *See id.*

[12] *See* SR–FINRA–2020–042, 85 FR at 81251–52; August 31 FINRA Filing, 85 FR at 55713.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

[15] 15 U.S.C. 78f(b)(7) and 78f(d).

[16] 15 U.S.C. 78f(b)(7) and 78f(d).

maintain fair and orderly markets while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID–19. The Exchange notes that this proposal, like SR–NYSENAT–2020–31, provides only temporary relief. As proposed, the changes would be in place through April 30, 2021. As noted in SR–NYSENAT–2020–31 and above, the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.

Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed temporary rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to provide continued temporary relief given the impacts of the COVID–19 pandemic and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) [17] of the Act and Rule 19b–4(f)(6) thereunder.[18]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange states that the COVID-related health and safety risks of conducting in-person activities, which necessitated these temporary amendments, persist and that cases are escalating nationwide. Based on FINRA's assessment of the current COVID–19 conditions and FINRA's determination that there is a continued need for this temporary relief for several months beyond December 31, 2020, the Exchange states that it agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020.[19] Moreover, the Exchange states that FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will provide a fair process for all parties and will enable the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets.[20] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee. Accordingly, the Exchange states that waiver of the operative delay would prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

The Exchange also indicates that this filing is eligible to become operative immediately because the proposal would continue to provide greater harmonization between the Exchange rules and FINRA rules that serve a similar purpose, resulting in less burdensome and more efficient regulatory compliance. This proposal would serve to extend the expiration date of the temporary amendments to the Exchange rules set forth in SR–NYSENAT–2020–31, which is consistent with FINRA's extension to its comparable rules, where FINRA requested and the Commission granted a waiver of the 30-day operative delay.[21] The Exchange also indicates that this temporary relief is necessary in order for the continue performing adjudicatory functions necessary to meet its statutory obligations in light of COVID–19 related health and safety risks associated with in-person hearings and will only be temporary relief, with the rules reverting back to their original state at the conclusion of the relief period and any extension thereof.[22]

The Commission observes that this proposal, like SR–NYSENAT–2020–31 and FINRA's comparable filing,[23] provides only temporary relief during the period in which the Exchange's operations are impacted by COVID–19. As proposed, the changes would be in place through April 30, 2021. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[24]

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

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[19] *See* SR–FINRA–2020–042.

[20] *See id.*

[21] *See supra* note 10 (referencing FINRA's proposal to extend the expiration date of temporary rule amendments allowing hearings to be conducted on a temporary basis by video conference if warranted by COVID–19 related health risks).

[22] *See supra* note 5 and accompanying text.

[23] *See supra* notes 8 and 10 and accompanying text.

[24] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSENAT–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–NYSENAT–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, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSENAT–2020–39 and should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29213 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90835; File No. SR–NYSEArca–2020–84]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.900–E To Adopt Generic Listing Standards for Managed Portfolio Shares

December 31, 2020.

I. Introduction

On September 22, 2020, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 8.900–E to adopt generic listing standards for Managed Portfolio Shares. On October 2, 2020, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on October 13, 2020.[3] On November 13, 2020, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] The Commission has received no comments on the proposed rule change. The Commission is publishing this order to solicit comments on the proposed rule change from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act [6] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

The Exchange adopted listing standards for Managed Portfolio Shares as set forth in NYSE Arca Rule 8.900–E.[7] A Managed Portfolio Share is a security that (a) represents an interest in an investment company (''Investment Company''), registered under the Investment Company Act of 1940 (''1940 Act'') organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a Creation Unit,[8] or multiples thereof, in return for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value and delivered to the Authorized Participant (as defined in the Investment Company's Form N–1A filed with the Commission) through a Confidential Account; [9] (c) when aggregated into a Redemption Unit,[10] or multiples thereof, may be redeemed for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value delivered to the Confidential Account for the benefit of the Authorized Participant; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90104 (October 7, 2020), 85 FR 64598 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 90418, 85 FR 73812 (November 19, 2020). The Commission designated January 11, 2021, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 88648 (April 15, 2020), 85 FR 22200 (April 21, 2020) (SR–NYSEArca–2020–32) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a New NYSE Arca Rule 8.900–E).

[8] NYSE Arca Rule 8.900–E(c)(6) defines the term ''Creation Unit'' as a specified minimum number of Managed Portfolio Shares issued by an Investment Company at the request of an Authorized Participant in return for a designated portfolio of instruments and/or cash.

[9] NYSE Arca Rule 8.900–E(c)(4) defines the term ''Confidential Account'' as ''an account owned by an Authorized Participant and held with an AP Representative on behalf of the Authorized Participant. The account will be established and governed by contractual agreement between the AP Representative and the Authorized Participant solely for the purposes of creation and redemption, while keeping confidential the Creation Basket constituents of each series of Managed Portfolio Shares, including from the Authorized Participant. The books and records of the Confidential Account will be maintained by the AP Representative on behalf of the Authorized Participant.'' NYSE Arca Rule 8.900–E(c)(3) defines the term ''AP Representative'' as ''an unaffiliated broker-dealer, with which an Authorized Participant has signed an agreement to establish a Confidential Account for the benefit of such Authorized Participant, that will deliver or receive, on behalf of the Authorized Participant, all consideration to or from the Investment Company in a creation or redemption. An AP Representative will not be permitted to disclose the Creation Basket to any person, including the Authorized Participants.''

[10] NYSE Arca Rule 8.900–E(c)(7) defines the term ''Redemption Unit'' as a specified minimum number of Managed Portfolio Shares that may be redeemed to an Investment Company at the request of an Authorized Participant in return for a portfolio of instruments and/or cash.

quarter.[11] Further, each series of Managed Portfolio Shares widely disseminates a Verified Intraday Indicative Value or ''VIIV'' [12] in one second intervals during the Core Trading Session.[13]

NYSE Arca Rule 8.900–E(b)(1) currently requires that the Exchange submit a proposed rule change with the Commission to list and trade each new series of Managed Portfolio Shares.[14] The Exchange proposes to amend NYSE Arca Rule 8.900–E to adopt ''generic'' listing standards that would allow the Exchange to approve the listing and trading (including pursuant to unlisted trading privileges) of series of Managed Portfolio Shares that satisfy those generic listing standards pursuant to Rule 19b–4(e) under the Act.[15]

A. Proposed Amendments to Rule 8.900–E

The Exchange proposes to amend Rule 8.900–E(b)(1) to state that the Exchange may approve Managed Portfolio Shares for listing and/or trading (including pursuant to unlisted trading privileges) pursuant to Rule 19b–4(e) under the Act. The Exchange would also specify within proposed Rule 8.900–E(b)(1) that components of a series of Managed Portfolio Shares listed pursuant to Rule 19b–4(e) shall satisfy the criteria set forth in Rule 8.900–E and Commentary .01 thereto upon initial listing and on a continual basis. In addition, the Exchange would specify that it will file separate proposals under Section 19(b) of the Act before the listing and trading of a series of Managed Portfolio Shares with components that do not satisfy the criteria set forth in proposed Commentary .01 or components other than those specified in proposed Commentary .01.[16]

Proposed Commentary .01(a) to Rule 8.900–E would provide that the portfolio holdings for a series of Managed Portfolio Shares shall include only the following components:

(1) U.S. exchange-traded securities that are common stocks; preferred stocks; American Depositary Receipts; and real estate investment trusts;

(2) U.S. exchange-traded funds that are listed under the following NYSE Arca rules: Investment Company Units (Rule 5.2–E(j)(3)); Exchange-Traded Fund Shares (Rule 5.2–E(j)(8)); Portfolio Depositary Receipts (Rule 8.100–E); Managed Fund Shares (Rule 8.600–E); Active Proxy Portfolio Shares (Rule 8.601–E); and Managed Portfolio Shares (Rule 8.900–E);

(3) Equity Gold Shares (listed under NYSE Arca Rule 5.2–E(j)(5))

(4) Index-Linked Securities (listed under NYSE Arca Rule 5.2–E(j)(6));

(5) Commodity-Based Trust Shares (listed under NYSE Arca Rule 8.201–E);

(6) Currency Trust Shares (listed under NYSE Arca Rule 8.202–E);

(7) The following securities, which are required to be organized as commodity pools: Commodity Index Trust Shares (listed under NYSE Arca Rule 8.203–E); Commodity Futures Trust Shares (listed under NYSE Arca Rule 8.204–E); Trust Units (listed under NYSE Arca Rule 8.500–E); and Managed Trust Securities (listed under NYSE Arca Rule 8.700–E);

(8) The following securities if organized as commodity pools: Trust Issued Receipts (listed under NYSE Arca Rule 8.200–E) and Partnership Units (listed under NYSE Arca Rule 8.300–E);

(9) U.S. exchange-traded futures that trade contemporaneously with shares of a series of Managed Portfolio Shares in the Exchange's Core Trading Session; and

(10) Cash and cash equivalents, which cash equivalents would be limited to short-term U.S. Treasury securities, government money market funds, and repurchase agreements.

Proposed Commentary .01(b) to Rule 8.900–E would provide that a series of Managed Portfolio Shares will not hold short positions in securities and other financial instruments referenced in the list of permitted investments in proposed Commentary .01(a). Proposed Commentary .01(c) would provide that the securities referenced in proposed Commentary .01(a)(2)–(8) would also include securities listed on another national securities exchange pursuant to substantially equivalent listing rules.

The Exchange states that the securities and financial instruments enumerated in proposed Commentary .01(a) to Rule 8.900–E are consistent with, and limited to, the ''permissible investments'' for series of Managed Portfolio Shares previously approved by the Commission for Exchange listing and trading, as described in the Approval Orders [17] and as permitted by their respective exemptive relief under the 1940 Act.

The Exchange also states that the regulatory staff of the Exchange, or the Financial Industry Regulatory Authority, Inc. (''FINRA''), on behalf of the Exchange, will communicate as needed regarding trading in Managed Portfolio Shares, other exchange-traded equity securities and futures contracts with other markets that are members of the Intermarket Surveillance Group (''ISG''), including U.S. exchanges on which the components are traded. In addition, the Exchange may obtain information regarding trading in

[11] *See* NYSE Arca Rule 8.900–E(c)(1).

[12] NYSE Arca Rule 8.900–E(c)(2) defines the term ''Verified Intraday Indicative Value'' (''VIIV'') as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during the Core Trading Session by the Reporting Authority.

[13] NYSE Arca Rule 8.900–E(d)(2)(A) requires for continued listing that the VIIV for a series of Managed Portfolio Shares be widely disseminated by the Reporting Authority and/or by one or more major market data vendors in one second intervals during the Core Trading Session, and be disseminated to all market participants at the same time.

[14] The Exchange notes that the Commission has approved listing and trading of series of Managed Portfolio Shares on the Exchange under NYSE Arca Rule 8.900–E and on another national securities exchange under substantially equivalent listing rules. *See* Securities Exchange Act Release Nos. 89633 (August 25, 2020), 85 FR 53868 (August 31, 2020) (SR–NYSEArca–2020–48) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to List and Trade Shares of Gabelli ETFs under Rule 8.900–E) (''Gabelli Approval Order''); 88247 (February 20, 2020), 85 FR 11137 (February 26, 2020) (SR–CboeBZX–2019–102) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3 Thereto, to List and Trade Shares of the ClearBridge Focus Value ETF under BZX Rule 14.11(k)) (''ClearBridge Approval Order''); 88175 (February 12, 2020), 85 FR 9494 (February 19, 2020) (SR–CboeBZX–2019–057) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2 Thereto, to List and Trade Shares of the American Century Focused Dynamic Growth ETF and American Century Focused Large Cap Value ETF under BZX Rule 14.11(k)) (''American Century Approval Order'' and, together with the Gabelli Approval Order and the ClearBridge Approval Order, ''Approval Orders'').

[15] 17 CFR 240.19b–4(e). Rule 19b–4(e)(1) under the Act provides that the listing and trading of a new derivative securities product by a self-regulatory organization (''SRO'') is not deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b–4, if the Commission has approved, pursuant to Section 19(b) of the Act, the SRO's trading rules, procedures and listing standards for the product class that would include the new derivative securities product and the SRO has a surveillance program for the product class. *See* 17 CFR 240.19b–4(e)(1). Under Rule 19b–4(e), the term ''new derivative securities product'' means any type of option, warrant, hybrid securities product or any other security, other than a single equity option or a security futures product, whose value is based, in whole or in part, upon the performance of, or interest in, an underlying instrument. *See* 17 CFR 240.19b–4(e). Under Rule 19b–4(c)(1), a stated policy, practice, or interpretation of the SRO shall be deemed to be a proposed rule change unless it is reasonably and fairly implied by an existing rule of the SRO. 17 CFR 240.19b–4(c)(1). 17 CFR 240.19b–4(c)(1).

[16] For example, according to the Exchange, if the components of a series of Managed Portfolio Shares included a security or asset that is not specified in proposed Commentary .01, the Exchange would file a separate proposed rule change with the Commission to list the series of Managed Portfolio Shares.

[17] *See supra* note 14.

Managed Portfolio Shares from other markets that are members of the ISG, including all U.S. securities exchanges and futures exchanges on which the equity securities and futures contracts are traded. The Exchange represents that its surveillance procedures are adequate to continue to properly monitor the trading of Managed Portfolio Shares in all trading sessions and to deter and detect violations of Exchange rules. Specifically, the Exchange intends to utilize its existing surveillance procedures applicable to derivative products, which will include Managed Portfolio Shares, to monitor trading in the Managed Portfolio Shares.

The Exchange states that the Managed Portfolio Shares will conform to the initial and continued listing criteria under Rule 8.900–E. All Managed Portfolio Shares listed and/or traded pursuant to Rule 8.900–E (including pursuant to unlisted trading privileges) are subject to all Exchange rules and procedures that currently govern the trading of equity securities on the Exchange. The issuer of a series of Managed Portfolio Shares will be required to comply with Rule 10A–3 under the Act for the initial and continued listing of Managed Portfolio Shares, as provided under NYSE Arca Rule 5.3–E.

Further, according to the Exchange, prior to listing pursuant to proposed amended Rule 8.900–E and proposed Commentary .01 thereto, an issuer would be required to represent to the Exchange that it will advise the Exchange of any failure by a series of Managed Portfolio Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If a series of Managed Portfolio Shares is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under NYSE Arca Rule 5.5–E(m).

III. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEArca–2020–84, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [18] to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[19] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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 to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.[20]

The Exchange proposes to adopt generic listing standards for Managed Portfolio Shares, which would allow the Exchange to list and trade Managed Portfolio Shares that meet the requirements of NYSE Arca Rule 8.900–E and Commentary .01 without filing a proposed rule change with the Commission. As noted above, however, the Exchange only recently adopted Rule 8.900–E to permit the listing and trading of Managed Portfolio Shares on the Exchange.[21] Further, the Exchange states that only three series of Managed Portfolio Shares are currently listed and traded on BZX and does not indicate whether any series are currently listed and traded on the Exchange.[22]

Accordingly, the Commission and the Exchange, as well as the marketplace, more generally, have limited experience with respect to this type of new derivative securities product.[23] In the past, a new derivative securities product typically had a significant history of being listed and traded on an exchange before the Commission approved its generic listing standards. For example, the Commission approved the Exchange's listing standards for Managed Fund Shares in 2008, but did not approve the generic listing standards for the same until 2016.[24] Given the relatively short amount of time the Commission has had to oversee and observe Managed Portfolio Shares and other similarly structured exchange traded products, the Commission is concerned that there is insufficient experience to determine that the proposal to permit generic listing and trading of Managed Portfolio Shares is consistent with Section 6(b)(5) of the Act, including whether the proposal is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest.

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 [SRO] that proposed the rule change.'' [25] The

[18] 15 U.S.C. 78s(b)(2)(B).

[19] *Id.*

[20] 15 U.S.C. 78f(b)(5).

[21] *See supra* note 7 and accompanying text. The Commission notes that it also recently approved a substantively similar rule for the listing and trading of Managed Portfolio Shares on Cboe BZX Exchange, Inc. (''BZX''). *See* Securities Exchange Act Release No. 87759 (December 16, 2019), 84 FR 70223 (December 20, 2019) (Notice of Filing of Amendment Nos. 4 and 5, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 4 and 5, to Adopt BZX Rule 14.11(k) to Permit the Listing and Trading of Managed Portfolio Shares).

[22] *See* Notice, *supra* note 3, at 64600. *See also* Approval Orders, *supra* note 14. The Commission notes that, since the initial filing of the Exchange's proposal, additional Managed Portfolio Shares have been approved, or filed pursuant to (b)(3)(A) under Section 19 of the Exchange Act, for listing on a national securities exchange. *See* Securities Exchange Act Release Nos. 90528 (November 30, 2020), 85 FR 78389 (December 4, 2020) (Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, to List and Trade Shares of Alger Mid Cap 40 ETF and Alger 25 ETF Under Rule 8.900–E); 90683 (December 16, 2020), 85 FR 83665 (December 22, 2020) (Order Approving a Proposed Rule Change, as Modified by Amendments No. 1 and No. 2, to List and Trade Shares of the AdvisorShares Q Portfolio Blended Allocation ETF and AdvisorShares Q Dynamic Growth ETF Under NYSE Arca Rule 8.900–E).

[23] *See supra* note 15.

[24] *See* Securities Exchange Act Release No. 78397 (July 22, 2016), 81 FR 49320 (July 27, 2016 (SR–NYSEArca–2015–110) (Order Granting Approval of Proposed Rule Change, as Modified by Amendment No. 7 Thereto, Amending NYSE Arca Equities Rule 8.600 to Adopt Generic Listing Standards for Managed Fund Shares) and Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (Notice of Filing of Amendment No. 1 to Proposed Rule Change and Order Granting Accelerated Approval of Such Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Rules Permitting the Listing and Trading of Managed Fund Shares, Trading Hours and Halts, Listing Fees Applicable to Managed Fund Shares, and the Listing and Trading of Shares of the PowerShares Active AlphaQ Fund, PowerShares Active Alpha Multi-Cap Fund, PowerShares Active Mega-Cap Portfolio, and the PowerShares Active Low Duration Portfolio).

[25] 17 CFR 201.700(b)(3).

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,[26] 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 Act and the applicable rules and regulations.[27] The Commission notes that the Exchange has provided no data or analysis to support the determination that, in the absence of significant market or regulatory experience, its proposal to permit the listing and trading of Managed Portfolio Shares pursuant to a generic listing standards raises no new or novel concerns.

Accordingly, the Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including whether the proposal is consistent with the Act.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) [28] of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[29] any request for an opportunity to make an oral presentation.[30]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by January 27, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by February 10, 2021. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[31] in addition to any other comments they may wish to submit about the proposed rule change. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2020–84 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2020–84. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–84 and should be submitted by January 27, 2021. Rebuttal comments should be submitted by February 10, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29283 Filed 1–5–21; 8:45 am]

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[26] *See id.*

[27] *See id.*

[28] 15 U.S.C. 78f(b)(5).

[29] 17 CFR 240.19b–4.

[30] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[31] *See* Notice, *supra* note 3.

[32] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90831; File No. SR–PEARL–2020–36]

Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 3100, Registration Requirements, To Adopt Temporary Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons To Function as Principals)

December 30, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 28, 2020, MIAX PEARL, LLC (''MIAX PEARL'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit 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 Exchange Rule 3100, Registration Requirements, to adopt temporary Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals).

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.

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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) to Exchange Rule 3100, Registration Requirements. The proposed rule change would extend the 120-day period that certain individuals can function as principals without having successfully passed an appropriate qualification examination through April 30, 2021,[3] and would apply only to those individuals who were designated to function as principals prior to January 1, 2021. This proposed rule change is based on a filing recently submitted by the Financial Regulatory Authority, Inc. (''FINRA'')[4] and is intended to harmonize the Exchange's registration rules with those of FINRA so as to promote uniform standards across the securities industry.

In response to COVID–19, earlier this year FINRA began providing temporary relief by way of frequently asked questions (''FAQs'')[5] to address disruptions to the administration of FINRA qualification examinations caused by the pandemic that have significantly limited the ability of individuals to sit for examinations due to Prometric test center capacity issues.[6]

FINRA published the first FAQ on March 20, 2020, providing that individuals who were designated to function as principals under FINRA Rule 1210.04[7] prior to February 2, 2020, would be given until May 31, 2020, to pass the appropriate principal qualification examination.[8] On May 19, 2020, FINRA extended the relief to pass the appropriate examination until June 30, 2020. On June 29, 2020, FINRA extended the temporary relief providing that individuals who were designated to function as principals under FINRA Rule 1210.04 prior to May 4, 2020, would be given until August 31, 2020, to pass the appropriate principal qualification examination. On August 28, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness to extend the temporary relief provided via the two FAQs by adopting: (1) Temporary Supplementary Material .12 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under FINRA Rule 1210 (Registration Requirements), and (2) temporary Supplementary Material .07 (Temporary Extension of the Limited Period for Persons to Function as Operations Professionals) under FINRA Rule 1220 (Registration Categories).[9] Pursuant to this rule filing, individuals who were designated prior to September 3, 2020, to function as a principal under FINRA Rule 1210.04 would have until December 31, 2020, to pass the appropriate qualification examination.

Thereafter, on December 9, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness to extend the limited period for registered persons to function as a principal through April 30, 2021.[10] Pursuant to this rule filing, individuals who were designated prior to January 1, 2021 to function as a principal would have until April 30, 2021 to pass the appropriate qualifying examination.

The Exchange continues to closely monitor the impact of the COVID–19 pandemic on Members,[11] investors, and other stakeholders. The COVID–19 conditions necessitating the extension of relief provided in the FINRA's FAQs and rule amendments persist and, in fact, appear to be worsening.[12] One of the impacts of COVID–19 continues to be serious interruptions in the administration of FINRA qualification examinations at Prometric test centers and the limited ability of individuals to sit for the examinations.[13] Although Prometric has begun reopening test centers, Prometric's safety practices mean that currently not all test centers are open, some of the open test centers are at limited capacity, and some open test centers are delivering only certain examinations that have been deemed essential by the local government.[14] Furthermore, Prometric has had to close some reopened test centers due to incidents of COVID–19 cases. The initial nationwide closure in March along with the inability to fully reopen all Prometric test centers due to COVID–19 have led to a significant backlog of individuals who are waiting to sit for FINRA examinations.[15]

In addition, firms are continuing to experience operational challenges with much of their personnel working from home due to shelter-in-place orders, restrictions on businesses and social activity imposed in various states, and

[3] *See* Exchange Act Release No. 90617 (December 9, 2020), 85 FR 81258 (December 15, 2020) (SR–FINRA–2020–043) (''FINRA Filing''). The Exchange notes that the FINRA Filing also provides temporarily relief to individuals registered with FINRA as Operations Professionals under FINRA Rule 1220. The Exchange does not have a registration category for Operations Professionals and therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filing. If the Exchange seeks to provide additional temporary relief from the rule requirement identified in this proposal beyond April 30, 2021, it will submit a separate rule filing to further extend the temporary extension of time.

[4] *See id.*

[5] *See https://www.finra.org/rules-guidance/key-topics/covid-19/faq#qe.*

[6] At the outset of the COVID–19 pandemic, all FINRA qualification examinations were administered at test centers operated by Prometric. Based on the health and welfare concerns resulting from COVID–19, in March Prometric closed all of its test centers in the United States and Canada and began to slowly reopen some of them at limited capacity in May. At this time, not all of these Prometric test centers have reopened at full capacity.

[7] Exchange Rule 3100, Interpretation and Policy .04, is the corresponding rule to FINRA Rule 1210.04.

[8] FINRA Rule 1210.04 (Requirements for Registered Persons Functioning as Principals for a Limited Period) allows a FINRA-member firm to designate certain individuals to function in a principal capacity for 120 calendar days before having to pass an appropriate principal qualification examination. Exchange Rule 3100, Interpretation and Policy .04, provides the same allowance to Exchange Members.

[9] *See* Exchange Act Release No. 89732 (September 1, 2020), 85 FR 55535 (September 8, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–026).

[10] *See supra* note 3.

[11] 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.

[12] *See, e.g.,* Meryl Kornfield, Jacqueline Dupree, Marisa Iati, Paulina Villegas, Siobhan O'Grady and Hamza Shaban, New daily coronavirus cases in U.S. rise to 145,000, latest all-time high, Wash. Post, November 11, 2020, *https://www.washingtonpost.com/nation/2020/11/11/coronavirus-covid-live-updates-us/.*

[13] Information about the continued impact of COVID–19 on FINRA-administered examinations is available at *https://www.finra.org/rules-guidance/key-topics/covid-19/exams.*

[14] Information from Prometric about its safety practices and the impact of COVID–19 on its operations is available at *https://www.prometric.com/corona-virus-update.*

[15] Although an online test delivery service has been launched to help address the backlog, the General Securities Principal Exam (Series 24) is not available online. *See supra* note 13. FINRA is considering making additional qualifications examinations available remotely on a limited basis.

adherence to other social distancing guidelines consistent with the recommendations of public health officials.[16] As a result, firms continue to face potentially significant disruptions to their normal business operations that may include a limitation of in-person activities and staff absenteeism as a result of the health and welfare concerns stemming from COVID–19. Such potential disruptions may be further exacerbated and may even affect client services if firms cannot continue to keep principal positions filled as they may have difficulty finding other qualified individuals to transition into these roles or may need to reallocate employee time and resources away from other critical responsibilities at the firm.

These ongoing, extenuating circumstances make it impracticable for Members to ensure that the individuals whom they have designated to function in a principal capacity, as set forth in Exchange Rule 3100, Interpretation and Policy .04, are able to successfully sit for and pass an appropriate qualification examination within the 120-calendar day period required under the rule, or to find other qualified staff to fill this position. The ongoing circumstances also require individuals to be exposed to the health risks associated with taking an in-person examination, because the General Securities Principal examination is not available online. Therefore, the Exchange is proposing to provide the temporary relief provided through the FINRA FAQs by adopting Interpretation and Policy .13 to Exchange Rule 3100 to extend the 120-day period during which an individual can function as a principal before having to pass an applicable qualification examination until April 30, 2021.[17] The proposed rule change would apply only to those individuals who were designated to function as a principal prior to January 1, 2021. Any individuals designated to function as a principal on or after January 1, 2021, would need to successfully pass an appropriate qualification examination within 120 days.

The Exchange believes that this proposed extension of time is tailored to address the needs and constraints on a Member's operations during the COVID–19 pandemic, without significantly compromising critical investor protection. The proposed extension of time will help to minimize the impact of COVID–19 on Members by providing flexibility so that Members can ensure that principal positions remain filled. The potential risks from the proposed extension of the 120-day period are mitigated by the Member's requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as Exchange rules.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Exchange Act[18] in general, and furthers the objectives of Section 6(b)(5) of the Act[19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposed rule change is intended to minimize the impact of COVID–19 on Member operations by extending the 120-day period certain individuals may function as a principal without having successfully passed an appropriate qualification examination under Exchange Rule 3100, Interpretation and Policy. 04, until April 30, 2021. The proposed rule change does not relieve Members from maintaining, under the circumstances, a reasonably designed system to supervise the activities of their associated persons to achieve compliance with applicable securities laws and regulations, and with applicable Exchange rules that directly serve investor protection. In a time when faced with unique challenges resulting from the COVID–19 pandemic, the Exchange believes that the proposed rule change is a sensible accommodation that will continue to afford Members the ability to ensure that critical positions are filled and client services maintained, while continuing to serve and promote the protection of investors and the public interest in this unique environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is intended to provide temporary relief given the impacts of the COVID–19 pandemic crisis and to also maintain consistency with the rules of other self-regulatory organizations (''SROs'') with respect to the registration requirements applicable to Members and their registered personnel. In that regard, the Exchange believes that any burden on competition would be clearly outweighed by providing Members with temporary relief in this unique environment while also ensuring clear and consistent requirements applicable across SROs and mitigating any risk of SROs implementing different standards in these important areas. In its filing, FINRA provides an abbreviated economic impact assessment maintaining that the changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rule 1210 in response to the impacts of the COVID–19 pandemic that is equally applicable to the changes the Exchange proposes.[20] The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[21] and Rule 19b–4(f)(6) thereunder.[22]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection

[16] *See, e.g.,* Centers for Disease Control and Prevention, How to Protect Yourself & Others, *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.*

[17] *See supra* note 3.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] *See supra* notes 3 and 9.

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6). In addition, Rule 19–b4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange stated that the proposed extension of time will help minimize the impact of the COVID–19 outbreak on Members' operations by allowing them to keep principal positions filled and minimizing disruptions to client services and other critical responsibilities. The Exchange further stated that the ongoing extenuating circumstances of the COVID–19 pandemic make it impractical to ensure that individuals designated to act in these capacities are able to take and pass the appropriate qualification examination during the 120-calendar day period required under the rules. The Exchange also explained that shelter-in-place orders, quarantining, restrictions on business and social activity and adherence to social distancing guidelines consistent with the recommendations of public officials remain in place in various states.[23] In addition, the Exchange observed that, following a nationwide closure of all test centers earlier in the year, some test centers have re-opened, but are operating at limited capacity or are only delivering certain examinations that have been deemed essential by the local government.[24] Although, as the Exchange noted, FINRA has launched an online test delivery service to help address this backlog, the General Securities Principal (Series 24) Examination is not available online.[25] Nevertheless, the Exchange explained that the proposed rule change will provide needed flexibility to ensure that these positions remain filled and is tailored to address the constraints on Members' operations during the COVID–19 pandemic without significantly compromising critical investor protection.[26]

The Commission observed that the Exchange's proposal, like FINRA's analogous filing, provides only temporary relief from the requirement to pass certain qualification examinations within the 120-day period in the rules. As proposed, this relief would extend the 120-day period that certain individuals can function as principals through April 30, 2021. If a further extension of temporary relief from the rule requirements identified in this proposal beyond April 30, 2021 is required, the Exchange noted that it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.[27] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.[28] Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[29]

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–2020–36 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–2020–36. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of MIAX PEARL. 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–2020–36 and should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29220 Filed 1–5–21; 8:45 am]

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[23] *See supra* note 16.

[24] *See supra* notes 13 and 14. The Exchange states that Prometric has also had to close some reopened test centers due to incidents of COVID–19 cases.

[25] *See supra* note 15. FINRA is considering making additional qualification examinations available remotely on a limited basis.

[26] The Exchange states that Members remain subject to the continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as MIAX PEARL rules.

[27] *See supra* note 3.

[28] As noted above by the Exchange, this proposed temporary change is based on a recent filing by FINRA that the Commission approved with a waiver of the 30-day operative delay. *See supra* note 3, FINRA Filing at 81260.

[29] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90829; File No. SR–EMERALD–2020–21]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 1900, Registration Requirements, To Adopt Temporary Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons To Function as Principals)

December 30, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 28, 2020, MIAX Emerald, LLC (''MIAX Emerald'' or the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 1900, Registration Requirements, to adopt temporary Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals).

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/emerald,* at MIAX Emerald'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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to adopt Interpretation and Policy .13 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) to Exchange Rule 1900, Registration Requirements. The proposed rule change would extend the 120-day period that certain individuals can function as principals without having successfully passed an appropriate qualification examination through April 30, 2021,[3] and would apply only to those individuals who were designated to function as principals prior to January 1, 2021. This proposed rule change is based on a filing recently submitted by the Financial Regulatory Authority, Inc. (''FINRA'')[4] and is intended to harmonize the Exchange's registration rules with those of FINRA so as to promote uniform standards across the securities industry.

In response to COVID–19, earlier this year FINRA began providing temporary relief by way of frequently asked questions (''FAQs'')[5] to address disruptions to the administration of FINRA qualification examinations caused by the pandemic that have significantly limited the ability of individuals to sit for examinations due to Prometric test center capacity issues.[6]

FINRA published the first FAQ on March 20, 2020, providing that individuals who were designated to function as principals under FINRA Rule 1210.04[7] prior to February 2, 2020, would be given until May 31, 2020, to pass the appropriate principal qualification examination.[8] On May 19, 2020, FINRA extended the relief to pass the appropriate examination until June 30, 2020. On June 29, 2020, FINRA extended the temporary relief providing that individuals who were designated to function as principals under FINRA Rule 1210.04 prior to May 4, 2020, would be given until August 31, 2020, to pass the appropriate principal qualification examination. On August 28, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness to extend the temporary relief provided via the two FAQs by adopting: (1) Temporary Supplementary Material .12 (Temporary Extension of the Limited Period for Registered Persons to Function as Principals) under FINRA Rule 1210 (Registration Requirements), and (2) temporary Supplementary Material .07 (Temporary Extension of the Limited Period for Persons to Function as Operations Professionals) under FINRA Rule 1220 (Registration Categories).[9] Pursuant to this rule filing, individuals who were designated prior to September 3, 2020, to function as a principal under FINRA Rule 1210.04 would have until December 31, 2020, to pass the appropriate qualification examination.

Thereafter, on December 9, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness to extend the limited period for registered persons to function as a principal through April 30, 2021.[10] Pursuant to this rule filing, individuals who were designated prior to January 1, 2021 to function as a principal would have until April 30, 2021 to pass the appropriate qualifying examination.

The Exchange continues to closely monitor the impact of the COVID–19 pandemic on Members,[11] investors, and other stakeholders. The COVID–19 conditions necessitating the extension of relief provided in the FINRA's FAQs and rule amendments persist and, in fact, appear to be worsening.[12] One of the impacts of COVID–19 continues to be serious interruptions in the administration of FINRA qualification examinations at Prometric test centers and the limited ability of individuals to sit for the examinations.[13] Although Prometric has begun reopening test centers, Prometric's safety practices mean that currently not all test centers are open, some of the open test centers are at limited capacity, and some open test centers are delivering only certain

[3] *See* Exchange Act Release No. 90617 (December 9, 2020), 85 FR 81258 (December 15, 2020) (SR–FINRA–2020–043) (''FINRA Filing''). The Exchange notes that the FINRA Filing also provides temporarily relief to individuals registered with FINRA as Operations Professionals under FINRA Rule 1220. The Exchange does not have a registration category for Operations Professionals and therefore, the Exchange is not proposing to adopt that aspect of the FINRA Filing. If the Exchange seeks to provide additional temporary relief from the rule requirement identified in this proposal beyond April 30, 2021, it will submit a separate rule filing to further extend the temporary extension of time.

[4] *See id.*

[5] *See https://www.finra.org/rules-guidance/key-topics/covid-19/faq#qe.*

[6] At the outset of the COVID–19 pandemic, all FINRA qualification examinations were administered at test centers operated by Prometric. Based on the health and welfare concerns resulting from COVID–19, in March Prometric closed all of its test centers in the United States and Canada and began to slowly reopen some of them at limited capacity in May. At this time, not all of these Prometric test centers have reopened at full capacity.

[7] Exchange Rule 1900, Interpretation and Policy .04, is the corresponding rule to FINRA Rule 1210.04.

[8] FINRA Rule 1210.04 (Requirements for Registered Persons Functioning as Principals for a Limited Period) allows a FINRA-member firm to designate certain individuals to function in a principal capacity for 120 calendar days before having to pass an appropriate principal qualification examination. Exchange Rule 1900, Interpretation and Policy .04, provides the same allowance to Exchange Members.

[9] *See* Exchange Act Release No. 89732 (September 1, 2020), 85 FR 55535 (September 8, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–026).

[10] *See supra* note 3.

[11] 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.

[12] *See, e.g.,* Meryl Kornfield, Jacqueline Dupree, Marisa Iati, Paulina Villegas, Siobhan O'Grady and Hamza Shaban, New daily coronavirus cases in U.S. rise to 145,000, latest all-time high, Wash. Post, November 11, 2020, *https://www.washingtonpost.com/nation/2020/11/11/coronavirus-covid-live-updates-us/.*

[13] Information about the continued impact of COVID–19 on FINRA-administered examinations is available at *https://www.finra.org/rules-guidance/key-topics/covid-19/exams.*

examinations that have been deemed essential by the local government.[14] Furthermore, Prometric has had to close some reopened test centers due to incidents of COVID–19 cases. The initial nationwide closure in March along with the inability to fully reopen all Prometric test centers due to COVID–19 have led to a significant backlog of individuals who are waiting to sit for FINRA examinations.[15]

In addition, firms are continuing to experience operational challenges with much of their personnel working from home due to shelter-in-place orders, restrictions on businesses and social activity imposed in various states, and adherence to other social distancing guidelines consistent with the recommendations of public health officials.[16] As a result, firms continue to face potentially significant disruptions to their normal business operations that may include a limitation of in-person activities and staff absenteeism as a result of the health and welfare concerns stemming from COVID–19. Such potential disruptions may be further exacerbated and may even affect client services if firms cannot continue to keep principal positions filled as they may have difficulty finding other qualified individuals to transition into these roles or may need to reallocate employee time and resources away from other critical responsibilities at the firm.

These ongoing, extenuating circumstances make it impracticable for Members to ensure that the individuals whom they have designated to function in a principal capacity, as set forth in Exchange Rule 1900, Interpretation and Policy .04, are able to successfully sit for and pass an appropriate qualification examination within the 120-calendar day period required under the rule, or to find other qualified staff to fill this position. The ongoing circumstances also require individuals to be exposed to the health risks associated with taking an in-person examination, because the General Securities Principal examination is not available online. Therefore, the Exchange is proposing to provide the temporary relief provided through the FINRA FAQs by adopting Interpretation and Policy .13 to Exchange Rule 1900 to extend the 120-day period during which an individual can function as a principal before having to pass an applicable qualification examination until April 30, 2021.[17] The proposed rule change would apply only to those individuals who were designated to function as a principal prior to January 1, 2021. Any individuals designated to function as a principal on or after January 1, 2021, would need to successfully pass an appropriate qualification examination within 120 days.

The Exchange believes that this proposed extension of time is tailored to address the needs and constraints on a Member's operations during the COVID–19 pandemic, without significantly compromising critical investor protection. The proposed extension of time will help to minimize the impact of COVID–19 on Members by providing flexibility so that Members can ensure that principal positions remain filled. The potential risks from the proposed extension of the 120-day period are mitigated by the Member's requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as Exchange rules.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b) of the Exchange Act [18] in general, and furthers the objectives of Section 6(b)(5) of the Act [19] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposed rule change is intended to minimize the impact of COVID–19 on Member operations by extending the 120-day period certain individuals may function as a principal without having successfully passed an appropriate qualification examination under Exchange Rule 1900, Interpretation and Policy. 04, until April 30, 2021. The proposed rule change does not relieve Members from maintaining, under the circumstances, a reasonably designed system to supervise the activities of their associated persons to achieve compliance with applicable securities laws and regulations, and with applicable Exchange rules that directly serve investor protection. In a time when faced with unique challenges resulting from the COVID–19 pandemic, the Exchange believes that the proposed rule change is a sensible accommodation that will continue to afford Members the ability to ensure that critical positions are filled and client services maintained, while continuing to serve and promote the protection of investors and the public interest in this unique environment.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The proposed rule change is intended to provide temporary relief given the impacts of the COVID–19 pandemic crisis and to also maintain consistency with the rules of other self-regulatory organizations (''SROs'') with respect to the registration requirements applicable to Members and their registered personnel. In that regard, the Exchange believes that any burden on competition would be clearly outweighed by providing Members with temporary relief in this unique environment while also ensuring clear and consistent requirements applicable across SROs and mitigating any risk of SROs implementing different standards in these important areas. In its filing, FINRA provides an abbreviated economic impact assessment maintaining that the changes are necessary to temporarily rebalance the attendant benefits and costs of the obligations under FINRA Rule 1210 in response to the impacts of the COVID–19 pandemic that is equally applicable to the changes the Exchange proposes.[20] The Exchange accordingly incorporates FINRA's abbreviated economic impact assessment by reference.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[14] Information from Prometric about its safety practices and the impact of COVID–19 on its operations is available at *https://www.prometric.com/corona-virus-update.*

[15] Although an online test delivery service has been launched to help address the backlog, the General Securities Principal Exam (Series 24) is not available online. *See supra* note 13. FINRA is considering making additional qualifications examinations available remotely on a limited basis.

[16] *See, e.g.,* Centers for Disease Control and Prevention, How to Protect Yourself & Others, *https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html.*

[17] *See supra* note 3.

[18] 15 U.S.C. 78f(b).

[19] 15 U.S.C. 78f(b)(5).

[20] *See supra* notes 3 and 9.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [21] and Rule 19b–4(f)(6) thereunder.[22]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange stated that the proposed extension of time will help minimize the impact of the COVID–19 outbreak on Members' operations by allowing them to keep principal positions filled and minimizing disruptions to client services and other critical responsibilities. The Exchange further stated that the ongoing extenuating circumstances of the COVID–19 pandemic make it impractical to ensure that individuals designated to act in these capacities are able to take and pass the appropriate qualification examination during the 120-calendar day period required under the rules. The Exchange also explained that shelter-in-place orders, quarantining, restrictions on business and social activity and adherence to social distancing guidelines consistent with the recommendations of public officials remain in place in various states.[23] In addition, the Exchange observed that, following a nationwide closure of all test centers earlier in the year, some test centers have re-opened, but are operating at limited capacity or are only delivering certain examinations that have been deemed essential by the local government.[24] Although, as the Exchange noted, FINRA has launched an online test delivery service to help address this backlog, the General Securities Principal (Series 24) Examination is not available online.[25] Nevertheless, the Exchange explained that the proposed rule change will provide needed flexibility to ensure that these positions remain filled and is tailored to address the constraints on Members' operations during the COVID–19 pandemic without significantly compromising critical investor protection.[26]

The Commission observed that the Exchange's proposal, like FINRA's analogous filing, provides only temporary relief from the requirement to pass certain qualification examinations within the 120-day period in the rules. As proposed, this relief would extend the 120-day period that certain individuals can function as principals through April 30, 2021. If a further extension of temporary relief from the rule requirements identified in this proposal beyond April 30, 2021 is required, the Exchange noted that it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.[27] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest.[28] Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[29]

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–EMERALD–2020–21on 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–EMERALD–2020–21. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of MIAX Emerald. 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–EMERALD–2020–21and

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[23] *See supra* note 16.

[24] *See supra* notes 13 and 14. The Exchange states that Prometric has also had to close some reopened test centers due to incidents of COVID–19 cases.

[25] *See supra* note 15. FINRA is considering making additional qualification examinations available remotely on a limited basis.

[26] The Exchange states that Members remain subject to the continued requirement to supervise the activities of these designated individuals and ensure compliance with federal securities laws and regulations, as well as MIAX Emerald rules.

[27] *See supra* note 3.

[28] As noted above by the Exchange, this proposed temporary change is based on a recent filing by FINRA that the Commission approved with a waiver of the 30-day operative delay. *See supra* note 3, FINRA Filing at 81260.

[29] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29218 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90832; File No. SR–NASDAQ–2020–097]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Waive Certain Fees Related to Non-Convertible Bonds

December 30, 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 23, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to waive certain fees related to non-convertible bonds listed in conjunction with their voluntary delisting from a regulated foreign exchange.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 5935 of the Nasdaq Listing Rules to waive the application and annual fees to list a class of non-convertible bonds on Nasdaq pursuant to Rule 5702 in conjunction with the company voluntarily delisting that bond from a regulated foreign exchange. The proposed waiver is identical to a waiver currently applied under Rule 5935 in connection with the listing of non-convertible bonds transferred from the New York Stock Exchange or NYSE American.[3] In adopting this waiver in relation to non-convertible bonds whose listing was being transferred from the New York Stock Exchange or NYSE American, the Exchange noted that less work is required to process a listing application for a security that is already listed on another exchange than it is to process an application for listing a new security.[4] Similarly, less work is required to process a listing application for a security that is already listed on a foreign exchange because the issuer is familiar with being on a regulated exchange. Additionally, the Exchange noted that issuers that have already paid their annual fees to NYSE or NYSE American would be disincentivized to switch to the Exchange without a waiver.[5] The Exchange also noted that the proposed waivers were consistent with the approach it has taken with certain listing and annual fees for issuers of equity securities who transfer their listings to the Exchange from another national securities exchange.[6] The Exchange competes with foreign regulated exchanges for the listing of debt securities in the same way it competes with other national securities exchanges and the costs of initial listing and the potential duplication of fee payments in the first part year of listing on the Exchange represent a similar impediment to the Exchange successfully competing with foreign regulated exchanges for the transfer of the listing of those securities. As such, the Exchange believes it is appropriate to apply waivers in relation to issuers voluntarily delisting their securities from a regulated foreign exchange in connection with listing them on the Exchange for trading non-convertible bonds. The proposed rule change would not affect the Exchange's commitment of resources to its regulatory oversight of the listing process or its regulatory programs.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(4)[8] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,[9] in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Proposed Change Is Reasonable

The Exchange operates in a highly competitive marketplace when seeking to obtain listings of non-convertible debt securities. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. The Exchange believes that the ever-shifting market share among the exchanges with respect to new listings and the transfer of existing listings between competitor exchanges demonstrates that issuers can choose different listing markets in response to fee changes. Accordingly, competitive forces constrain exchange listing fees. Stated otherwise, changes to exchange listing fees can have a direct effect on the ability of an exchange to compete for new listings and retain existing listings. Given this competitive environment, the Exchange believes that the proposal to waive the application and annual fees for non-convertible bonds listing in conjunction with their voluntary delisting from a foreign regulated exchange is reasonable because the cost

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 84001 (August 30, 2018); 83 FR 45289 (September 6, 2018) (SR–NASDAQ–2018–070).

[4] *Id.* at 45295.

[5] *Id.* at 45296.

[6] *Id.* at 45295. *See also* Securities Exchange Act Release No. 70418 (September 16, 2013), 78 FR 57909 (September 20, 2013) (SR–NASDAQ–2013–115).

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

of paying listing fees to both the Exchange and the predecessor foreign regulated exchange imposes a financial burden and acts as a disincentive to transferring. Additionally, the Exchange has implemented similar waivers for companies that switch their listing markets for its non-convertible bonds from the New York Stock Exchange or NYSE America.[10] Moreover, similar waivers exist on other exchanges.[11]

The Proposal Is an Equitable Allocation of Fees

The Exchange believes that the waiver of the application and annual fees for listing non-convertible bonds listings in conjunction with their voluntary delisting from a foreign regulated exchange is not inequitable as it expects it will be available to a small number of issuers and is being implemented solely to relieve these issuers of the burden of duplicative payments to two exchanges.

The Proposal Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory, because the proposed waivers are solely intended to avoid duplication of costs for issuers transferring their listings from foreign regulated exchanges and does not provide them with any benefit that would place them in a more favorable position than other listed companies. Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that its proposals will place any applicant at a competitive disadvantage. To the contrary, the proposed waiver will ensure that applicants who transfer their listings from a foreign exchange are not placed at a disadvantage versus other applicants. The proposed waivers will be available to all similarly situated applicants on the same basis. The Exchange does not believe that the proposed amended fees will have any meaningful effect on the competition among issuers listed on the Exchange. Moreover, applicants are free to list on other venues to the extent they believe that the waiver is not attractive.

Intermarket Competition

The Exchange operates in a highly competitive market in which issuers can readily choose to list new securities on other exchanges and transfer listings to other exchanges if they deem fee levels at those other venues to be more favorable. Because competitors are free to modify their own fees in response, and because issuers may change their chosen listing venue, the Exchange does not believe its proposed fee change imposes any burden on intermarket competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[12] and paragraph (f) of Rule 19b–4 thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2020–097 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–097. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–097 and should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29221 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90833; File No. SR–NYSEAMER–2020–87]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Modify the NYSE American Options Fee Schedule

December 30, 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 29, 2020, NYSE American LLC (''NYSE

[10] *See* Rule 5935.

[11] *See* Securities Exchange Act Release No. 88408 (March 18, 2020), 85 FR 16705 (March 24, 2020) (NYSE–2020–16).

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

American'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE American Options Fee Schedule (''Fee Schedule'') to extend the waiver of certain Floor-based fixed fees. The Exchange proposes to implement the fee change effective January 1, 2021. The proposed change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify the Fee Schedule to extend the waiver of certain Floor-based fixed fees for market participants that have been unable to resume their Floor operations to a certain capacity level, as discussed below. The Exchange proposes to implement the fee change effective January 1, 2021.

On March 18, 2020, the Exchange announced that it would temporarily close the Trading Floor, effective Monday, March 23, 2020, as a precautionary measure to prevent the potential spread of COVID–19. Following the temporary closure of the Trading Floor, the Exchange waived certain Floor-based fixed fees for April, May and June 2020.[4] Although the Trading Floor partially reopened on May 26, 2020 and Floor-based open outcry activity is supported, certain participants have been unable to resume pre-Floor closure levels of operations. As a result, the Exchange extended the fee waiver through December 2020, but only for Floor Broker firms that were unable to operate at more than 50% of their March 2020 on-Floor staffing levels and for Market Maker firms that have vacant or ''unmanned'' Podia for the entire month due to COVID–19 related considerations (the ''Qualifying Firms'').[5] Because the Trading Floor will continue to operate with reduced capacity, the Exchange proposes to extend the fee waiver for Qualifying Firms through the earlier of the first full month of a full reopening of the Trading Floor facilities to Floor personnel or March 2021.[6]

Specifically, as with the prior fee waivers, the proposed fee waiver covers the following fixed fees for Qualifying Firms, which relate directly to Floor operations, are charged only to Floor participants and do not apply to participants that conduct business off-Floor:

- Floor Access Fee;
- Floor Broker Handheld
- Transport Charges
- Floor Market Maker Podia;
- Booth Premises; and
- Wire Services.[7]

The proposed fee change is designed to reduce monthly costs for all Qualifying Firms whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening. The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[9] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [10]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[11] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in November 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.[12]

[4] *See* Securities Exchange Act Release Nos. 88595 (April 8, 2020), 85 FR 20737 (April 14, 2020) (SR–NYSEAMER–2020–25) (waiving Floor-based fixed fees); 88840 (May 8, 2020), 85 FR 28992 (May 14, 2020) (SR–NYSEAMER–2020–37) (extending April 2020 fee changes through May 2020); and 89049 (June 11, 2020), 85 FR 36649 (June 17, 2020) (SR–NYSEAMER–2020–44) (extending April and May fee changes through June 2020). *See also* Fee Schedule, Section III. Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

[5] *See* Securities Exchange Act Release Nos. 89241 (July 7, 2020), 85 FR 42034 (July 13, 2020) (SR–NYSEAMER–2020–47); 89482 (August 5, 2020), 85 FR 48577 (August 11, 2020) (SR–NYSEAMER–2020–55); 89692 (August 27, 2020), 85 FR 54611 (September 2, 2020) (SR–NYSEAMER–2020–65); 90185 (October 14, 2020), 85 FR 66675 (October 20, 2020) (SR–NYSEAMER–2020–75). *See also* Fee Schedule, Section III., Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

[6] *See* proposed Fee Schedule, Section III., Monthly Trading Permit, Rights, Floor Access and Premium Product Fees, and IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees.

[7] *See id.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[11] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/market-data/volume/default.jsp.*

[12] Based on OCC data, *see id.,* the Exchange's market share in equity-based options increased slightly from 8.06% for the month of November 2019 to 9.09% for the month of November 2020.

This proposed fee change is reasonable, equitable, and not unfairly discriminatory because it would reduce monthly costs for all Qualifying Firms whose operations have been disrupted despite the fact that the Trading Floor has partially reopened because of the social distancing requirements and/or other health concerns related to resuming operation on the Floor. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening of the Floor. The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits as it merely continues the previous fee waiver for Qualifying Firms, which affects fees charged only to Floor participants and does not apply to participants that conduct business off-Floor. The Exchange believes it is an equitable allocation of fees and credits to extend the fee waiver for Qualifying Firms because such firms have either no more than half of their Floor staff (as measured by either the March 2020 or Exchange-approved) levels or have vacant podia—and this reduction in staffing levels on the Floor impacts the speed, volume and efficiency with which these firms can operate, which is to their financial detriment.

The Exchange believes that the proposal is not unfairly discriminatory because the proposed continuation of the fee waiver would affect all similarly-situated market participants on an equal and non-discriminatory basis.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes would encourage the continued participation of Qualifying Firms, thereby promoting market depth, price discovery and transparency and would enhance order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [13]

Intramarket Competition. The proposed change, which continues the fee waiver for all Qualifying Firms, is designed to reduce monthly costs for those Floor participants whose operations continue to be impacted, even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their previously on-Floor operations to off-Floor. The Exchange believes that the proposed waiver of fees for Qualifying Firms would not impose a disparate burden on competition among market participants on the Exchange because off-Floor market participants are not subject to these Floor-based fixed fees. In addition, Floor-based firms that are not subject to the extent of staffing shortfalls as are Qualifying Firms, *i.e.,* such firms have more than 50% of their March 2020—or Exchange-approved—staffing levels on the Floor and/or have no vacant Podia during the month, do not face the same operational disruption and potential financial impact during the partial reopening of the Floor.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[14] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in November 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.[15]

The Exchange believes that the proposed rule change reflects this competitive environment because it waives fees for Qualifying Firms and is designed to reduce monthly costs for Floor participants whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow affected participants to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [16] of the Act and subparagraph (f)(2) of Rule 19b–4 [17] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [18] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–

[13] *See* Reg NMS Adopting Release, *supra* note 10, at 37499.

[14] *See supra* note 11.

[15] Based on OCC data, *supra* note 12, the Exchange's market share in equity-based options was 8.06% for the month of November 2019 and 9.09% for the month of November 2020.

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

NYSEAMER–2020–87 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–NYSEAMER–2020–87. 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–NYSEAMER–2020–87 and should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29222 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90821; File No. SR–NYSE–2020–107]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Expiration Date of the Temporary Amendments to Rules 9261 and 9830 as Set Forth in SR–NYSE–2020–76 From December 31, 2020, to April 30, 2021

December 30, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 22, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes extending the expiration date of the temporary amendments to Rules 9261 and 9830 as set forth in SR–NYSE–2020–76 from December 31, 2020, to April 30, 2021, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA''). The proposed rule change would not make any changes to the text of NYSE Rules 9261 and 9830. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes extending the expiration date of the temporary amendments in SR–NYSE–2020–76 [4] to Rules 9261 (Evidence and Procedure in Hearing) and 9830 (Hearing) from December 31, 2020, to April 30, 2021 to harmonize with recent changes by FINRA to extend the expiration date of the temporary amendments to its Rules 9261 and 9830. SR–NYSE–2020–76 temporarily granted to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing COVID–19 pandemic. The proposed rule change would not make any changes to the text of Exchange Rules 9261 and 9830.[5]

Background

In 2013, the NYSE adopted disciplinary rules that are, with certain exceptions, substantially the same as the FINRA Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and enforcement actions.[6] The NYSE disciplinary rules were implemented on July 1, 2013.[7]

In adopting disciplinary rules modeled on FINRA's rules, the NYSE adopted the hearing and evidentiary processes set forth in Rule 9261 and in Rule 9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 9800 Series. As adopted, the text of Rule 9261 is identical to the counterpart FINRA rule. Rule 9830 is substantially

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 90024 (September 28, 2020), 85 FR 62353 (October 2, 2020) (SR–NYSE–2020–76) (''SR–NYSE–2020–76'').

[5] The Exchange may submit a separate rule filing to extend the expiration date of the proposed extension beyond April 30, 2021 if the Exchange requires additional temporary relief from the rule requirements identified in NYSE–SR–2020–76. The amended NYSE rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.

[6] *See* Securities Exchange Act Release No. 68678 (January 16, 2013), 78 FR 5213 (January 24, 2013) (SR–NYSE–2013–02) (''2013 Notice''), 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013) (SR–NYSE–2013–02) (''2013 Approval Order''), and 69963 (July 10, 2013), 78 FR 42573 (July 16, 2013) (SR–NYSE–2013–49).

[7] *See* NYSE Information Memorandum 13–8 (May 24, 2013).

the same as FINRA's rule, except for conforming and technical amendments.[8]

In response to the spread of COVID–19, on August 31, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness, SR–FINRA–2020–027, to temporarily grant FINRA's Office of Hearing Officers (''OHO'') and the National Adjudicatory Council (''NAC'') the authority to conduct certain hearings by video conference, if warranted by the current COVID–19-related public health risks posed by in-person hearings. Among the rules FINRA amended were Rules 9261 and 9830.[9]

Given that FINRA and OHO administers disciplinary hearings on the Exchange's behalf, and that the public health concerns addressed by FINRA's amendments apply equally to Exchange disciplinary hearings, on September 15, 2020, the Exchange filed to temporarily amend Rule 9261 and Rule 9830 to permit FINRA to conduct virtual hearings on its behalf.[10] The temporary amendments to Rule 9261 and Rule 9830, as originally proposed, will expire on December 31, 2020, absent another proposed rule change filing by the Exchange.

The COVID–19 conditions necessitating these temporary amendments persist, with cases rapidly escalating nationwide. Based on its assessment of current COVID–19 conditions and the lack of certainty as to when COVID–19-related health concerns will subside, on December 1, 2020, FINRA filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from December 31, 2020, to April 30, 2021.[11]

Proposed Rule Change

Consistent with FINRA's recent proposal, the Exchange proposes to extend the expiration date of the temporary rule amendments to NYSE Rules 9261 and 9830 as set forth in SR–NYSE–2020–76 from December 31, 2020, to April 30, 2021.

As set forth in SR–FINRA 2020–042, based on its assessment of current COVID–19 conditions, including the recent escalation in COVID–19 cases nationwide, FINRA does not believe that the COVID–19- related health concerns necessitating this relief will subside by December 31, 2020, and has determined that there will be a continued need for this temporary relief for several months beyond December 31, 2020.[12] FINRA accordingly proposed to extend the expiration date of the temporary rule amendments in the August 31 FINRA Filing from December 31, 2020, to April 30, 2021.

The Exchange proposes to similarly extend the expiration date of the temporary rule amendments to NYSE Rules 9261 and 9830 as set forth in SR–NYSE–2020–76 from December 31, 2020, to April 30, 2021. With COVID–19 cases surging nationwide, the Exchange agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020. The proposed change will permit OHO to continue to assess, based on critical COVID–19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain fair process for the parties.[13] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 9261 and 9830 chaired by a FINRA employee.

As noted below, the Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5),[15] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[16]

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change, which extends the expiration date of the temporary amendments to Exchange rules consistent with FINRA's extension to its Rules 9261 and 9830 for four months as set forth in SR–FINRA–2020–042, will permit the Exchange to continue to effectively conduct hearings during the COVID–19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will permit the adjudicatory functions of the Exchange's disciplinary rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to continue to proceed without delay, thereby enabling the Exchange to continue to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

As set forth in detail in the SR–NYSE–2020–76, the temporary relief to permit hearings to be conducted via video conference maintains fair process and will continue to provide fair process consistent with Sections 6(b)(7) and 6(d) of the Act[17] while striking an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID–19. The Exchange

[8] *See* 2013 Approval Order, 78 FR at 15394, n.7 & 15400; 2013 Notice, 78 FR at 5228 & 5234.

[9] *See* Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR–FINRA–2020–027) (the ''August 31 FINRA Filing'').

[10] *See supra* note 4.

[11] *See* Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR–FINRA–2020–042) (''SR–FINRA–2020–042'').

[12] *See id.*

[13] *See* SR–FINRA–2020–042, 85 FR at 81251–52; August 31 FINRA Filing, 85 FR at 55713.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(7) and 78f(d).

[17] 15 U.S.C. 78f(b)(7) and 78f(d).

notes that this proposal, like SR–NYSE–2020–76, provides only temporary relief. As proposed, the changes would be in place through April 30, 2021. As noted in SR–NYSE–2020–76 and above, the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.

Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed temporary rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to provide continued temporary relief given the impacts of the COVID–19 pandemic and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) [18] of the Act and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange states that the COVID-related health and safety risks of conducting in-person activities, which necessitated these temporary amendments, persist and that cases are escalating nationwide. Based on FINRA's assessment of the current COVID–19 conditions and FINRA's determination that there is a continued need for this temporary relief for several months beyond December 31, 2020, the Exchange states that it agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020.[20] Moreover, the Exchange states that FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will provide a fair process for all parties and enable the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets.[21] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 9261 and 9830 chaired by a FINRA employee. Accordingly, the Exchange states that waiver of the operative delay would prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

The Exchange also indicates that this filing is eligible to become operative immediately because the proposal would continue to provide greater harmonization between the Exchange rules and FINRA rules that serve a similar purpose, resulting in less burdensome and more efficient regulatory compliance. This proposal would serve to extend the expiration date of the temporary amendments to the Exchange rules set forth in SR–NYSE–2020–76, which is consistent with FINRA's extension to its comparable rules, where FINRA requested and the Commission granted a waiver of the 30-day operative delay.[22] The Exchange also indicates that this temporary relief is necessary in order for the continued performance of its adjudicatory functions necessary to meet its statutory obligations in light of COVID–19 related health and safety risks associated with in-person hearings and will only be temporary relief, with the rules reverting back to their original state at the conclusion of the relief period and any extension thereof.[23]

The Commission observes that this proposal, like SR–NYSE–2020–76 and FINRA's comparable filing,[24] provides only temporary relief during the period in which the Exchange's operations are impacted by COVID–19. As proposed, the changes would be in place through April 30, 2021. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[25]

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–NYSE–2020–107 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] *See* SR–FINRA–2020–042.

[21] *See id.*

[22] *See supra* note 11 (referencing FINRA's proposal to extend the expiration date of temporary rule amendments allowing hearings to be conducted on a temporary basis by video conference if warranted by COVID–19 related health risks).

[23] *See supra* note 5 and accompanying text.

[24] *See supra* notes 9 and 11 and accompanying text.

[25] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

All submissions should refer to File Number SR–NYSE–2020–107. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–107 and should be submitted on or before February 22, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29212 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90820; File No. SR–NYSEArca–2020–116]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Expiration Date of the Temporary Amendments to Rules 10.9261 and 10.9830 as Set Forth in SR–NYSEArca–2020–85 From December 31, 2020, to April 30, 2021

December 30, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 22, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes extending the expiration date of the temporary amendments to Rules 10.9261 and 10.9830 as set forth in SR–NYSEArca–2020–85 from December 31, 2020, to April 30, 2021, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA''). The proposed rule change would not make any changes to the text of NYSE Arca Rules 10.9261 and 10.9830. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes extending the expiration date of the temporary amendments in SR–NYSEArca–2020–85 [4] to Rules 10.9261 (Evidence and Procedure in Hearing) and 10.9830 (Hearing) from December 31, 2020, to April 30, 2021 to harmonize with recent changes by FINRA to extend the expiration date of the temporary amendments to its Rules 9261 and 9830. SR–NYSEArca–2020–85 temporarily granted to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing COVID–19 pandemic. The proposed rule change would not make any changes to the text of Exchange Rules 10.9261 and 10.9830.[5]

Background

In 2019, NYSE Arca adopted disciplinary rules based on the text of the Rule 8000 and Rule 9000 Series of its affiliate NYSE American LLC (''NYSE American''), with certain changes. The NYSE American disciplinary rules are, in turn, substantially the same as the Rule 8000 Series and Rule 9000 Series of FINRA and the New York Stock Exchange LLC.[6] The NYSE Arca disciplinary rules were implemented on May 27, 2019.[7]

In adopting disciplinary rules modeled on FINRA's rules, NYSE Arca adopted the hearing and evidentiary processes set forth in Rule 10.9261 and in Rule 10.9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 10.9800 Series. As adopted, the text of Rule 10.9261 and Rule 10.9830 are

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 90088 (October 5, 2020), 85 FR 64186 (October 9, 2020) (SR–NYSEArca–2020–85) (''SR–NYSEArca–2020–85'').

[5] The Exchange may submit a separate rule filing to extend the expiration date of the proposed extension beyond April 30, 2021 if the Exchange requires additional temporary relief from the rule requirements identified in SR–NYSEArca–2020–85. The amended NYSE Arca rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.

[6] *See* Securities Exchange Act Release No. 85639 (April 12, 2019), 84 FR 16346 (April 18, 2019) (SR–NYSEArca–2019–15) (''2019 Notice'').

[7] *See* NYSE Arca Equities RB–19–060 & NYSE Arca Options RB–19–02 (April 26, 2019).

substantially the same as the FINRA rules with certain modifications.[8]

In response to the spread of COVID–19, on August 31, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness, SR–FINRA–2020–027, to temporarily grant FINRA's Office of Hearing Officers (''OHO'') and the National Adjudicatory Council (''NAC'') the authority to conduct certain hearings by video conference, if warranted by the current COVID–19-related public health risks posed by in-person hearings. Among the rules FINRA amended were Rules 9261 and 9830.[9]

Given that FINRA and OHO administers disciplinary hearings on the Exchange's behalf, and that the public health concerns addressed by FINRA's amendments apply equally to Exchange disciplinary hearings, on September 23, 2020, the Exchange filed to temporarily amend Rule 10.9261 and Rule 10.9830 to permit FINRA to conduct virtual hearings on its behalf.[10] The temporary amendments to Rule 10.9261 and Rule 10.9830, as originally proposed, will expire on December 31, 2020, absent another proposed rule change filing by the Exchange.

The COVID–19 conditions necessitating these temporary amendments persist, with cases rapidly escalating nationwide. Based on its assessment of current COVID–19 conditions and the lack of certainty as to when COVID–19-related health concerns will subside, on December 1, 2020, FINRA filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from December 31, 2020, to April 30, 2021.[11]

Proposed Rule Change

Consistent with FINRA's recent proposal, the Exchange proposes to extend the expiration date of the temporary rule amendments to NYSE Arca Rules 10.9261 and 10.9830 as set forth in SR–NYSEArca–2020–85 from December 31, 2020, to April 30, 2021.

As set forth in SR–FINRA–2020–042, based on its assessment of current COVID–19 conditions, including the recent escalation in COVID–19 cases nationwide, FINRA does not believe that the COVID–19-related health concerns necessitating this relief will subside by December 31, 2020, and has determined that there will be a continued need for this temporary relief for several months beyond December 31, 2020.[12] FINRA accordingly proposed to extend the expiration date of the temporary rule amendments in the August 31 FINRA Filing from December 31, 2020, to April 30, 2021.

The Exchange proposes to similarly extend the expiration date of the temporary rule amendments to NYSE Arca Rules 10.9261 and 10.9830 as set forth in SR–NYSEArca–2020–85 from December 31, 2020, to April 30, 2021. With COVID–19 cases surging nationwide, the Exchange agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020. The proposed change will permit OHO to continue to assess, based on critical COVID–19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain fair process for the parties.[13] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee.

As noted below, the Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5),[15] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[16]

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change, which extends the expiration date of the temporary amendments to Exchange rules consistent with FINRA's extension to its Rules 9261 and 9830 for four months as set forth in SR–FINRA–2020–042, will permit the Exchange to continue to effectively conduct hearings during the COVID–19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will permit the adjudicatory functions of the Exchange's disciplinary rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to continue to proceed without delay, thereby enabling the Exchange to continue to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

As set forth in detail in the SR–NYSEArca–2020–85, the temporary relief to permit hearings to be conducted via video conference maintains fair process and will continue to provide fair process consistent with Sections 6(b)(7) and 6(d) of the Act[17] while striking an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID–

[8] *See* 2019 Notice, 84 FR at 16365 & 16373–4.

[9] *See* Securities Exchange Act Release No. 89737 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR–FINRA–2020–027) (the ''August 31 FINRA Filing'').

[10] *See supra* note 4.

[11] *See* Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR–FINRA–2020–042) (''SR–FINRA–2020–042'').

[12] *See id.*

[13] *See* SR–FINRA–2020–042, 85 FR at 81251–52; August 31 FINRA Filing, 85 FR at 55713.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(7) and 78f(d).

[17] 15 U.S.C. 78f(b)(7) and 78f(d).

19. The Exchange notes that this proposal, like SR–NYSEArca–2020–85, provides only temporary relief. As proposed, the changes would be in place through April 30, 2021. As noted in SR–NYSEArca–2020–85 and above, the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.

Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed temporary rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to provide continued temporary relief given the impacts of the COVID–19 pandemic and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) [18] of the Act and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange states that the COVID-related health and safety risks of conducting in-person activities, which necessitated these temporary amendments, persist and that cases are escalating nationwide. Based on FINRA's assessment of the current COVID–19 conditions and FINRA's determination that there is a continued need for this temporary relief for several months beyond December 31, 2020, the Exchange states that it agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020.[20] Moreover, the Exchange states that FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will provide a fair process for all parties and will enable the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets.[21] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 10.9261 and 10.9830 chaired by a FINRA employee. Accordingly, the Exchange states that waiver of the operative delay would prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

The Exchange also indicates that this filing is eligible to become operative immediately because the proposal would continue to provide greater harmonization between the Exchange rules and FINRA rules that serve a similar purpose, resulting in less burdensome and more efficient regulatory compliance. This proposal would serve to extend the expiration date of the temporary amendments to the Exchange rules set forth in SR–NYSEArca–2020–85, which is consistent with FINRA's extension to its comparable rules, where FINRA requested and the Commission granted a waiver of the 30-day operative delay.[22] The Exchange also states that this temporary relief is necessary in order to continue performing adjudicatory functions necessary to meet its statutory obligations in light of COVID–19 related health and safety risks associated with in-person hearings and will only be temporary relief, with the rules reverting back to their original state at the conclusion of the relief period and any extension thereof.[23]

The Commission observes that this proposal, like SR–NYSEArca–2020–85 and FINRA's comparable filing,[24] provides only temporary relief during the period in which the Exchange's operations are impacted by COVID–19. As proposed, the changes would be in place through April 30, 2021. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[25]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2020–116 on the subject line.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] *See* SR–FINRA–2020–042.

[21] *See id.*

[22] *See supra* note 11 (referencing FINRA's proposal to extend the expiration date of temporary rule amendments allowing hearings to be conducted on a temporary basis by video conference if warranted by COVID–19 related health risks).

[23] *See supra* note 5 and accompanying text.

[24] *See supra* notes 9 and 11 and accompanying text.

[25] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2020–116. 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, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–116 and should be submitted on or before February 22, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29211 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90823; File No. SR–NYSEAMER–2020–88]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Expiration Date of the Temporary Amendments to Rules 9261 and 9830 as Set Forth in SR–NYSEAMER–2020–69 From December 31, 2020, to April 30, 2021

December 30, 2020.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 22, 2020, NYSE American LLC (''NYSE American'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes extending the expiration date of the temporary amendments to Rules 9261 and 9830 as set forth in SR–NYSEAMER–2020–69 from December 31, 2020, to April 30, 2021, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. (''FINRA''). The proposed rule change would not make any changes to the text of NYSE American Rules 9261 and 9830. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes extending the expiration date of the temporary amendments as set forth in SR–NYSEAMER–2020–69 [4] to Rules 9261 (Evidence and Procedure in Hearing) and 9830 (Hearing) from December 31, 2020, to April 30, 2021 to harmonize with recent changes by FINRA to extend the expiration date of the temporary amendments to its Rules 9261 and 9830. SR–NYSEAMER–2020–69 temporarily granted to the Chief or Deputy Chief Hearing Officer the authority to order that hearings be conducted by video conference if warranted by public health risks posed by in-person hearings during the ongoing COVID–19 pandemic. The proposed rule change would not make any changes to the text of Exchange Rules 9261 and 9830.[5]

Background

In 2016, NYSE American (then known as NYSE MKT LLC) adopted disciplinary rules that are, with certain exceptions, substantially the same as the Rule 8000 Series and Rule 9000 Series of FINRA and its affiliate the New York Stock Exchange LLC (''NYSE''), and which set forth rules for conducting investigations and enforcement actions.[6] The NYSE American disciplinary rules were implemented on April 15, 2016.[7]

In adopting disciplinary rules modeled on FINRA's rules, NYSE American adopted the hearing and evidentiary processes set forth in Rule 9261 and in Rule 9830 for hearings in matters involving temporary and permanent cease and desist orders under the Rule 9800 Series. As adopted, the text of Rule 9261 and Rule 9830 are substantially the same as the FINRA rules with certain modifications.[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 90085 (October 2, 2020), 85 FR 63603 (October 8, 2020) (SR–NYSEAMER–2020–69) (''SR–NYSEAMER–2020–69'').

[5] The Exchange may submit a separate rule filing to extend the expiration date of the proposed extension beyond April 30, 2021 if the Exchange requires additional temporary relief from the rule requirements identified in SR–NYSEAMER–2020–69. The amended NYSE American rules will revert back to their original state at the conclusion of the temporary relief period and any extension thereof.

[6] *See* Securities Exchange Act Release Nos. 77241 (February 26, 2016), 81 FR 11311 (March 3, 2016) (SR–NYSEMKT–2016–30) (''2016 Notice'').

[7] *See* NYSE MKT Information Memorandum 16–02 (March 14, 2016).

[8] *See* 2016 Notice, 81 FR at 11327 & 11332.

In response to the spread of COVID–19, on August 31, 2020, FINRA filed with the Commission a proposed rule change for immediate effectiveness, SR–FINRA–2020–027, to temporarily grant FINRA's Office of Hearing Officers (''OHO'') and the National Adjudicatory Council (''NAC'') the authority to conduct certain hearings by video conference, if warranted by the current COVID–19-related public health risks posed by in-person hearings. Among the rules FINRA amended were Rules 9261 and 9830.[9]

Given that FINRA and OHO administers disciplinary hearings on the Exchange's behalf, and that the public health concerns addressed by FINRA's amendments apply equally to Exchange disciplinary hearings, on September 15, 2020, the Exchange filed to temporarily amend Rule 9261 and Rule 9830 to permit FINRA to conduct virtual hearings on its behalf.[10] The temporary amendments to Rule 9261 and Rule 9830, as originally proposed, will expire on December 31, 2020, absent another proposed rule change filing by the Exchange.

The COVID–19 conditions necessitating these temporary amendments persist, with cases rapidly escalating nationwide. Based on its assessment of current COVID–19 conditions and the lack of certainty as to when COVID–19-related health concerns will subside, on December 1, 2020, FINRA filed to extend the expiration date of the temporary rule amendments to, among other rules, FINRA Rule 9261 and 9830 from December 31, 2020, to April 30, 2021.[11]

Proposed Rule Change

Consistent with FINRA's recent proposal, the Exchange proposes to extend the expiration date of the temporary rule amendments to NYSE American Rules 9261 and 9830 as set forth in SR–NYSEAMER–2020–69 from December 31, 2020, to April 30, 2021.

As set forth in SR–FINRA–2020–042, based on its assessment of current COVID–19 conditions, including the recent escalation in COVID–19 cases nationwide, FINRA does not believe that the COVID–19-related health concerns necessitating this relief will subside by December 31, 2020, and has determined that there will be a continued need for this temporary relief for several months beyond December 31, 2020.[12] FINRA accordingly proposed to extend the expiration date of the temporary rule amendments in the August 31 FINRA Filing from December 31, 2020, to April 30, 2021.

The Exchange proposes to similarly extend the expiration date of the temporary rule amendments to NYSE American Rules 9261 and 9830 as set forth in SR–NYSEAMER–2020–69 from December 31, 2020, to April 30, 2021. With COVID–19 cases surging nationwide, the Exchange agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020. The proposed change will permit OHO to continue to assess, based on critical COVID–19 data and criteria and the guidance of health and security consultants, whether an in-person hearing would compromise the health and safety of the hearing participants such that the hearing should proceed by video conference. FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will maintain fair process for the parties.[13] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 9261 and 9830 chaired by a FINRA employee.

As noted below, the Exchange has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5),[15] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with Sections 6(b)(7) and 6(d) of the Act.[16]

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change, which extends the expiration date of the temporary amendments to Exchange rules consistent with FINRA's extension to its Rules 9261 and 9830 for four months as set forth in SR–FINRA–2020–042, will permit the Exchange to continue to effectively conduct hearings during the COVID–19 pandemic in situations where in-person hearings present likely public health risks. The ability to conduct hearings by video conference will permit the adjudicatory functions of the Exchange's disciplinary rules to continue unabated, thereby avoiding protracted delays. The Exchange believes that this is especially important in matters where temporary and permanent cease and desist orders are sought because the proposed rule change would enable those hearings to continue to proceed without delay, thereby enabling the Exchange to continue to take immediate action to stop significant, ongoing customer harm, to the benefit of the investing public.

As set forth in detail in SR–NYSEAMER–2020–69, the temporary relief to permit hearings to be conducted via video conference maintains fair process and will continue to provide fair process consistent with Sections 6(b)(7) and 6(d) of the Act[17] while striking an appropriate balance between providing fair process and enabling the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets while accounting for the significant health and safety risks of in-person hearings stemming from the outbreak of COVID–19. The Exchange notes that this proposal, like SR–NYSEAMER–2020–69, provides only temporary relief. As

[9] *See* Securities Exchange Act Release No. 83289 (September 2, 2020), 85 FR 55712 (September 9, 2020) (SR–FINRA–2020–027) (the ''August 31 FINRA Filing'').

[10] *See supra* note 4.

[11] *See* Securities Exchange Act Release No. 90619 (December 9, 2020), 85 FR 81250 (December 15, 2020) (SR–FINRA–2020–042) (''SR–FINRA–2020–042'').

[12] *See id.*

[13] *See* SR–FINRA–2020–042, 85 FR at 81251–52; August 31 FINRA Filing, 85 FR at 55713.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] 15 U.S.C. 78f(b)(7) and 78f(d).

[17] 15 U.S.C. 78f(b)(7) and 78f(d).

proposed, the changes would be in place through April 30, 2021. As noted in SR–NYSEAMER–2020–69 and above, the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof. Accordingly, the proposed rule change extending this temporary relief is in the public interest and consistent with the Act's purpose.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed temporary rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but is rather intended solely to provide continued temporary relief given the impacts of the COVID–19 pandemic and the related health and safety risks of conducting in-person activities. The Exchange believes that the proposed rule change will prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) [18] of the Act and Rule 19b–4(f)(6) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative immediately upon filing. As noted above, the Exchange states that the COVID-related health and safety risks of conducting in-person activities, which necessitated these temporary amendments, persist and that cases are escalating nationwide. Based on FINRA's assessment of the current COVID–19 conditions and FINRA's determination that there is a continued need for this temporary relief for several months beyond December 31, 2020, the Exchange states that it agrees with FINRA that the COVID–19-related public health risks necessitating this temporary relief have not yet abated and are unlikely to abate by December 31, 2020.[20] Moreover, the Exchange states that FINRA has adopted a detailed and thorough protocol to ensure that hearings conducted by video conference will provide a fair process for all parties and enable the Exchange to fulfill its statutory obligations to protect investors and maintain fair and orderly markets.[21] The Exchange believes that this is a reasonable procedure to continue to follow for hearings under Rules 9261 and 9830 chaired by a FINRA employee. Accordingly, the Exchange states that waiver of the operative delay would prevent unnecessary disruptions that would otherwise result if the temporary amendments were to expire on December 31, 2020.

The Exchange also indicates that this filing is eligible to become operative immediately because the proposal would continue to provide greater harmonization between the Exchange rules and FINRA rules that serve a similar purpose, resulting in less burdensome and more efficient regulatory compliance. This proposal would serve to extend the expiration date of the temporary amendments to the Exchange rules set forth in SR–NYSEAMER–2020–69, which is consistent with FINRA's extension to its comparable rules, where FINRA requested and the Commission granted a waiver of the 30-day operative delay.[22] The Exchange also indicates that this temporary relief is necessary in order for the continued performance of its adjudicatory functions necessary to meet its statutory obligations in light of COVID–19 related health and safety risks associated with in-person hearings and will only be temporary relief, with the rules reverting back to their original state at the conclusion of the relief period and any extension thereof.[23]

The Commission observes that this proposal, like SR–NYSEAMER–2020–69 and FINRA's comparable filing,[24] provides only temporary relief during the period in which the Exchange's operations are impacted by COVID–19. As proposed, the changes would be in place through April 30, 2021. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[25]

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–NYSEAMER–2020–88 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.

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[20] *See* SR–FINRA–2020–042.

[21] *See id.*

[22] *See supra* note 11 (referencing FINRA's proposal to extend the expiration date of temporary rule amendments allowing hearings to be conducted on a temporary basis by video conference if warranted by COVID–19 related health risks).

[23] *See supra* note 5 and accompanying text.

[24] *See supra* notes 9 and 11 and accompanying text.

[25] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

All submissions should refer to File Number SR–NYSEAMER–2020–88. 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, on business days between the hours of 10:00 a.m. and 3:00 p.m., located at 100 F Street NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAMER–2020–88 and should be submitted on or before February 22, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

J. Matthew DeLesDernier,

Assistant Secretary.

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[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90824; File No. SR–FINRA–2020–031]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Proposed Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) and Rescind the Rules Related to the OTC Bulletin Board Service

December 30, 2020.

I. Introduction

On September 24, 2020, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to rescind the rules related to the OTC Bulletin Board Service and cease its operation and to adopt new requirements for member inter-dealer quotation systems that disseminate quotations in equity securities traded over-the-counter (''OTC''). The proposed rule change was published for comment in the **Federal Register** on October 7, 2020.[3] On November 4, 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 December 21, 2020, FINRA filed Amendment No. 1 to the proposed rule change.[6] The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Summary of the Proposal, as Modified by Amendment No. 1

As further described below, FINRA proposes to (i) rescind FINRA's rules governing the OTC Bulletin Board Service (''OTCBB'') and cease its operation; and (ii) adopt new Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems) to expand the obligations of member interdealer quotation systems (''IDQSs'')[8] that disseminate quotation updates on a real-time basis in OTC Equity Securities.[9]

A. Rescission of Rules Governing the OTCBB

The OTCBB is a FINRA-operated IDQS available for use by broker-dealers to publish quotations in eligible OTC Equity Securities.[10] FINRA has operated the OTCBB since 1990.[11] FINRA states that, due to technological advancements since 1990 and the increase in alternative electronic venues with more extensive functionality than the OTCBB, the level of quotation activity occurring on the OTCBB has continued to decline over the past several years and is now nonexistent.[12] FINRA represents that, as of the date that it filed the proposed rule change, the OTCBB does not display or widely disseminate quotation information on any OTC Equity Security.[13]

FINRA states that it does not believe that continued operation of the OTCBB serves any benefit to investors or the marketplace and that ceasing operation of the OTCBB would eliminate potential

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 90067 (October 1, 2020), 85 FR 63314 (''Notice''). Comments on the proposed rule change can be found at: *https://www.sec.gov/comments/sr-finra-2020-031/srfinra2020031.htm.*

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Exchange Act Release No. 90335 (November 4, 2020). The Commission designated January 5, 2021 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[6] Amendment No. 1 is a partial amendment in which FINRA included a representation that it will not cease operation of the OTCBB until the enhanced regulatory requirements under Rule 6439 (except for certain provisions related to order-level information reports that also relate to information required for the Consolidated Audit Trail) become effective. *See infra* note 41. Amendment No. 1 may be found at: *https://www.sec.gov/comments/sr-finra-2020-031/srfinra2020031.htm.*

[7] 15 U.S.C. 78s(b)(2)(B).

[8] FINRA Rule 6420(c) defines ''inter-dealer quotation system'' as ''any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers.'' This definition tracks the Commission's definition of the same term in Exchange Act Rule 15c2–11, 17 CFR 240.15c2–11.

[9] The term ''OTC Equity Security'' is defined in FINRA Rule 6420(f) as any equity security that is not an ''NMS stock'' as that term is defined in Rule 600(b)(47) of Regulation NMS; provided, however, that the term ''OTC Equity Security'' shall not include any Restricted Equity Security. The term ''Restricted Equity Security'' is further defined in FINRA Rule 6420(k) to mean any equity security that meets the definition of ''restricted security'' as contained in Rule 144(a)(3) under the Securities Act of 1933.

[10] *See* Notice, *supra* note 3, at 63315.

[11] *See id.*

[12] *See id.*

[13] *See id.*

investor confusion regarding the availability of quotation information for OTC Equity Securities.[14] In addition, FINRA notes that it does not believe that the OTCBB, in its current state, furthers the goals and objectives of Section 17B of the Act and, therefore, does not meet the characteristics of a system described in Section 17B of the Act regarding the widespread dissemination of reliable and accurate quotation information with respect to ''penny stocks.'' [15]

As a result, FINRA proposes to rescind the FINRA Rule 6500 Series, which governs the operation of the OTCBB. Among other things, the FINRA Rule 6500 Series contains provisions regarding the securities eligible to be quoted on the OTCBB (FINRA Rule 6530), market maker obligations on the OTCBB (FINRA Rule 6540), and transaction reporting (FINRA Rule 6550). FINRA also proposes to rescind FINRA Rule 7720, which sets forth the fees applicable to a broker-dealer that displays quotations or trading interest in the OTCBB, and to amend FINRA Rule 9217 (Violations Appropriate for Disposition Under Plan Pursuant to SEA Rule 19d–1(c)(2)) to remove reference to FINRA Rule 6550 (Transaction Reporting). While these proposed changes to the FINRA rulebook would cause the operation of the OTCBB to terminate when effective, in Amendment No. 1, FINRA states that it would not cease operation of the OTCBB until proposed Rule 6439 (except for proposed Rule 6439(d)(1)(B)), discussed below, is effective.[16]

B. Proposed Rule 6439 (Requirements for Member Inter-Dealer Quotation Systems)

FINRA states that all quotation activity in OTC Equity Securities now occurs on member-operated IDQSs, rather than the OTCBB.[17] FINRA proposes, in conjunction with the cessation of the OTCBB, to adopt new requirements for member IDQSs that provide quotations in OTC Equity Securities in order to ensure that they have minimum standards in place.[18] FINRA states that it believes that the proposed requirements would complement the existing framework governing the form and content of quotations [19] and are consistent with the goals and objectives of Section 17B of the Act regarding the facilitation of widespread dissemination of reliable and accurate quotation information in penny stocks.[20]

Proposed Rule 6439 would apply to member IDQSs (whether or not such member is also an alternative trading system (''ATS'')) that permits quotation updates on a real-time basis in OTC Equity Securities. Under proposed Rule 6439(a), member IDQSs must establish, maintain and enforce written policies and procedures relating to the collection and dissemination of quotation information in OTC Equity Securities on or through their systems. Such written policies and procedures must be reasonably designed to ensure that quotations received and disseminated are informative, reliable, accurate, firm, and treated in a not unfairly discriminatory manner, including by establishing non-discretionary standards under which quotations are prioritized and displayed.[21] Member IDQSs must also prominently disclose these written policies and procedures, along with any material updates, modifications and revisions thereto, to subscribers within five business days following the date of establishment of a policy or procedure or implementation of a material change, as well as provide them to prospective subscribers upon request.[22]

Under proposed Rule 6439(b), each member IDQS must establish non-discriminatory written standards for granting access to quoting and trading in OTC Equity Securities on its systems that do not unreasonably prohibit or limit any person with respect to access to services offered by such member IDQS.[23] As with the requirements under proposed Rule 6439(a), member IDQSs would be required to prominently disclose these written standards relating to fair access, and any material updates, modifications and revisions thereto, to their subscribers within five business days following the date of establishment of written standards or implementation of a material change, as well as provide them to prospective subscribers upon request.[24] In addition, member IDQSs would be required to make and keep records of all grants of access and all denials or limitations of access. Such records must include, for all subscribers, the reasons for granting access, and, for all denials or limitations of access, the reasons for denying or limiting such access.[25]

Proposed Rules 6439(c) and (d) would apply only to member IDQSs that do not automatically execute all orders presented for execution against displayed quotations for which a member subscriber has an obligation under FINRA Rule 5220 (Offers at Stated Prices) [26] (such a system is

[14] *See id.* at 63318. For example, FINRA states that where investors look to feeds that solely disseminate OTCBB data for quotation information on a particular OTC Equity Security, investors mistakenly may conclude that there are no current quotations in the security (when, in fact, there may be numerous quotations available elsewhere—*i.e.,* on member-operated IDQSs). *See id.*

[15] Section 17B of the Act mandates, among other things, that the Commission facilitate the widespread dissemination of quotation information for penny stocks through automated quotation systems operated by registered securities associations. *See* 15 U.S.C 78q–2(b). Under Exchange Act Rule 3a51–1, ''penny stock'' is a non-NMS stock that among other things, does not include securities that have a price of five dollars or more as determined either on a per transaction basis or, in the absence of a transaction, on the basis of the inside bid quotation for the security displayed on an automated quotation system that has the characteristics set forth in Section 17B(b)(2) of the Act or any other system that is designated by the Commission. *See* 17 CFR 240.3a51–1.

[16] *See* Amendment No. 1, *supra* note 6.

[17] *See* Notice, *supra* note 3 at 63320.

[18] *Id.* at 63316.

[19] FINRA currently has in place rules that govern the activity of member firms when they engage in quoting OTC Equity Securities. Specifically, the FINRA Rule 6400 Series (Quoting and Trading in OTC Equity Securities), among other things, provides a regulatory framework that governs the form and content of OTC Equity Securities' quotations, and the FINRA Rule 5200 Series sets forth rules of general applicability that govern quoting and trading practices in this market sector (hereinafter, the FINRA Rule Series 6400 and 5200 are collectively referred to as the ''FINRA Quotation Governance Rules''). *See* Notice, *supra* note 3, at 63314–15. Rather than governing the activity of member firms, like the FINRA Quotation Governance Rules, proposed Rule 6439 would provide quotation governance standards for member IDQSs on or through which quotations are displayed.

[20] *See supra* note 15.

[21] For example, FINRA states that a member IDQS would be required to address in its procedures its methodology for ranking quotations, including at a minimum, addressing factors such as price (including any applicable quote access fee), size, time, capacity and type of quotation (such as unpriced quotes and bid/offer wanted quotations). The member IDQS also would be required to include any other factors relevant to the ranking and display of quotations (*e.g.,* reserve sizes, quotation updates, treatment of closed quotations, and quotation information imported from other systems). *See* Notice, *supra* note 3, at 63316.

[22] FINRA states that a member that is an IDQS at the time of the effective date of this proposed rule change would be required to prominently disclose the required information to its subscribers upon the effective date of the proposed rule change and, thereafter, within five business days of the implementation of any material update, modification or revision thereto. *See id.,* at n.16.

[23] FINRA states that this proposed requirement is consistent with the ''fair access'' requirements of Regulation ATS but would apply to quoting and trading in all OTC Equity Securities on the member IDQS, regardless of the percentage of average daily volume that such member IDQS had in the security. *See* 17 CFR 242.301(b)(5). FINRA states that while certain member IDQSs may already be subject to the similar volume-based fair access requirements under Regulation ATS, proposed Rule 6439 would ensure the application of fair access requirements to all member IDQSs. *See* Notice, *supra* note 3, at 63316.

[24] *See id.* at 63316–17. *See also supra* note 22.

[25] *See* proposed Rule 6439(b).

[26] FINRA Rule 5220 and its associated Supplementary Material set forth members' firm quote obligations. Specifically, FINRA Rule 5220 provides that no member shall make an offer to buy from or sell to any person any security at a stated

hereafter referred to as a ''non-auto-executing member IDQS''). Under proposed Rule 6439(c), non-auto-executing member IDQSs must establish, maintain and enforce written policies and procedures that are reasonably designed to address instances of unresponsiveness to orders in an OTC Equity Security. At a minimum, these policies and procedures must specify an efficient process for: (i) Monitoring subscriber unresponsiveness; (ii) subscribers to submit complaints to the non-auto-executing member IDQS regarding potential instances of order unresponsiveness; (iii) documenting the subscriber's rationale for unresponsiveness; and (iv) determining specified steps when an instance of, or repeated, order unresponsiveness may have occurred.[27]

Under proposed Rule 6439(d), non-auto-executing member IDQSs must report to FINRA, in a form and manner prescribed by FINRA,[28] certain aggregate and order-level information in OTC Equity Securities. Specifically, proposed Rule 6439(d) would require a non-auto-executing member IDQS to report to FINRA on a monthly basis the following aggregated information, categorized by FINRA member subscriber market participant identifier (MPID) across all symbols quoted by the MPID during the previous calendar month: (i) Total number of marketable orders presented for execution against the MPID's quotation;[29] (ii) average execution (full or partial) time for marketable orders presented against the MPID's quotation based on the time an order is presented; (iii) total number of full or partial executions based on the time a marketable order is presented that are within the following execution timeframes: < 5 seconds; ≥ 5 and < 10 seconds; ≥ 10 and < 20 seconds; and ≥ 20 seconds; (iv) total number of marketable orders presented against the MPID's quotation that did not receive a full or partial execution; and (v) average response time of the highest 10% and highest 50% of the MPID's response times for marketable orders (for full or partial executions).[30]

Proposed Rule 6439(d) would require non-auto-executing member IDQSs to provide to FINRA the following order-level information for each order presented against an MPID's quotation during the previous calendar month: (i) Buy/sell; (ii) security symbol; (iii) price; (iv) size; (v) All or None indicator (yes or no); (vi) order entry firm MPID; (vii) order receipt time; (viii) time in force; (ix) response time; (x) order response (*e.g.,* execute, reject cancel, etc.); (xi) executed quantity; (xii) system-generated order number (if any); and (xiii) position in queue for quote (*e.g.,* IL1, IL2).[31] However, to the extent that the above order-level information is or becomes reportable under the Consolidated Audit Trail (''CAT'') pursuant to FINRA Rule 6830 (Industry Member Data Reporting), non-auto-executing member IDQSs would not be required to report this order-level information under proposed Rule 6439(d).[32]

Proposed Rule 6439(e) would require each member IDQS to make available to customers on its website (or its affiliate distributor's website) a written description of each OTC Equity Security order- or quotation-related data product offered by such member IDQS and related pricing information, including fees, rebates, discounts and cross-product pricing incentives. Member IDQSs would be required to keep the relevant website page(s) accurate and up-to-date with respect to the required data product descriptions and pricing information and to make such information available at least two business days in advance of offering a data product.[33] Proposed Rule 6439(e) would specify that a member IDQS is not precluded from negotiating lower fees with customers, provided that the member IDQS discloses on such website page(s) the circumstances under which it may do so.

Finally, under proposed Rule 6439(f), a member IDQS must provide FINRA with prompt notification when it reasonably becomes aware of any systems disruption that is not de minimis that degrades, limits, or otherwise impacts the member IDQS's functionality with respect to trading or the dissemination of market data.[34] Such notification must include, on a reasonable best efforts basis, a brief description of the event, its impact, and the member IDQS's resolution efforts.[35] FINRA states that to comply with this requirement, a member IDQS that is an SCI ATS, as defined in Rule 1000 of Regulation SCI, could provide FINRA with the same information (or a duplicate copy of any notification) submitted to the Commission as required under Regulation SCI Rule 1002(b)[36] promptly after filing the notification with the Commission.[37] FINRA states that if a member IDQS is not an SCI ATS, it could comply with this requirement by providing FINRA prompt notification when it reasonably becomes aware of any such systems disruption, and by providing periodic updates on the event and its resolution.[38] Such notifications would include, on a reasonable best efforts basis, a brief description of the event, its impact, and resolution efforts.[39]

FINRA states that if the proposed rule change is approved by the Commission, FINRA will announce in a *Regulatory Notice* the effective date(s) of the proposed rule change, which may be phased in but will be no later than 365 days following Commission approval.[40] The effective date for rescinding the rules related to the OTCBB will not occur until proposed Rule 6439 (except for Rule 6439(d)(1)(B)) is effective.[41] FINRA also states that it will examine for compliance by member IDQSs with proposed Rule 6439, including by reviewing the adequacy of member IDQSs' written policies and procedures and written fair access standards required under the proposal, conducting a targeted exam of impacted member IDQSs after the initial effectiveness of the rule, and incorporating a Rule 6439

price unless such member is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.

[27] *See* Notice, *supra* note 3, at 63317.

[28] FINRA states that following Commission approval, FINRA would announce in a *Regulatory Notice* details about the required manner and timing of the submission of this information to FINRA. *See* Notice, *supra* note 3, at 63317, n.27.

[29] FINRA states that in this context, a ''marketable order'' refers to a message presented against a market maker's quote that is priced to be immediately executable. *See id.,* n.29.

[30] *See* proposed Rule 6439(d)(1)(A).

[31] *See* proposed Rule 6439(d)(1)(B).

[32] *See* proposed Rule 6439(d)(2). If such information is reportable to the CAT pursuant to FINRA Rule 6830, this information will be available to FINRA. Thus, separate reporting pursuant to proposed FINRA Rule 6439(d) would be duplicative.

[33] *See* proposed Rule 6439(e).

[34] FINRA would announce in a *Regulatory Notice* the methods and process by which members may provide systems disruption notifications to FINRA. *See* Notice, *supra* note 3, at 63318.

[35] *See* proposed Rule 6439(f).

[36] 17 CFR 242.1002(b).

[37] *See* Notice, *supra* note 3, at 63318.

[38] *See id.*

[39] *See id.*

[40] *See* Notice, *supra* note 3, at 63319.

[41] *See* Amendment No. 1, *supra* note 6. FINRA states that proposed Rule 6439, with one exception related to the reporting to FINRA of order-level information, will become effective at the same time as, or prior to, the rescission of the OTCBB rules. FINRA states that paragraph (d)(1)(B) of proposed Rule 6439 (requiring reporting of specified order-level information) may be phased in at a later date within the 365-day timeframe to allow FINRA to better coordinate with the timeline for reporting information in OTC Equity Securities to the CAT under FINRA Rule 6830 (Industry Member Data Reporting). *See id.*

review as part of the regular exam program for impacted member firms.[42]

III. Proceedings To Determine Whether To Approve or Disapprove SR–FINRA–2020–031, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[43] to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposal.

Pursuant to Section 19(b)(2)(B) of the Act,[44] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposal's consistency with the Act, and, in particular, with Section 15A(b)(6) of the Act, which requires, among other things, that the rules of a national securities association be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest,''[45] and Section 15A(b)(11) of the Act, which requires that the rules of a national securities association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied, and that such rules ''be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.''[46]

As discussed above, FINRA is proposing to rescind FINRA's rules governing the OTCBB and cease its operation and adopt new Rule to expand the obligations of Member IDQSs that disseminate quotation updates on a real-time basis in OTC Equity Securities. The Commission has received three comment letters regarding the proposed rule change,[47] and a response to comments from FINRA.[48] In addition, on December 21, 2020, FINRA filed partial Amendment No. 1, which states that FINRA would not cease operation of the OTCBB until proposed Rule 6439 (except for proposed Rule 6439(d)(1)(B)) is effective.[49] FINRA further states that paragraph (d)(1)(B) of proposed Rule 6439 (requiring reporting of specified order-level information) may be phased in at a later date within the 365-day timeframe to allow FINRA to better coordinate with the timeline for reporting information in OTC Equity Securities to the CAT under FINRA Rule 6830 (Industry Member Data Reporting).[50] Given the filing of this recent amendment, and the comment letters received and the response from FINRA, the Commission is seeking additional public comment on the proposed rule change in order to determine whether it is consistent with the requirements of Sections 15A(b)(6) and 15A(b)(11) of the Act.

The Commission notes that, under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Act and the rules and regulations thereunder. . .is on the self-regulatory organization ['SRO'] that proposed the rule change.''[51] 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,[52] and any failure of an SRO to provide this information may result in the Commission not having sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rule and regulations.[53]

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Sections 15A(b)(6) and 15A(b)(11) of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[54]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by January 27, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by February 10, 2021.

The Commission asks that commenters address the sufficiency of FINRA's statements in support of the proposal, which are set forth in the Notice and in Amendment No. 1,[55] in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2020–031 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.

[42] *See* Notice, *supra* note 3, at 63316, n.17.

[43] 15 U.S.C. 78s(b)(2)(B).

[44] *Id.*

[45] 15 U.S.C. 78*o*–3(b)(6).

[46] 15 U.S.C. 78*o*–3(b)(11).

[47] *See* Letters from Christopher Bok, Chief Compliance Officer, OTC Link, LLC, dated October 28, 2020; Kimberly Unger, CEO and Executive Director, The Security Traders Association of New York, Inc., dated October 28, 2020; and Sherry J. Sandler, Global OTC, dated November 9, 2020.

[48] *See* Letter from Racquel Russell, Associate General Counsel, FINRA, dated November 20, 2020.

[49] *See supra* note 6.

[50] *See id. See also supra* notes 31–32 and accompanying text.

[51] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[52] *See id.*

[53] *See id.*

[54] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[55] *See supra* notes 3 and 6.

All submissions should refer to File Number SR–FINRA–2020–031. 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 FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FNRA–2020–031 and should be submitted on or before January 27, 2021. Rebuttal comments should be submitted by February 10, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[56]

J. Matthew DeLesDernier,

Assistant Secretary.

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[56] 17 CFR 200.30–3(a)(12) and 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90838; File No. SR–NYSEArca–2020–115]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the NYSE Arca Options Fee Schedule

December 31, 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 29, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Arca Options Fee Schedule (''Fee Schedule'') to extend the waiver of certain Floor-based fixed fees. The Exchange proposes to implement the fee change effective January 1, 2021. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify the Fee Schedule to extend the waiver of certain Floor-based fixed fees for market participants that have been unable to resume their Floor operations to a certain capacity level, as discussed below. The Exchange proposes to implement the fee change effective January 1, 2021.

On March 18, 2020, the Exchange announced that it would temporarily close the Trading Floor, effective Monday, March 23, 2020, as a precautionary measure to prevent the potential spread of COVID–19. Following the temporary closure of the Trading Floor, the Exchange waived certain Floor-based fixed fees for April and May 2020.[4] Although the Trading Floor partially reopened on May 4, 2020 and Floor-based open outcry activity is supported, certain participants have been unable to resume pre-Floor closure levels of operations. As a result, the Exchange extended the fee waiver through December 2020, but only for Floor Broker firms that were unable to operate at more than 50% of their March 2020 on-Floor staffing levels and for Market Maker firms that have vacant or ''unmanned'' Podia for the entire month due to COVID–19 related considerations (the ''Qualifying Firms'').[5] Because the Trading Floor will continue to operate with reduced capacity, the Exchange proposes to extend the fee waiver for Qualifying Firms through the earlier of the first full month of a full reopening of the Trading Floor facilities to Floor personnel or March 2021.[6]

Specifically, as with the prior fee waivers, the proposed fee waiver covers the following fixed fees for Qualifying Firms, which relate directly to Floor operations, are charged only to Floor participants and do not apply to participants that conduct business off-Floor:

- Floor Booths;
- Market Maker Podia;
- Options Floor Access;
- Wire Services; and
- ISP Connection.[7]

The proposed fee change is designed to reduce monthly costs for all Qualifying Firms whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the

[4] *See* Securities Exchange Act Release Nos. 88596 (April 8, 2020), 85 FR 20796 (April 14, 2020) (SR–NYSEArca–2020–29); 88812 (May 5, 2020), 85 FR 27787 (May 11, 2020) (SR–NYSEArca–2020–38).

[5] *See* Securities Exchange Act Release Nos. 89038 (June 10, 2020), 85 FR 36447 (June 16, 2020) (SR–NYSEArca–2020–52); 89242 (June 7, 2020), 85 FR 42037 (July 13, 2020) (SR–NYSEArca–2020–60); 89480 (August 5, 2020), 85 FR 48591 (August 11, 2020) (SR–NYSEArca–2020–69); 89694 (August 27, 2020), 85 FR 54608 (September 2, 2020) (SR–NYSEArca–2020–76); 90191 (October 15, 2020), 85 FR 67032 (October 21, 2020) (SR–NYSEArca–2020–90). *See also* Fee Schedule, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO-LOCATION FEES.

[6] *See* proposed Fee Schedule, NYSE Arca OPTIONS: FLOOR and EQUIPMENT and CO-LOCATION FEES.

[7] *See id.*

partial reopening. The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[9] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [10]

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[11] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2020, the Exchange had slightly over 10% market share of executed volume of multiply-listed equity and ETF options trades.[12]

This proposed fee change is reasonable, equitable, and not unfairly discriminatory because it would reduce monthly costs for all Qualifying Firms whose operations have been disrupted despite the fact that the Trading Floor has partially reopened because of the social distancing requirements and/or other health concerns related to resuming operation on the Floor. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their prior fully-staffed on-Floor operations to off-Floor and recoup losses as a result of the partial reopening of the Floor. The Exchange believes that all Qualifying Firms would benefit from this proposed fee change.

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits as it merely continues the previous fee waiver for Qualifying Firms, which affects fees charged only to Floor participants and does not apply to participants that conduct business off-Floor. The Exchange believes it is an equitable allocation of fees and credits to extend the fee waiver for Qualifying Firms because such firms have either no more than half of their Floor staff (as measured by either the March 2020 or Exchange-approved) levels or have vacant podia—and this reduction in staffing levels on the Floor impacts the speed, volume and efficiency with which these firms can operate, which is to their financial detriment.

The Exchange believes that the proposal is not unfairly discriminatory because the proposed continuation of the fee waiver would affect all similarly-situated market participants on an equal and non-discriminatory basis.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes would encourage the continued participation of Qualifying Firms, thereby promoting market depth, price discovery and transparency and would enhance order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [13]

Intramarket Competition. The proposed change, which continues the fee waiver for all Qualifying Firms, is designed to reduce monthly costs for those Floor participants whose operations continue to be impacted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow Qualifying Firms that had Floor operations in March 2020 to reallocate funds to assist with the cost of shifting and maintaining their previously on-Floor operations to off-Floor. The Exchange believes that the proposed waiver of fees for Qualifying Firms would not impose a disparate burden on competition among market participants on the Exchange because off-Floor market participants are not subject to these Floor-based fixed fees. In addition, Floor-based firms that are not subject to the extent of staffing shortfalls as are Qualifying Firms, *i.e.,* such firms have more than 50% of their March 2020—or Exchange-approved—staffing levels on the Floor and/or have no vacant Podia during the month, do not face the same operational disruption and potential financial impact during the partial reopening of the Floor.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.[14] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2020, the Exchange had slightly over 10% market share of executed volume of multiply-listed equity and ETF options trades.[15]

The Exchange believes that the proposed rule change reflects this

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[11] The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, *available here: https://www.theocc.com/market-data/volume/default.jsp.*

[12] Based on OCC data, *see id.,* the Exchange's market share in equity-based options increased from 9.65% for the month of November 2019 to 10.35% for the month of November 2020.

[13] *See* Reg NMS Adopting Release, *supra* note 10, at 37499.

[14] *See supra* note 11.

[15] Based on OCC data, *supra* note 12, the Exchange's market share in equity-based options was the Exchange's market share in equity-based options increased from 9.65% for the month of November 2019 to 10.35% for the month of November 2020.

competitive environment because it waives fees for Qualifying Firms and is designed to reduce monthly costs for Floor participants whose operations continue to be disrupted even though the Trading Floor has partially reopened. In reducing this monthly financial burden, the proposed change would allow affected participants to reallocate funds to assist with the cost of shifting and maintaining their prior fully staffed on-Floor operations to off-Floor.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [16] of the Act and subparagraph (f)(2) of Rule 19b–4 [17] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [18] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2020–115 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2020–115. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–115 and should be submitted on or before January 27, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29285 Filed 1–5–21; 8:45 am]

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[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90827; File No. SR–OCC–2020–015]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Accelerated Approval of Proposed Rule Change Concerning the Implementation of New Sufficiency Scenarios in the Options Clearing Corporation's Stress Testing Inventory

December 30, 2020.

I. Introduction

On December 2, 2020, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–OCC–2020–015 (''Proposed Rule Change'') pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to implement additional stress test scenarios to OCC's Comprehensive Stress Testing & Clearing Fund Methodology, and to its Liquidity Risk Management Description.[3] The Proposed Rule Change was published for public comment in the **Federal Register** on December 14, 2020.[4] The Commission has received no comments regarding the Proposed Rule Change. This order approves the Proposed Rule Change on an accelerated basis.

II. Background

The Proposed Rule Change by OCC would take existing informational stress test scenarios and add them to the list of stress test scenarios designed to test the sufficiency of OCC's prefunded financial resources. The proposed changes are to OCC's Comprehensive Stress Testing & Clearing Fund Methodology, and to its Liquidity Risk Management Description (''Methodology Description'').

In 2018, OCC established its current clearing fund methodology, using a stress testing framework to measure its credit exposure at a level sufficient to cover potential losses under extreme but plausible market conditions.[5] OCC performs daily stress testing using a wide range of scenarios, both hypothetical and historical. Its stress testing scenario inventory includes four

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 4, 85 FR at 80829.

[4] Securities Exchange Act Release No. 90603 (Dec. 8, 2020), 85 FR 80829 (Dec. 14, 2020) (File No. SR–OCC–2020–015) (''Notice of Filing'').

[5] Securities Exchange Act Release No. 83735 (Jul. 27. 2018), 83 FR 37855 (Aug. 2, 2018) (File No. SR–OCC–2018–008).

different categories: (1) Scenarios that determine whether the financial resources collected from all Clearing Members collectively are adequate to cover OCC's risk tolerance (''Adequacy Scenarios''); (2) scenarios that establish the monthly size of the Clearing Fund at an amount necessary to cover losses arising from the default of the two Clearing Member Groups that would potentially cause the largest aggregate credit exposure as a result of a 1-in-80 year hypothetical market event (''Sizing Scenarios''); (3) scenarios that measure the exposure of the Clearing Fund to the portfolios of individual Clearing Member Groups and determine whether any such exposure is sufficiently large as to necessitate OCC calling for additional resources to guard against potential losses under a wide range of stress scenarios, including extreme but plausible market conditions (''Sufficiency Scenarios'');[6] and (4) scenarios that monitor and assess the size of OCC's prefunded financial resources against a wide range of stress scenarios that may include newly developed stress scenarios for evaluation as well as extreme but implausible scenarios (''Informational Scenarios''). Adequacy and Informational Scenarios are not used directly to size the Clearing Fund or drive calls for additional financial resources from OCC's Clearing Members.

As described in the Notice of Filing, OCC proposes to elevate four of its current Informational Scenarios to Sufficiency Scenarios. These Informational Scenarios are historical scenarios designed to represent recent market events from March 2020. The proposed Sufficiency Scenarios would include price shocks representing the most extreme market decline and rally moves in March 2020, and would include variations of these scenarios designed to account for specific wrong-way risk exposures arising from cleared positions on issued exchange traded notes (''ETNs'').[7]

These four scenarios, as Informational Scenarios, currently do not drive the size of the Clearing Fund or calls for additional resources. Once elevated to Sufficiency Scenarios, they would be used to measure OCC's Clearing Fund exposure to the portfolios of individual Clearing Member Groups and determine whether any such exposure is sufficiently large where it would necessitate OCC calling for additional resources in the form of margin or an intra-month resizing of the Clearing Fund. OCC asserts that by adding these four Sufficiency Scenarios, it would be able to test the sufficiency of its financial resources under a wider range of relevant stress scenarios and respond quickly when OCC believes additional financial resources are necessary.[8]

III. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

Section 19(b)(2)(C) of the Exchange Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to such organization.[9] After carefully considering the Proposed Rule Change, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to OCC. More specifically, the Commission finds that the proposal is consistent with Section 17A(b)(3)(F) of the Exchange Act,[10] and Rule 17Ad–22(e)(4)[11] thereunder, as described in detail below.

A. Consistency With Section 17A(b)(3)(F) of the Exchange Act

Section 17A(b)(3)(F) of the Exchange Act requires that the rules of a clearing agency be designed to, among other things, promote the prompt and accurate clearance and settlement of securities transactions, and assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[12] In 2018, the Commission approved a Proposed Rule Change to formalize OCC's current Clearing Fund Methodology Policy, including OCC's current stress testing methodology, and the Commission's approval was based in part on the same Section 17A(b)(3)(F) requirements above.[13] Based on its review of the record, and for the reasons described below, the Commission believes that the proposed addition of more stress test scenarios designed to test the sufficiency of OCC's prefunded financial resources as described above is consistent with the promotion of prompt and accurate clearance and settlement of securities transactions, and the assurance of the safeguarding of securities and funds which are in OCC's custody or control or for which OCC is responsible.

First, the proposal to elevate four Informational Scenarios to Sufficiency Scenarios would expand upon the scope of stress scenarios against which OCC monitors its financial resources. The Commission continues to believe that the historical scenarios replicating the 1987 market crash and financial crisis provide additional depth to the monitoring of OCC's financial resources.[14] Similarly, for the present proposal, the Commission believes that the introduction of new historical scenarios replicating the market events of March 2020 would provide stress exposure estimates that would be meaningful for the monitoring of OCC's total financial resources. Elevating these Informational Scenarios to become Sufficiency Scenarios would increase the likelihood that OCC will have sufficient financial resources in excess of margin to address credit losses that could arise from the default of a Clearing Member, and this would in turn enhance OCC's ability to continue to promptly and accurately clear and settle securities transactions for participants in the options markets during periods of market stress. Therefore, the Commission believes that the proposal is consistent with promoting the prompt and accurate clearance and settlement of securities transactions.

Second, adding the proposed Sufficiency Scenarios would be consistent with assuring the safeguarding of securities and funds currently in OCC's custody and control by creating a wider range of stress scenarios that would improve the likelihood of the Clearing Fund having sufficient resources to cover potential credit losses under adverse market conditions. As noted above, Sufficiency Scenarios are used to determine whether any exposure of the Clearing Fund to the portfolios of individual

[6] Pursuant to OCC Rule 609 and OCC's Clearing Fund Methodology Policy, if any of OCC's Sufficiency Scenarios identifies exposures that exceed 75% of the current Clearing Fund requirement less deficits, OCC may require additional margin deposits from the Clearing Member Group(s) driving the breach. Additionally, pursuant to Rule 1001(c) and the Clearing Fund Methodology Policy, if a Sufficiency Scenario identifies a Clearing Fund draw for any one or two Clearing Member Groups that exceeds 90% of the current Clearing Fund size (after subtracting any monies deposited as a result of a margin call in accordance with a breach of the 75% threshold), OCC has the authority to reset the size of the Clearing Fund on an intra-month basis to ensure that it continues to maintain sufficient prefunded financial resources. *See* Notice of Filing *supra* note 4, 85 FR at 80829–30.

[7] *See* Notice of Filing *supra* note 4, 85 FR at 80830.

[8] *Id.*

[9] 15 U.S.C. 78s(b)(2)(C).

[10] 15 U.S.C. 78q–1(b)(3)(F).

[11] 17 CFR 240.17Ad–22(e)(4).

[12] 15 U.S.C. 78q–1(b)(3)(F).

[13] *See supra* note 5, 83 FR at 37861–62.

[14] *See supra* note 5, 83 FR at 37861.

Clearing Member Groups is sufficiently large as to necessitate OCC calling for additional resources in the form of margin to guard against potential losses. Collecting this additional margin reduces the likelihood that OCC must mutualize the risk associated with these potential losses through the use of surviving Clearing Members' contributions to the Clearing Fund. The Commission continues to believe that reducing the potentiality of loss mutualization during periods of market stress, while unavoidable in certain circumstances, could reduce the potential knock-on effects to non-defaulting Clearing Members, their customers and the broader options market.[15] The addition of the four scenarios representing recent market events, previously uncaptured in OCC's Sufficiency stress testing, would widen the set of Sufficiency Scenarios to include such events, and further reduce the likelihood of drawing upon surviving Clearing Members' Clearing Fund collateral in the event that similar market scenarios occur. Therefore, the Commission believes that the proposal is consistent with assuring the safeguarding of securities and funds which are in OCC's custody or control.

The Commission believes, therefore, that the proposal to elevate the four Informational Scenarios to Sufficiency Scenarios is consistent with the requirements of Section 17A(b)(3)(F) of the Exchange Act.[16]

B. Consistency With Rule 17Ad–22(e)(4) Under the Exchange Act

Rule 17Ad–22(e)(4)(vi) under the Exchange Act requires OCC to establish, implement, maintain, and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes by testing the sufficiency of its total financial resources available to meet the minimum financial resource requirements under paragraphs Rules 17Ad–22(e)(4)(i) through (iii).[17] Such testing must include, among other things, conducting stress testing of OCC's total financial resources once each day using standard predetermined parameters and assumptions.[18]

After reviewing and assessing the proposal, the Commission believes that the proposed changes described above are consistent with Rule 17Ad–22(e)(4)(vi) under the Exchange Act. As it stated in 2018, the Commission believes that expanding the scope of stress scenarios against which OCC monitors its financial resources would increase the likelihood that OCC maintains sufficient financial resources at all times.[19] Similarly, the Commission believes that the elevation of the four Informational Scenarios to Sufficiency Scenarios is consistent with Rule 17Ad–22(e)(4)(vi) because the addition of the four Sufficiency Scenarios would enhance OCC's financial resources testing, and the broader scope of stress scenarios would increase the chances that OCC maintains sufficient financial resources. The Commission also believes that the daily testing of OCC's financial resources against the Sufficiency Scenarios, including the four proposed Sufficiency Scenarios based on the March 2020 market events, would be consistent with the daily stress testing requirements of Rule 17Ad–22(e)(4)(vi)(A), as described above.

The Commission also believes that the proposed introduction of stress scenario variations accounting for specific wrong-way risk exposures arising from cleared positions on issued ETNs would be consistent with the requirements of Rules 17Ad–22(e)(4)(i), (iii), and (vi).[20] These Rules require that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by: (1) Maintaining sufficient financial resources to cover its credit exposure to each participant fully with a high degree of confidence; (2) maintaining additional financial resources at the minimum to enable it to cover a wide range of foreseeable stress scenarios that include, but are not limited to, the default of the participant family that would potentially cause the largest aggregate credit exposure for the covered clearing agency in extreme but plausible market conditions; and (3) testing the sufficiency of its total financial resources available to meet these minimum financial resource requirements. In its 2019 approval of enhancements to OCC's Clearing Fund and stress testing methodology, the Commission noted that OCC's introduction of new stress test scenarios designed to capture single wrong-way risk exposures for Clearing Member-issued ETNs would be consistent with the requirements of Rules 17Ad–22(e)(4)(i), (iii), and (vi), because it would enable OCC to test its total financial resources and to call for additional resources as necessary to ensure the resources it holds would be sufficient to enable OCC to cover exposures arising under the relevant stress scenarios.[21] Likewise, for the current proposal, the Commission believes that OCC's introduction of four Sufficiency Scenarios reflecting the market events of March 2020, including its specific wrong-way risk exposure variations, would also enable OCC to more accurately measure its credit risks and better test the sufficiency of its overall financial resources. The proposed rule change would thus enhance OCC's overall framework for measuring and managing its credit risks and would reduce the risk that OCC's financial resources would be insufficient in the event of a Clearing Member default consistent with Rules 17Ad–22(e)(4)(i), (iii), and (vi).

The Commission believes, therefore, that the proposal to elevate the four Informational Scenarios to Sufficiency Scenarios is consistent with the requirements of Rule 17Ad–22(e)(4) under the Exchange Act.[22]

C. Accelerated Approval of the Proposed Rule Change

In its filing, OCC requests that the Commission grant accelerated approval of the Proposed Rule Change pursuant to Secton 19(b)(C)(iii) of the Exchange Act.[23] Under Section 19(b)(2)(C)(iii) of the Exchange Act, the Commission may grant accelerated approval of a proposed rule change if the Commission finds good cause for doing so.[24] OCC believes that there is good cause for the Commission to accelerate effectiveness because the proposed changes are designed to improve OCC's ability to measure, monitor and manage its credit exposures to its participants.[25] Further, OCC believes that implementation of the proposed Sufficiency Scenarios would promote the protection of investors and the public interest by enabling OCC to test the sufficiency of its prefunded financial resources against a recent and significant period of market volatility and enhancing OCC's ability to manage

[15] *See e.g.,* Securities Exchange Act Release No. 86119 (Jun. 17. 2019), 84 FR 29267, 29269 (Jun. 21, 2019) (File No. SR–OCC–2019–004) (noting a new liquidation cost model's impact on reducing potential loss mutualization).

[16] 15 U.S.C. 78q–1(b)(3)(F).

[17] 17 CFR 240.17Ad–22(e)(4)(vi) (citing 17 CFR 240.17Ad–22(e)(4)(i)–(iii)).

[18] 17 CFR 240.17Ad–22(e)(4)(vi)(A).

[19] *See supra* note 5, 83 FR at 37863.

[20] 17 CFR 240.17Ad–22(e)(4)(i), (iii), and (vi).

[21] Securities Exchange Act Release No. 87718 (Dec. 11, 2019), 84 FR 68992, 68995 (Dec. 17, 2019) (File No. SR–OCC–2019–010).

[22] 17 CFR 240.17Ad–22(e)(4).

[23] 15 U.S.C. 78s(b)(2)(C)(iii).

[24] *Id.*

[25] *See* Notice of Filing, 85 FR at 80830.

the risks it faces as a systemically important financial market utility.[26]

The Commission finds good cause, pursuant to Section 19(b)(2)(C)(iii) of the Exchange Act,[27] for approving the Proposed Rule Change on an accelerated basis, prior to the 30th day after the date of publication of notice in the **Federal Register**, because accelerated approval of this proposed rule change will facilitate the prompt and accurate clearance and settlement of options contracts by ensuring that OCC has expanded the range of stress scenarios to measure, monitor, and manage its credit exposures to its participants in a timely fashion, thereby immediately putting OCC in a better position to manage the risks it faces as a systemically important financial market utility.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the Proposed Rule Change is consistent with the requirements of the Exchange Act, and in particular, the requirements of Section 17A of the Exchange Act[28] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[29] that the Proposed Rule Change (SR–OCC–2020–015) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29217 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

[26] *Id.*

[27] 15 U.S.C. 78s(b)(2)(C)(iii).

[28] In approving this Proposed Rule Change, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[29] 15 U.S.C. 78s(b)(2).

[30] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90837; File No. SR–NASDAQ–2020–099]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend General 7: Consolidated Audit Trail Compliance, the Exchange's Compliance Rule

December 31, 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 30, 2020, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend General 7: Consolidated Audit Trail Compliance, the Exchange's compliance rule (''Compliance Rule'') regarding the National Market System Plan Governing the Consolidated Audit Trail (the ''CAT NMS Plan'' or ''Plan'')[3] to be consistent with a conditional exemption granted by the Commission from certain allocation reporting requirements set forth in Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan (''Allocation Exemption'').[4]

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/nasdaq/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend the General 7: Consolidated Audit Trail Compliance to be consistent with the Allocation Exemption. The Commission granted the relief conditioned upon the Participants' adoption of Compliance Rules that implement the alternative approach to reporting allocations to the Central Repository described in the Allocation Exemption (referred to as the ''Allocation Alternative'').

(1) Request for Exemptive Relief

Pursuant to Section 6.4(d)(ii)(A) of the CAT NMS Plan, each Participant must, through its Compliance Rule, require its Industry Members to record and report to the Central Repository, if the order is executed, in whole or in part: (1) An Allocation Report;[5] (2) the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable; and the (3) CAT-Order-ID of any contra-side order(s). Accordingly, the Exchange and the other Participants implemented Compliance Rules that require their Industry Members that are executing brokers to submit to the Central Repository, among other things, Allocation Reports and the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable.

On August 27, 2020, the Participants submitted to the Commission a request for an exemption from certain allocation reporting requirements set forth in Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan (''Exemption Request'').[6] In the Exemption Request, the Participants requested that they be permitted to implement the Allocation Alternative, which, as noted above, is an alternative approach to reporting allocations to the Central Repository. Under the Allocation Alternative, any Industry Member that performs an allocation to a client account would be required under the Compliance Rule to submit an Allocation Report to the Central Repository when shares/contracts are allocated to a client account regardless of whether the Industry Member was involved in executing the underlying order(s). Under the Allocation Alternative, a ''client account'' would be any account

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Unless otherwise specified, capitalized terms used in this rule filing are defined as set forth in the Compliance Rule.

[4] *See* Securities Exchange Act Rel. No. 90223 (October 19, 2020), 85 FR 67576 (October 23, 2020) (''Allocation Exemptive Order'').

[5] Section 1.1 of the CAT NMS Plan defines an ''Allocation Report'' as ''a report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.''

[6] *See* letter from the Participants to Vanessa Countryman, Secretary, Commission, dated August 27, 2020 (the ''Exemption Request'').

that is not owned or controlled by the Industry Member.

In addition, under the Allocation Alternative, an ''Allocation'' would be defined as: (1) The placement of shares/contracts into the same account for which an order was originally placed; or (2) the placement of shares/contracts into an account based on allocation instructions (*e.g.,* subaccount allocations, delivery versus payment (''DVP'') allocations). Pursuant to this definition and the proposed Allocation Alternative, an Industry Member that performs an Allocation to an account that is not a client account, such as proprietary accounts and events including step outs,[7] or correspondent flips,[8] would not be required to submit an Allocation Report to the Central Repository for that allocation, but could do so on a voluntary basis. Industry Members would be allowed to report Allocations to accounts other than client accounts; in that instance, such Allocations must be marked as Allocations to accounts other than client accounts.

(A) Executing Brokers and Allocation Reports

To implement the Allocation Alternative, the Participants requested exemptive relief from Section 6.4(d)(ii)(A)(1) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members that are executing brokers, who do not perform Allocations, to record and report to the Central Repository, if the order is executed, in whole or in part, an Allocation Report. Under the Allocation Alternative, when an Industry Member other than an executing broker (*e.g.,* a prime broker or clearing broker) performs an Allocation, that Industry Member would be required to submit the Allocation Report to the Central Repository. When an executing broker performs an Allocation for an order that is executed, in whole or in part, the burden of submitting an Allocation Report to the Central Repository would remain with the executing broker under the Allocation Alternative. In certain circumstances this would result in multiple Allocation Reports—the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

The Participants stated that granting exemptive relief from submitting Allocation Reports for executing brokers who do not perform an Allocation, and requiring the Industry Member other than the executing broker that is performing the Allocation to submit such Allocation Reports, is consistent with the basic approach taken by the Commission in adopting Rule 613 under the Exchange Act. Specifically, the Participants stated that they believe that the Commission sought to require each broker-dealer and exchange that touches an order to record the required data with respect to actions it takes on the order.[9] Without the requested exemptive relief, executing brokers that do not perform Allocations would be required to submit Allocation Reports. In addition, the Participants stated that, because shares/contracts for every execution must be allocated to an account by the clearing broker in such circumstances, there would be no loss of information by shifting the reporting obligation from the executing broker to the clearing broker.

(B) Identity of Prime Broker

To implement the Allocation Alternative, the Participants also requested exemptive relief from Section 6.4(d)(ii)(A)(2) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members to record and report to the Central Repository, if an order is executed, in whole or in part, the SRO-Assigned Market Participant Identifier of the prime broker, if applicable. Currently, under the CAT NMS Plan, an Industry Member is required to report the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker in connection with the execution of an order, and such information would be part of the order's lifecycle, rather than in an Allocation Report that is not linked to the order's lifecycle.[10] Under the Allocation Alternative, the identity of the prime broker would be required to be reported by the clearing broker on the Allocation Report, and, in addition, the prime broker itself would be required to report the ultimate allocation, which the Participants believe would provide more complete information.

The Participants stated that associating a prime broker with a specific execution, as is currently required by the CAT NMS Plan, does not reflect how the allocation process works in practice as allocations to a prime broker are done post-trade and are performed by the clearing broker of the executing broker. The Participants also stated that with the implementation of the Allocation Alternative, it would be duplicative for the executing broker to separately identify the prime broker for allocation purposes.

The Participants stated that if a particular customer only has one prime broker, the identity of the prime broker can be obtained from the customer and account information through the DVP accounts for that customer that contain the identity of the prime broker. The Participants further stated that Allocation Reports related to those executions would reflect that shares/contracts were allocated to the single prime broker. The Participants believe that there is no loss of information through the implementation of the Allocation Alternative compared to what is required in the CAT NMS Plan and that this approach does not decrease the regulatory utility of the CAT for single prime broker circumstances.

In cases where a customer maintains relationships with multiple prime brokers, the Participants asserted that the executing broker will not have information at the time of the trade as to which particular prime broker may be allocated all or part of the execution. Under the Allocation Alternative, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts where the shares/contracts were ultimately allocated. To determine the prime broker for a customer, a regulatory user would query the customer and account

[7] ''A step-out allows a broker-dealer to allocate all or part of a client's position from a previously executed trade to the client's account at another broker-dealer. In other words, a step-out functions as a client's position transfer, rather than a trade; there is no exchange of shares and funds and no change in beneficial ownership.'' *See* FINRA, Trade Reporting Frequently Asked Questions, at Section 301, available at: *https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq.*

[8] Correspondent clearing flips are the movement of a position from an executing broker's account to a different account for clearance and settlement, allowing a broker-dealer to execute a trade through another broker-dealer and settle the trade in its own account. *See, e.g.,* The Depository Trust & Clearing Corporation, Correspondent Clearing, available at: *https://www.dtcc.com/clearing-services/equities-tradecapture/correspondent-clearing.*

[9] *See* Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45748 (August 1, 2012).

[10] The Participants did not request exemptive relief relating to the reporting of the SRO-Assigned Market Participant Identifier of clearing brokers.

database using the customer's CCID to obtain all DVP accounts for the CCID at broker-dealers. The Participants state that when a customer maintains relationships with multiple prime brokers, the customer typically has a separate DVP account with each prime broker, and the identities of those prime brokers can be obtained from the customer and account information.

(C) Additional Conditions to Exemptive Relief

In the Exemption Request, the Participants included certain additional conditions for the requested relief. Currently, the definition of Allocation Report in the CAT NMS Plan only refers to shares. To implement the Allocation Alternative, the Participants proposed to require that all required elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. Specifically, Participants would require the reporting of the following in each Allocation Report: (1) The FDID for the account receiving the allocation, including subaccounts; (2) the security that has been allocated; (3) the identifier of the firm reporting the allocation; (3) the price per share/contracts of shares/contracts allocated; (4) the side of shares/contracts allocated; (4) the number of shares/contracts allocated; and (5) the time of the allocation.

Furthermore, to implement the Allocation Alternative, the Participants proposed to require the following information on all Allocation Reports: (1) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (2) trade date; (3) settlement date; (4) IB/correspondent CRD Number (if applicable); (5) FDID of new order(s) (if available in the booking system);[11] (6) allocation instruction time (optional); (7) if the account meets the definition of institution under FINRA Rule 4512(c);[12] (8) type of allocation (allocation to a custody account, allocation to a DVP account, step out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (*e.g.,* option exercises, conversions); (9) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign indicator, if the custodian is a foreign entity; and (10) if an allocation was cancelled, a cancel flag, which indicates that the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

(2) Proposed Rule Changes To Implement Exemptive Relief

On October 29, 2020, the Commission granted the exemptive relief requested in the Exemption Request. The Commission granted the relief conditioned upon the adoption of Compliance Rules that implement the reporting requirements of the Allocation Alternative. Accordingly, the Exchange proposes the following changes to its Compliance Rule to implement the reporting requirements of the Allocation Alternative.

(A) Definition of Allocation

The Exchange proposes to add a definition of ''Allocation'' as new paragraph (c) to General 7, Section 3.[13] Proposed paragraph (c) of General 7, Section 3 would define an ''Allocation'' to mean ''(1) the placement of shares/contracts into the same account for which an order was originally placed; or (2) the placement of shares/contracts into an account based on allocation instructions (*e.g.,* subaccount allocations, delivery versus payment (''DVP'') allocations).'' The SEC stated in the Allocation Exemption that this definition of ''Allocation'' is reasonable.

(B) Definition of Allocation Report

The Exchange proposes to amend the definition of ''Allocation Report'' set forth in General 7, Section 1(c) to reflect the requirements of the Allocation Exemption. General 7, Section 1(c) defines the term ''Allocation Report'' to mean:

A report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided, for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.

The Exchange proposes to amend this definition in two ways: (1) Applying the requirements for Allocation Reports to contracts in addition to shares; and (2) requiring the reporting of additional elements for the Allocation Report.

(i) Shares and Contracts

The requirements for Allocation Reports apply only to shares, as the definition of ''Allocation Report'' in General 7, Section 1(c) refers to shares, not contracts. In the Allocation Exemption, the Commission stated that applying the requirements for Allocation Reports to contracts in addition to shares is appropriate because CAT reporting requirements apply to both options and equities. Accordingly, the SEC stated that the Participants would be required to modify their Compliance Rules such that all required elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. Therefore, the Exchange proposes to amend General 7, Section 1(c) (to be renumbered as General 7, Section 1(d)) to apply to contracts, as well as shares. Specifically, the Exchange proposes to add references to contracts to the definition of ''Allocation Report'' to the following phrases: ''the Firm Designated ID for any account(s), including subaccount(s), to which executed shares/contracts are allocated,'' ''the price per share/contract of shares/contracts allocated,'' ''the side of shares/contracts allocated,'' and ''the number of shares/contracts allocated to each account.''

(ii) Additional Elements

The Commission also conditioned the Allocation Exemption on the Participants amending their Compliance Rules to require the ten additional elements in Allocation Reports described above. Accordingly, the Exchange proposes to require these additional elements in Allocation Reports. Specifically, the Exchange proposes to amend the definition of ''Allocation Report'' in General 7, Section 1(c) (to be renumbered as General 7, Section 1(d)) to include the following elements, in addition to those elements currently required under the CAT NMS Plan:

[11] The Participants propose that for scenarios where the Industry Member responsible for reporting the Allocation has the FDID of the related new order(s) available, such FDID must be reported. This would include scenarios in which: (1) The FDID structure of the top account and subaccounts is known to the Industry Member responsible for reporting the Allocation(s); and (2) the FDID structure used by the IB/Correspondent when reporting new orders is known to the clearing firm reporting the related Allocations.

[12] FINRA Rule 4512(c) states for the purposes of the rule, the term ''institutional account'' means the account of: (1) A bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million.

[13] The Exchange proposes to renumber the definitions in General 7, Section 3 to accommodate the addition of this new definition of ''Allocation'' and the new definition of ''Client Account'' discussed below.

(6) The time of the allocation; (7) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (8) trade date; (9) settlement date; (10) IB/correspondent CRD Number (if applicable); (11) FDID of new order(s) (if available in the booking system); (12) allocation instruction time (optional); (12) if account meets the definition of institution under FINRA Rule 4512(c); (13) type of allocation (allocation to a custody account, allocation to a DVP account, step-out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (*e.g.,* option exercises, conversions); (14) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign indicator, if the custodian is a foreign entity; and (15) if an allocation was cancelled, a cancel flag indicating that the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

(C) Allocation Reports

(i) Executing Brokers That Do Not Perform Allocations

The Commission granted the Participants an exemption from the requirement that the Participants, through their Compliance Rule, require executing brokers that do not perform Allocations to submit Allocation Reports. The Commission stated that it understands that executing brokers that are not self-clearing do not perform allocations themselves, and such allocations are handled by prime and/or clearing brokers, and these executing brokers therefore do not possess the requisite information to provide Allocation Reports. Accordingly, the Exchange proposes to eliminate General 7, Section 3(a)(2)(A)(i),[14] which requires an Industry Member to record and report to the Central Repository an Allocation Report if the order is executed, in whole or in part, and to replace this provision with proposed General 7, Section 3(a)(2)(F) as discussed below.

(ii) Industry Members That Perform Allocations

The Allocation Exemption requires the Participants to amend their Compliance Rules to require Industry Members to provide Allocation Reports to the Central Repository any time they perform Allocations to a client account, whether or not the Industry Member was the executing broker for the trades. Accordingly, the Commission conditioned the Allocation Exemption on the Participants adopting Compliance Rules that require prime and/or clearing brokers to submit Allocation Reports when such brokers perform allocations, in addition to requiring executing brokers that perform allocations to submit Allocation Reports. The Commission determined that such exemptive relief would improve efficiency and reduce the costs and burdens of reporting allocations for Industry Members because the reporting obligation would belong to the Industry Member with the requisite information, and executing brokers that do not have the information required on an Allocation Report would not have to develop the infrastructure and processes required to obtain, store and report the information. The Commission stated that this exemptive relief should not reduce the regulatory utility of the CAT because an Allocation Report would still be submitted for each executed trade allocated to a client account, which in certain circumstances could still result in multiple Allocation Reports,[15] just not necessarily by the executing broker.

In accordance with the Allocation Exemption, the Exchange proposes to add proposed General 7, Section 3(a)(2)(F) to the Compliance Rule. Proposed General 7, Section 3(a)(2)(F) would require Industry Members to record and report to the Central Repository ''an Allocation Report any time the Industry Member performs an Allocation to a Client Account, whether or not the Industry Member was the executing broker for the trade.''

(iii) Client Accounts

In the Allocation Exemption, the Commission also exempted the Participants from the requirement that they amend their Compliance Rules to require Industry Members to report Allocations for accounts other than client accounts. The Commission believes that allocations to client accounts, and not allocations to proprietary accounts or events such as step-outs and correspondent flips, provide regulators the necessary information to detect abuses in the allocation process because it would provide regulators with detailed information regarding the fulfillment of orders submitted by clients, while reducing reporting burdens on broker-dealers. For example, Allocation Reports would be required for allocations to registered investment advisor and money manager accounts. The Commission further believes that the proposed approach should facilitate regulators' ability to distinguish Allocation Reports relating to allocations to client accounts from other Allocation Reports because Allocations to accounts other than client accounts would have to be identified as such. This approach could reduce the time CAT Reporters expend to comply with CAT reporting requirements and lower costs by allowing broker-dealers to use existing business practices.

To clarify that an Industry Member must report an Allocation Report solely for Allocations to a client account, proposed General 7, Section 3(a)(2)(F) specifically references ''Client Accounts,'' as discussed above. In addition, the Exchange proposes to add a definition of ''Client Account'' as proposed General 7, Section 1(l). Proposed General 7, Section 1(l) would define a ''Client Account'' to mean ''for the purposes of an Allocation and Allocation Report, any account or subaccount that is not owned or controlled by the Industry Member.''

(D) Identity of Prime Broker

The Exchange also proposes to amend General 7, Section 3(a)(2)(A)(ii) to eliminate the requirement for executing brokers to record and report the SRO-Assigned Market Participant Identifier of the prime broker. General 7, Section 3(a)(2)(A)(ii) states that each Industry Member is required to record and report to the Central Repository, if the order is executed, in whole or in part, the ''SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable.'' The Exchange proposes to delete the phrase ''or prime broker'' from this provision. Accordingly, each Industry Member that is an executing broker would no longer be required to report the SRO-Assigned Market Participant Identifier of the prime broker.

As the Commission noted in the Allocation Exemption, exempting the Participants from the requirement that they, through their Compliance Rules, require executing brokers to provide the SRO-Assigned Market Participant Identifier of the prime broker is appropriate because, as stated by the Participants, allocations are done on a post-trade basis and the executing broker will not have the requisite information at the time of the trade. Because an executing broker, in certain circumstances, does not have this information at the time of the trade, this

[14] The Exchange proposes to renumber General 7, Section 3(a)(2)(A)(ii) and (iii) as General 7, Section 3(a)(2)(A)(i) and (ii) in light of the proposed deletion of General 7, Section 3(a)(2)(A)(i).

[15] As noted above, under the Allocation Alternative, for certain executions, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

relief relieves executing brokers of the burdens and costs of developing infrastructure and processes to obtain this information in order to meet the contemporaneous reporting requirements of the CAT NMS Plan.

As the Commission noted in the Allocation Exemption, although executing brokers would no longer be required to provide the prime broker information, regulators will still be able to determine the prime broker(s) associated with orders through querying the customer and account information database. If an executing broker has only one prime broker, the identity of the prime broker can be obtained from the customer and account information associated with the executing broker. For customers with multiple prime brokers, the identity of the prime brokers can be obtained from the customer and account information which will list the prime broker, if there is one, that is associated with each account.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act in general and Section 6(b)(5) of the Act,[16] in particular, which require, among other things, that the Exchange's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 6(b)(8) of the Act,[17] which requires that the Exchange's rules not impose any burden on competition that is not necessary or appropriate.

The Exchange believes that this proposal is consistent with the Act because it is consistent with, and implements, the Allocation Exemption, and is designed to assist the Exchange and its Industry Members in meeting regulatory obligations pursuant to the Plan. In approving the Plan, the SEC noted that the Plan ''is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.'' [18] To the extent that this proposal implements the Plan, and applies specific requirements to Industry Members, the Exchange believes that this proposal furthers the objectives of the Plan, as identified by the SEC, and is therefore consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule changes are consistent with the Allocation Exemption, and are designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan. The Exchange also notes that the proposed rule changes will apply equally to all Industry Members. In addition, all national securities exchanges and FINRA are proposing this amendment to their Compliance Rules. Therefore, this is not a competitive rule filing and does not impose a burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act [19] and subparagraph (f)(6) of Rule 19b–4 thereunder.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2020–099 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2020–099. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2020–099, and should be submitted on or before January 27, 2021.

[16] 15 U.S.C. 78f(b)(6).

[17] 15 U.S.C. 78f(b)(8).

[18] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696, 84697 (November 23, 2016).

[19] 15 U.S.C. 78s(b)(3)(A)(iii).

[20] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–29284 Filed 1–5–21; 8:45 am]

BILLING CODE 8011–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No: SSA–2020–0067]

Agency Information Collection Activities: Proposed Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes new information collections, and revisions of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB) Office of Management and Budget, Attn: Desk Officer for SSA

Comments: *https://www.reginfo.gov/public/do/PRAMain.* Submit your comments online, referencing Docket ID Number [SSA–2020–0067].

(SSA) Social Security Administration, OLCA, Attn: Reports Clearance Director, 3100 West High Rise, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov*

Or you may submit your comments online through *https://www.reginfo.gov/public/do/PRAMain,* referencing Docket ID Number [SSA–2020–0067].

The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than March 8, 2021. Individuals can obtain copies of the collection instruments by writing to the above email address.

[21] 17 CFR 200.30–3(a)(12).

1. Retaining Employment and Talent After Injury/Illness Network (RETAIN)—0960–NEW.

Background

The Social Security Administration (SSA) and the U.S. Department of Labor (DOL) are undertaking the Retaining Employment and Talent After Injury/Illness Network (RETAIN) demonstration. The RETAIN demonstration will test the impact of early intervention strategies to improve stay-at-work/return-to-work (SAW/RTW) outcomes of individuals who experience work disability while employed. We define ''work disability'' as an injury, illness, or medical condition that has the potential to inhibit or prevent continued employment or labor force participation. SAW/RTW programs succeed by returning injured or ill workers to productive work as soon as medically possible during their recovery process, and by providing interim part-time or light duty work and accommodations, as necessary. The RETAIN demonstration is loosely modeled after promising programs operating in Washington State, including the Centers of Occupational Health and Education (COHE), the Early Return to Work (ERTW), and the Stay at Work programs. While these programs operate within the state's workers' compensation system, and are available only to people experiencing work-related injuries or illnesses, the RETAIN demonstration provides opportunities to improve SAW/RTW outcomes for both occupational and non-occupational injuries and illnesses of people who are employed, or at a minimum in the labor force, when their injury or illness occurs.

The primary goals of the RETAIN demonstration are:

1. To increase employment retention and labor force participation of individuals who acquire, or are at risk of developing, work disabilities; and

2. To reduce long-term work disability among RETAIN service users, including the need for Social Security Disability Insurance and Supplemental Security Income.

The ultimate purpose of the demonstration is to validate and expand implementation of evidence-based strategies to accomplish these goals. DOL is funding the intervention approaches and programmatic technical assistance for the demonstration. SSA is funding evaluation support, including technical assistance and the full evaluation for the demonstration.

Project Description

The demonstration consists of two phases. The first involves the implementation and assessment of cooperative awards to eight states to conduct planning and start-up activities, including the launch of a small pilot demonstration. During phase 1, SSA will provide evaluation-related technical assistance and planning, and conduct evaluability assessments to assess which states' projects would allow for a rigorous evaluation if continued beyond the pilot phase. DOL will select a subset of the states to continue to phase 2, full implementation.

Phase 2 will include a subset of states for full implementation and evaluation. During phase 2, DOL will fund the operations and program technical assistance activities for the recommended states, and SSA will fund the full set of evaluation activities.

SSA is requesting clearance for the collection of data needed to implement and evaluate RETAIN. The four components of this evaluation, completed during site visits, interviews with RETAIN service users, surveys of RETAIN enrollees, and surveys of RETAIN service providers, include:

- *The participation analysis:* Using RETAIN service user interviews and surveys, this analysis will provide insights into which eligible workers choose to participate in the program, in what ways they participate, and how services received vary with participant characteristics. Similarly, it will assess the characteristics of, and if possible, reasons for non-enrollment of non-participants.
- *The process analysis:* Using staff interviews and logs, this analysis will produce information about operational features that affect service provision; perceptions of the intervention design by service users, providers, administrators, and other stakeholders; the relationships among the partner organizations; each program's fidelity to the research design; and lessons for future programs with similar objectives.
- *The impact analysis:* This analysis will produce estimates of the effects of the interventions on primary outcomes, including employment and Social Security disability applications, and secondary outcomes, such as health and service usage. SSA will identify evaluation designs for each state to generate impact estimates. The evaluation design could include experimental or non-experimental designs.
- *The cost-benefit analysis:* This analysis will assess whether the benefits

of RETAIN justify its costs. We conduct this assessment from a range of perspectives, including those of the participants, state and Federal governments, SSA, and society as a whole.

The proposed data collections to support these analyses include qualitative and quantitative data. At this time, SSA requests clearance for all of these data collection activities. The qualitative data collection consists of: (1) Semi-structured interviews with program staff and service users; and (2) staff activity logs. The program staff will complete interviews during two rounds of site visits. They will focus on staff's perceptions of the successes and challenges of implementing each state's program. The staff activity logs will house information on staff's time to inform the benefit-cost analysis. The service user interviews will inform SSA's understanding of users' experiences with program services. The quantitative data include SSA's program records and survey data. The survey data collection consists of: (1) Two rounds of follow-up surveys, focusing on individual-level outcomes, with enrollees, all of whom who have experienced a disability onset; and (2) two rounds of surveys with RETAIN providers.

The respondents are staff members selected for staff interviews and staff activity logs, and RETAIN service users, enrollees, and providers.

Type of Request: Request for a new information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes) **	Total annual opportunity cost (dollars) ***
RETAIN 2021 Burden Figures							
Enrollee Survey Round 1 (Respondents)	320	1	15	80	* $25.72	** 24	*** $5,350
Enrollee Survey Round 1 (Nonrespondents)	80	1	3	4	* 25.72	** 24	*** 926
Totals	400			84			*** 6,276
RETAIN 2022 Burden Figures							
Staff Interviews (state administrators/directors)	4	1	105	7	* 45.23	24	*** 407
Staff Interviews (program line staff)	72	1	75	90	* 32.58	** 24	*** 3,870
Service User Interviews (Respondents)	60	1	36	36	* 25.72	** 24	*** 1,543
Service User Interviews (Nonrespondents)	540	1	6	54	* 25.72	** 24	*** 6,945
Staff Activity Logs (state administrators/directors)	4	1	70	5	* 45.23	** 24	*** 298
Staff Activity Logs (program line staff)	48	1	70	56	32.58	** 24	*** 2,450
Enrollee Survey Round 1 (Respondents)	3,840	1	15	960	* 25.72	** 24	*** 64,197
Enrollee Survey Round 1 (Nonrespondents)	960	1	3	48	* 25.72	** 24	*** 11,111
Enrollee Survey Round 2 (Respondents)	960	1	21	336	25.72	** 24	*** 18,518
Enrollee Survey Round 2 (Nonrespondents)	240	1	3	12	25.72	24	*** 2,778
Provider Survey Round 2 (Respondents)	320	1	17	91	* 32.58	** 24	*** 7,135
Provider Survey Round 2 (Nonrespondents)	80	1	3	4	* 32.58	** 24	*** 1,173
Totals	7,128			1,699			*** 120,425
RETAIN 2023 Burden Figures							
Enrollee Survey Round 1 (Respondents)	3,840	1	15	960	* 25.72	** 24	*** 64,197
Enrollee Survey Round 1 (Nonrespondents)	960	1	3	48	25.72	24	*** 11,111
Enrollee Survey Round 2 (Respondents)	3,840	1	21	1,344	* 25.72	** 24	*** 74,074
Enrollee Survey Round 2 (Nonrespondents)	960	1	3	48	* 25.72	** 24	*** 11,111
Provider Survey Round 2 (Respondents)	320	1	17	91	* 32.58	** 24	*** 7,135
Provider Survey Round 2 (Nonrespondents)	80	1	3	4	* 32.58	** 24	*** 1,173
Totals	10,000			2,495			*** 168,801
RETAIN 2024 Burden Figures							
Enrollee Survey Round 1 (Respondents)	1,600	1	15	400	* 25.72	** 24	*** 26,749
Enrollee Survey Round 1 (Nonrespondents)	400	1	3	20	* 25.72	** 24	*** 4,629
Enrollee Survey Round 2 (Respondents)	3,840	1	21	1,344	* 25.72	** 24	*** 74,074
Enrollee Survey Round 2 (Nonrespondents)	960	1	3	48	* 25.72	** 24	*** 11,111
Totals	6,800			1,812			*** 116,563
RETAIN 2025 Burden Figures							
Enrollee Survey Round 2 (Respondents)	960	1	21	336	* 25.72	** 24	*** 18,518
Enrollee Survey Round 2 (Nonrespondents)	240	1	3	12	* 25.72	** 24	*** 2,778
Totals	1,200			348			*** 21,296
RETAIN Grand Total Burden Figures							
Totals	25,528			6,438			*** 433,361

* We based these figures on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*), and average local Government Management and staff hourly wages, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes110000.htm*) & (*https://www.bls.gov/oes/current/oes131071.htm*).

** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

2. *Internet and Telephone Appointment Applications—20 CFR 404.620–404.630, and 416.330–416.340—0960–NEW.* SSA offers both internet and telephone appointment options for individuals who wish to request an appointment when they are unable to complete one of SSA's online or automated telephone applications because they failed the initial verification checks,—or who state their reading language preference is other than English.

iAppointment: iAppointment is an online process that allows members of the public an easy-to-use method to schedule an appointment with the servicing office of their choice. Since the application date can affect when a claimant's benefit begins, iAppointment establishes a protective filing date and provides respondents information related to the date by which they must file their actual application. The iAppointment application propagates information the applicant already entered onto any of SSA's internet applications for SSN, name, date of birth, and gender. Applicants must provide minimal additional information: Mailing address; telephone number; language preference; type of appointment (Disability, Retirement, Medicare); and whether they prefer a telephone interview or in-office appointment. iAppointment is a customer-centric application. If the available appointment times do not meet the customer's needs, iAppointment allows the user to enter a different zip code to identify another field office, which may offer different appointment times. At this time, SSA only allows domestic first party applicants to use iAppointment. If users indicate they are filing as third parties, iAppointment provides a message directing them to call the National 800 Number for assistance. If a foreign first party user is unable to complete iClaim, iAppointment directs them to contact a Social Security representative, and provides a link to SSA's Service Around the World website.

Enhanced Leads and Appointment System (eLAS): eLAS is an Intranet-based version of the iAppointment screens for use by SSA technicians both in the field offices and call centers. eLAS interacts with iAppointment to ensure we always record the same information whether an individual requests an appointment through our internet screens or via telephone. eLAS is a non-public facing system that allows SSA employees in the field offices, workload support units, and teleservice centers to use an telephone interview process to schedule appointments and document an individual's intent to file using a script and asking the same questions to each individual. We use eLAS with individuals who use our automated telephone system or who prefer not to use iAppointment to set up their appointment.

The respondents are individuals who are unable to use our internet or automated telephone systems because they failed the initial verification checks; or because they state their reading language preference is other than English.

Type of Request: Request for a new information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average combined wait time in field office or for teleservice center (minutes) **	Total annual opportunity cost (dollars) ***
iAppointment	17,621	1	10	2,937	* $25.72	.....	*** $75,540
eLAS	5,157,780	1	10	859,630	* 25.72	** 21	*** 68,540,019
Totals	5,175,401	.....	.....	862,567	.....	.....	*** 68,615,559

* We based these figures on average U.S. worker's hourly wages (based on *BLS.gov* data, *https://www.bls.gov/oes/current/oes_nat.htm*).

** We based this figure on the combined average FY 2020 wait times for field offices (approximately 24 minutes per respondent) and teleservice centers (approximately 17 minutes per respondent), based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

3. *Statement of Living Arrangements, In-Kind Support, and Maintenance—20 CFR 416.1130–416.1148—0960–0174.* SSA determines Supplemental Security Income (SSI) payment amounts based on individuals' needs. We measure individuals' needs, in part, by the amount of income they receive, including in-kind support and maintenance in the form of food and shelter provided by other persons. SSA uses Form SSA–8006 to determine if in-kind support and maintenance exists for SSI applicants and recipients. This information also assists SSA in determining the income value of in-kind support and maintenance. The respondents are individuals who apply for SSI payments, or who complete an SSI eligibility redetermination.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average combined wait time in field office or for teleservice center (minutes) **	Total annual opportunity cost (dollars) ***
SSA–8006—Intranet version (SSI Claims System)	109,436	1	7	12,768	* $10.73	** 17	*** $469,706
SSA—8006–Paper version	12,160	1	7	1,419	* 10.73	** 24	*** 67,417
Totals	121,596	.....	.....	14,187	.....	.....	*** 537,123

* We based this figure on average DI payments based on SSA's current FY 2020 data (*https://www.ssa.gov/legislation/2020Fact%20Sheet.pdf*).

** We based this figure on the average FY 2020 wait times for field offices (24 minutes) and wait times for teleservice centers (17 minutes), based on SSA's current management information data.

*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

4. Statement of Funds You Provided to Another and Statement of Funds You Received—20 CFR 416.1103(f)—0960–0481. SSA uses Forms SSA–2854 (Statement of Funds You Provided to Another) and SSA–2855 (Statement of Funds You Received) to gather information to verify if a loan is bona fide for SSI recipients. The SSA–2854 asks the lender for details on the transaction, and Form SSA–2855 asks the borrower the same basic questions independently. Agency personnel then compare the two statements, gather evidence if needed, and make a decision on the validity of the bona fide status of the loan.

For SSI purposes, we consider a loan bona fide if it meets these requirements:

- Must be between a borrower and lender with the understanding that the borrower has an obligation to repay the money;
- Must be in effect at the time the cash goes to the borrower, that is, the agreement cannot come after the cash is paid; and
- Must be enforceable under State law, as often there are additional requirements from the State.

SSA collects this information at the time of initial application for SSI, or at any point when an individual alleges being party to an informal loan while receiving SSI. SSA collects information on the informal loan through both interviews and mailed forms. The agency's field personnel conduct the interviews and mail the form(s) for completion, as needed. The respondents are SSI recipients and applicants, and individuals who lend money to them.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average combined wait time in field office or for teleservice center (minutes) **	Total annual opportunity cost (dollars) **
SSA–2854	20,000	1	15	5,000	* $25.72	** 24	*** $334,360
SSA–2855	20,000	1	15	5,000	* 25.72	** 24	*** 334,360
Totals	40,000			10,000			*** 668,720

* We based this figure on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).
** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

5. Medicare Subsidy Quality Review Forms—20 CFR part 418—0960–0707. The Medicare Modernization Act of 2003 mandated the creation of the Medicare Part D prescription drug coverage program and provides certain subsidies for eligible Medicare beneficiaries to help pay for the cost of prescription drugs. As part of its stewardship duties of the Medicare Part D subsidy program, SSA must conduct periodic quality review checks of the information Medicare beneficiaries report on their subsidy applications (Form SSA–1020). SSA uses the Medicare Quality Review program to conduct these checks. The respondents are applicants for the Medicare Part D subsidy whom SSA chose to undergo a quality review.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Total annual opportunity cost (dollars) ***
SSA–9301 (Medicare Subsidy Quality Review Case Analysis Form	3,500	1	30	1,750	* $40.64	** $71,120
SSA–9302 (Notice of Quality Review Acknowledgment Form for those with Phones)	3,500	1	15	875	* 25.72	** 22,505
SSA–9303 (Notice of Quality Review Acknowledgment Form for those without Phones)	350	1	15	88	* 25.72	** 2,263
SSA–9308 (Request for Information)	7,000	1	15	1,750	* 25.72	** 45,010
SSA–9310 (Request for Documents)	3,500	1	5	292	* 25.72	** 7,510
SSA–9311 (Notice of Appointment—Denial—Reviewer Will Call)	450	1	15	113	* 25.72	** 2,906
SSA–9312 (Notice of Appointment—Denial—Please Call Reviewer)	50	1	15	13	* 25.72	** 334
SSA–9313 (Notice of Quality Review Acknowledgment Form for those with Phones)	2,500	1	15	625	* 25.72	** 16,075
SSA–9314 (Notice of Quality Review Acknowledgement Form for those without Phones)	500	1	15	125	* 25.72	** 3,215
Total	21,350			5,631		** 170,938

* We based this figures on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm).*
** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

6. Redetermination of Eligibility for Help with Medicare Prescription Drug Plan Costs—20 CFR 418.3125—0960–0723. Under the Medicare Modernization Act of 2003, SSA conducts low-income subsidy eligibility redeterminations for Medicare beneficiaries who currently receive Medicare Part D subsidy and who meet certain criteria. Respondents complete Form SSA–1026–OCR–SM–REDE under the following circumstances: (1) When individuals became entitled to the Medicare Part D subsidy during the past 12 months; (2) if they were eligible for the Part D subsidy for more than 12 months; or (3) if they reported a change in income, resources, or household size. Part D beneficiaries complete Form SSA–1026–OCR–SM–SCE when they need to report a potentially subsidy-changing event, including the following: (1) Marriage; (2) spousal separation; (3) divorce; (4) annulment of a marriage; (5) spousal death; or (6) moving back in with one's spouse following a separation. The respondents are current recipients of Medicare Part D low-income subsidy who will undergo an eligibility redetermination for one of the reasons mentioned above.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)	Average theoretical hourly cost amount (dollars) *	Average wait time in field office (minutes)**	Total annual opportunity cost (dollars) ***
SSA–1026–OCR–SM–REDE	120,220	1	18	36,066	* $25.72		*** $927,618
SSA–1026–OCR–SM–SCE	3,462	1	18	1,039	* 25.72		*** 26,723
REDE Field Office Interview	50,879	1	18	15,264	* 25.72	** 24	*** 916,033
SCE Field Office Interview	4,441	1	18	1,332	* 25.72	** 24	*** 79,948
Totals	179,002			53,701			*** 1,950,322

* We based this figure on average U.S. citizen's hourly salary, as reported by Bureau of Labor Statistics data (*https://www.bls.gov/oes/current/oes_nat.htm*).
** We based this figure on the average FY 2020 wait times for field offices, based on SSA's current management information data.
*** This figure does not represent actual costs that SSA is imposing on recipients of Social Security payments to complete this application; rather, these are theoretical opportunity costs for the additional time respondents will spend to complete the application. *There is no actual charge to respondents to complete the application.*

Dated: December 20, 2020.

Naomi Sipple,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 2020–29207 Filed 1–5–21; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 11277]

30-Day Notice of Proposed Information Collection: Request for Approval of Special Validation for Travel to a Restricted Country or Area

ACTION: Notice of request for public comment and submission to OMB of proposed collection of information.

SUMMARY: The Department of State has submitted the information collection described below to the Office of Management and Budget (OMB) for approval. In accordance with the Paperwork Reduction Act of 1995 we are requesting comments on this collection from all interested individuals and organizations. The purpose of this Notice is to allow 30 days for public comment.

DATES: Submit comments up to February 5, 2021.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Request for Approval for Multiple-Entry Travel to a Restricted Country or Area.
- *OMB Control Number:* 1405–0228.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* Bureau of Consular Affairs, Passport Services, CA/PPT/S/A.
- *Form Number:* No form.
- *Respondents:* Individuals single or multiple-entry special validation, in accordance with 22 CFR 51.64, to use a U.S. passport to travel to, in, or through a country or area as to which U.S. passports have been declared invalid for such travel pursuant to 22 U.S.C. 211a and Executive Order 11295 (August 5, 1966) and in accordance with 22 CFR 51.63(a).
- *Estimated Number of Respondents:* 150.
- *Estimated Number of Responses:* 150.
- *Average Time per Response for a single entry validation request:* 45 minutes.
- *Average Time per Response for multiple-entry validation request:* 90 minutes.
- *Total Estimated Burden Time:* 150 hours.
- *Frequency:* Once per year when the individual wishes to travel to the restricted country or area, whether for single- or multiple-entry validation request.
- *Obligation to Respond:* Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review.

Abstract of Proposed Collection

The Secretary of State may exercise authority, under 22 U.S.C. 211a, Executive Order 11295 (August 5, 1966), and 22 CFR 51.63, to invalidate all U.S. passports for travel to a country or area if he determines that any of three conditions exist: The country is at war with the United States; armed hostilities are in progress in the country or area; or there is imminent danger to the public health or physical safety of U.S. travelers in the country or area. The regulations of the Department of State provide that an individual's passport may be considered for validation for

travel to, in, or through a country or area despite such restriction if the individual's travel is determined to fall within one of several categories established by the regulation 22 CFR 51.64. Without the requisite validation, use of a U.S. passport for travel to, in, or through a restricted country or area may justify revocation of the passport for misuse under 22 CFR 51.62(a)(3) and subject the traveler to felony prosecution under 18 U.S.C. 1544 for misuse of a passport or other applicable laws.

The categories of persons specified in 22 CFR 51.64(b) as being eligible for consideration for passport validation are as follows:

(a) An applicant who is a professional reporter and journalist whose trip is for the purpose of collecting and making available to the public information about the restricted country or area;

(b) An applicant who is a representative of the American Red Cross or the International Committee of the Red Cross on an officially sponsored Red Cross mission;

(c) An applicant whose trip to the restricted country or area is justified by compelling humanitarian considerations; or

(d) An applicant whose trip to the restricted country or area is otherwise in the national interest.

The information collection solicits data necessary for the Passport Services Directorate to determine whether an applicant is eligible to receive a special validation in his or her U.S. passport book permitting the applicant to make single or multiple round-trips to a restricted country or area, subject to additional requirements. The information requested consists of the applicant's name; a copy of the front and back of the applicant's valid government-issued photo identification card with the applicant's date of birth and signature; current contact information, including telephone number, email and mailing address; a statement explaining the reason that the applicant thinks their trip is in the national interest, including proposed travel dates and the applicant's role and responsibilities on the trip; and supporting documentary evidence, such as a letter from the organization being represented explaining in detail the purpose and intended work to be performed on the trip(s). For those seeking a multiple-entry special validation, applicants must also identify they are seeking the multiple-entry type of special validation and submit the following: Documentation showing the applicant or their organization has a well-established history of traveling to the DPRK to work on well-monitored projects with compelling humanitarian considerations; the applicant's draft itinerary, including proposed dates of travel and the intended work to be performed on each trip; and documentation that shows the applicant's humanitarian work requires that they make multiple trips to the DPRK in the next 365-day period. Those who are approved for a multiple-entry special validation must also submit a final itinerary detailing dates and purpose of travel at least five (5) days prior to each trip to the DPRK while using their multi-entry special validation U.S. passport. Failure to provide the requested information may result in denial of a special validation to use a U.S. passport to travel to, in, or through a restricted country or area.

Effective September 1, 2017, upon determining that there is imminent danger to the public health or physical safety of U.S. travelers in the Democratic People's Republic of Korea (DPRK), the Secretary of State imposed a passport restriction with respect to travel to the DPRK. Such restriction was further renewed in 2018, 2019, and most recently in 2020 for one year, effective September 1, 2020. The estimated number of recipients represents the Department of State's estimate of the annual number of special validations requests individuals will submit who wish to use their U.S. passport to travel to the DPRK, based on the current number of requests following the implementation of the Secretary of State's passport restriction. At this time, there are no other countries or areas that are the subject of passport restrictions pursuant to 22 CFR 51.63.

Methodology

Instructions for individuals seeking to apply for a special validation to use a U.S. passport to travel to, in, or through a restricted country or area is posted on a web page maintained by the Department (*travel.state.gov*). The web page directs applicants to submit the requested information via email to *PPTSpecialValidations@state.gov* or by mail to Office of Adjudication, Passport Services, U.S. Department of State, 44132 Mercure Circle, P.O. Box 1227, Sterling, VA 20166–1227, ATTN: Special Validations.

Information collected in this manner will be used to facilitate the granting of special validations to U.S. nationals who are eligible. The primary purpose of soliciting the information is to establish whether an applicant is within one of the categories specified in the regulations of the Department of State codified at 22 CFR 51.64(b) and therefore eligible to be issued a U.S. passport containing a special validation enabling him or her to make one or multiple entry round-trips to a restricted country or area, and to facilitate the application for a passport of such applicants.

Kevin E. Bryant,

Deputy, Office of Directives Management, Department of State.

[FR Doc. 2020–29202 Filed 1–5–21; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice: 11291]

Notice of Department of State Sanctions Actions; Reimposing Certain Sanctions With Respect to Iran

SUMMARY: The Secretary of State has imposed sanctions on 6 entities and 8 individuals.

DATES: The Secretary of State's determination and selection of certain sanctions to be imposed upon the 6 entities and 8 individuals identified in the **SUPPLEMENTARY INFORMATION** section was effective on October 29, 2020.

FOR FURTHER INFORMATION CONTACT: Taylor Ruggles, Director, Office of Economic Sanctions Policy and Implementation, Bureau of Economic and Business Affairs, Department of State, Washington, DC 20520, tel.: (202) 647 7677, email: *RugglesTV@state.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to Section 3(a) of E.O. 13846, the Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Homeland Security, and the United States Trade Representative, and with the President of the Export-Import Bank, the Chairman of the Board of Governors of the Federal Reserve System, and other agencies and officials as appropriate, is authorized to impose on a person any of the sanctions described in section 4 or 5 of E.O. 13846 upon determining that the person met any criteria set forth in sections 3(a)(i)—3(a)(vi) of E.O. 13846.

The Secretary of State has determined, pursuant to Section 3(a)(ii) of E.O. 13846, that Arya Sasol Polymer Company, Binrin Limited, Bakhtar Commercial Company, Kavian Petrochemical Company, and Strait Shipbrokers PTE. LTD, have knowingly, on or after November 5, 2018, engaged in a significant transaction for the purchase, acquisition, sale, transport, or marketing of petroleum products from Iran.

Pursuant to Section 5(a) of E.O. 13846, the Secretary of State has

selected the following sanctions to be imposed upon Arya Sasol Polymer Company, Binrin Limited, Bakhtar Commercial Company, Kavian Petrochemical Company, and Strait Shipbrokers PTE. LTD:

- Prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the entities have any interest;
- Prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the entities;
- Block all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of the entities, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in;
- Prohibit any United States person from investing in or purchasing significant amounts of equity or debt instruments of the entities;
- Restrict or prohibit imports of goods, technology, or services, directly or indirectly, into the United States from the entities; and
- Impose on the principal executive officer or officers, or persons performing similar functions and with similar authorities, of the entities the sanctions described in sections 5(a)(i)–5(a)(iv) and 5(a)(vi) of E.O. 13846, as selected by the Secretary of State.

Pursuant to Sections 4(e) and 5(a) of E.O. 13846, the Secretary of State has selected the following sanctions to be imposed upon Amir Hossein Bahreini, Lin Na Wei, Murtuza Mustafamunir Basrai, Hosein Firouzi Arani, and Ramezan Oladi, each of whom has been determined to be (i) a corporate officer or principal of the aforementioned entities and (ii) a principal executive officer of the aforementioned entities, or perform similar functions with similar authorities as a principal executive officer:

- Prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which Amir Hossein Bahreini, Lin Na Wei, Murtuza Mustafamunir Basrai, Hosein Firouzi Arani, and Ramezan Oladi have any interest;
- Prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of Amir Hossein Bahreini, Lin Na Wei, Murtuza Mustafamunir Basrai, Hosein Firouzi Arani, and Ramezan Oladi;
- Block all property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person of Amir Hossein Bahreini, Lin Na Wei, Murtuza Mustafamunir BasraiHosein Firouzi Arani, and Ramezan Oladi; and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in; and
- Restrict or prohibit imports of goods, technology, or services, directly or indirectly, into the United States from Amir Hossein Bahreini, Lin Na Wei, Murtuza Mustafamunir Basrai, Hosein Firouzi Arani, and Ramezan Oladi.

Additionally, pursuant to Section 4(e) of E.O. 13846, the Secretary of State shall deny a visa to, and the Secretary of Homeland Security shall exclude from the United States, any alien that the Secretary of State determines is a corporate officer or principal of, or a shareholder with a controlling interest in, a sanctioned person subject to this action.

Peter D. Haas,

Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, Department of State.

[FR Doc. 2020–29200 Filed 1–5–21; 8:45 am]

BILLING CODE 4710–AE–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36454]

Strasburg Rail Road Company—Continuance in Control Exemption—SRC Railway LLC

Strasburg Rail Road Company (SRC), a Class III rail carrier, has filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(2) to continue in control of SRC Railway LLC (Railway LLC), upon Railway LLC becoming a Class III rail carrier.[1] Railway LLC is a newly formed noncarrier entity that is controlled by SRC.

This transaction is related to a concurrently filed verified notice of exemption in *SRC Railway LLC—Lease & Operation Exemption—Strasburg Rail Road Co.,* Docket No. FD 36453. In that proceeding, Railway LLC seeks an exemption to lease and operate approximately 4.25 miles of rail line known as the Strasburg Line in Lancaster County, Pa. (the Line).

The verified notice states that because the Line is solely owned by SRC, lease of the Line to Railway LLC does not constitute a connection within the corporate family. SRC further states that the transaction does not involve a Class I rail carrier. The proposed transaction is therefore exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

The earliest this transaction may be consummated is January 20, 2021, the effective date of the exemption (30 days after the verified notice was filed).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Accordingly, the Board may not impose labor protective conditions here because only Class III carriers are involved.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than January 12, 2021.

All pleadings, referring to Docket No. FD 36454 should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on SRC's representative, Bradon J. Smith, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to SRC, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: December 31, 2020.

[1] SRC states that, although the proposed transaction is wholly within a corporate family and would satisfy the criteria for an exemption under section 1180.2(d)(3), it submitted verified notices for acquisition authority and continuance in control authority given the decision in *Oregon International Port of Coos Bay—Intra-Corporate Family Transaction Exemption,* FD 36199 (STB served Oct. 26, 2018). This notice does not address the appropriateness of section 1180.2(d)(3) in this situation, as the notice satisfies the criteria for section 1180.2(d)(2).

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2020–29257 Filed 1–5–21; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36453]

SRC Railway LLC—Lease and Operation Exemption—Strasburg Rail Road Company

SRC Railway LLC (Railway LLC), a noncarrier, has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to lease from Strasburg Rail Road Company (SRC) and operate approximately 4.25 miles of rail line known as the Strasburg Line in Lancaster County, Pa. (the Line). The Line extends from approximately quarter-milepost 20 at Leaman Place (immediately north of the underpass at U.S. Highway 30 and west of the interchange connection with Norfolk Southern Railway Company and the National Railroad Passenger Corporation (NRPC milepost 56.8)), southwesterly to quarter-milepost 3 at East Strasburg.

This transaction is related to a concurrently filed verified notice of exemption in *Strasburg Rail Road Company—Continuance in Control Exemption—SRC Railway LLC,* Docket No. FD 36454, in which SRC seeks to continue in control of Railway LLC upon Railway LLC's becoming a Class III rail carrier.

Railway LLC states that it will shortly execute agreements with SRC pursuant to which it will lease the Line from SRC. According to Railway LLC, the proposed agreements do not contain any provision that would limit future interchange on the Line with a third-party connecting carrier.

Further, Railway LLC certifies that its projected annual revenue will not exceed $5 million and will not result in Railway LLC becoming a Class I or II rail carrier.

The earliest this transaction may be consummated is January 20, 2021, the effective date of the exemption (30 days after the verified notice was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than January 12, 2021.

All pleadings, referring to Docket No. FD 36453, should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on Railway LLC's representative, Bradon J. Smith, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–3208.

According to Railway LLC, this action is categorically excluded from environmental review under 49 CFR 1105.6(c) and from historic preservation reporting requirements under 49 CFR 1105.8(b).

Board decisions and notices are available at *www.stb.gov.*

Decided: December 31, 2020.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2020–29256 Filed 1–5–21; 8:45 am]

BILLING CODE 4915–01–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

[Docket Number USTR–2020–0042]

Notice of Revision of Section 301 Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute

AGENCY: Office of the United States Trade Representative (USTR).

ACTION: Notice.

SUMMARY: The U.S. Trade Representative has determined to revise the action being taken in this Section 301 investigation to mirror the approach taken by the European Union (EU) in exercising its World Trade Organization (WTO) authorization in the Boeing dispute. In implementing this approach, the U.S. Trade Representative has determined to revise the action by adding certain products of certain EU member States to the list of products subject to additional duties.

DATES: The revisions in Annex I are applicable with respect to products that are entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time on January 12, 2021.

FOR FURTHER INFORMATION CONTACT: For questions about the investigation and revisions announced in this notice, contact Associate General Counsel Megan Grimball, at (202) 395–5725, or Director for Europe Michael Rogers, at (202) 395–3320. For questions on customs procedures or the classification of products identified in the annexes, contact *Traderemedy@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION

A. Proceedings in the Investigation

On April 12, 2019, the U.S. Trade Representative announced the initiation of an investigation to enforce U.S. rights in the WTO dispute against the EU and certain EU member States addressed to subsidies on large civil aircraft. *See* 84 FR 15028 (April 12 notice). The April 12 notice contains background information on the investigation and the dispute settlement proceedings.

The April 12 notice solicited comments on a proposed determination that, *inter alia,* the EU and certain member States have denied U.S. rights under the WTO Agreement, and in particular, under Articles 5 and 6.3 of the Agreement on Subsidies and Countervailing Measures and the General Agreement on Tariffs and Trade 1994, and have failed to comply with the WTO Dispute Settlement Body (DSB) recommendations to bring the WTO-inconsistent subsidies into compliance with WTO obligations. The April 12 notice invited public comments on a proposed action in the form of an additional *ad valorem* duty of up to 100 percent on products of EU member States to be drawn from a list of 317 tariff subheadings and 9 statistical reporting numbers of the Harmonized Tariff Schedule of the United States (HTSUS) included in the annex to that notice.

On July 5, 2019, USTR published a notice inviting public comments on a second list of products also being considered for an additional *ad valorem* duty of up to 100 percent. *See* 84 FR 32248.

On October 2, 2019, the WTO Arbitrator issued a report concluding that the appropriate level of countermeasures in response to the WTO-inconsistent launch aid provided by the EU or certain member States to their large civil aircraft domestic industry is approximately $7.5 billion annually.

On October 9, 2019, the U.S. Trade Representative published a determination that the EU and certain member States have denied U.S. rights under the WTO Agreement and have failed to implement DSB recommendations concerning certain subsidies to the EU large civil aircraft industry. The U.S. Trade Representative determined to take action in the form of additional duties on products of certain current or former member States of the EU, at levels of 10 or 25 percent *ad valorem,* effective October 18, 2019. *See* 84 FR 54245 (October 9, 2019) and 84 FR 55998 (October 18, 2019).

On December 12, 2019, the U.S. Trade Representative announced a review of

the action and invited public comments regarding potential revisions. *See* 84 FR 67992. As part of that review, on February 14, 2020, the U.S. Trade Representative announced a determination to revise the list of non-aircraft products subject to 25 percent additional duties and to increase additional duties on certain large civil aircraft from 10 to 15 percent, effective March 5 and March 18. *See* 85 FR 10204 (February 21, 2020) and 85 FR 14517 (March 12, 2020). The U.S. Trade Representative also determined that ''going forward, the action may be revised as appropriate immediately upon any EU imposition of additional duties on U.S. products in connection with the Large Civil Aircraft dispute or with the EU's WTO challenge to the alleged subsidization of U.S. large civil aircraft.''

On June 26, 2020, the U.S. Trade Representative published a notice announcing another review of the action and establishing a docket to receive public comments. *See* 85 FR 38488 (June 26 notice). The June 26 notice included a proposal to impose additional duties of up to 100 percent on a new list of products of France, Germany, Spain and the United Kingdom, covered by an additional 30 tariff subheadings with an approximate annual trade value of $3.1 billion in terms of estimated import trade value for calendar year 2018. *See* June 26 notice, as amended by 85 FR 39661 (July 1, 2020).

On August 12, 2020, the U.S. Trade Representative announced certain revisions to the action. *See* 85 FR 50866 (August 18, 2020). The notice reiterated the U.S. Trade Representative's prior determination that ''the action may be revised as appropriate immediately upon any EU imposition of additional duties on U.S. products.''

On November 9, 2020, the EU announced that it would impose additional duties on goods of the United States, effective November 10, 2020. Specifically, the EU determined to impose additional duties of 15 percent on imports of certain large civil aircraft of the United States, and additional duties of 25 percent on other U.S. goods. The EU stated that its action has an annual trade value of $4 billion. The EU's action followed a decision by the WTO arbitrator in *United States—Measure Affecting Trade in Large Civil Aircraft (DS353)*, and a corresponding WTO authorization for the EU to suspend WTO concessions to the United States.

The EU has represented that its retaliatory action mirrors the action taken by the United States in this investigation, but that is not accurate. Specifically, the EU's action does not mirror the U.S. action because the methodology used by the EU to exercise its $4 billion authorization relies on a benchmark reference period affected by the economic downturn caused by the COVID pandemic. Under this methodology, the EU was able to cover a greater volume of imports than if, like the United States, it had used data from a period when trade was not affected by the pandemic.

In addition, up to and until the exit of the United Kingdom from EU customs territory is finalized, goods of the United States are subject to additional EU duties when entering the United Kingdom. However, the EU's trade action valuation does not account for U.S. exports to the United Kingdom. Therefore, the value of U.S. exports subject to tariffs is greater than the trade value the EU ascribes to the various covered tariff lines.

The United States has expressed its concerns to the EU and has given the EU an opportunity to address these issues. The EU has declined to do so.

B. Revision of Action

In light of these developments, the U.S. Trade Representative determined to make a further revision of the action in this investigation as part of the ongoing efforts toward a satisfactory resolution of the dispute. The revision takes account of public comments received in the investigation, advice of advisory committees, and advice of the interagency Section 301 Committee.

In particular, the U.S. Trade Representative has determined to mirror the EU approach to exercising its DSB authorization by adjusting the reference period used for the U.S. trade action to mirror the August 2019 to July 2020 reference period used by the EU. In adopting this approach, the United States has made appropriate adjustments to ensure that the trade data from the revised reference period does not reflect reductions in trade resulting from the October 2019 trade action in the investigation. Using the estimated trade values from this reference period, the value of the U.S. trade action as last revised on August 12, 2020, is well below the $7.5 billion level authorized by the DSB.

In order to exercise the DSB authorization to the United States, the U.S. Trade Representative has determined to add products to the list of products currently subject to additional duties, while otherwise maintaining the trade action as last revised on August 12, 2020. In considering actions most likely to result in the EU's implementation of DSB recommendations or a mutually satisfactory resolution of the dispute, the U.S. Trade Representative has determined that the additional products should be goods of France and Germany, as these countries have provided the greatest level of WTO-inconsistent large civil aircraft subsidies.

As specified in the annexes to this notice, additional goods of France and Germany are subject to additional duties. These goods were drawn from the proposed lists in the April 12, 2019 notice.

In accordance with section 306(b)(2)(F) of the Trade Act (19 U.S.C. 2416(b)(2)(F)), the action includes reciprocal goods of the affected industry. The annual trade value of the tariff subheadings subject to additional duties under the revised action remains at approximately $7.5 billion, which is consistent with the WTO Arbitrator's finding on the appropriate level of countermeasures in the United States' dispute against the EU involving large civil aircraft.

Annex I to this notice identifies the products affected by the revised action, the rate of duty to be assessed, and the current or former EU member States affected. Annex II, section 1, contains the unofficial descriptive list of the revisions made by this Notice. Annex II, section 2, contains an unofficial, consolidated description of the action, reflecting the changes in annex I.

In order to implement this determination, effective January 12, 2021, subchapter III of chapter 99 of the HTSUS is modified by annex I to this notice. The additional duties provided for in the HTSUS subheadings established by annex I apply in addition to all other applicable duties, fees, exactions and charges.

Any product listed in annex I to this notice, except any product that is eligible for admission under 'domestic status' as defined in 19 CFR 146.43, which is subject to the additional duty imposed by this determination, and is admitted into a U.S. foreign trade zone on or after 12:01 a.m. eastern standard time on January 12, 2021, only may be admitted as 'privileged foreign status' as defined in 19 CFR 146.41. Such products will be subject upon entry for consumption to any *ad valorem* rates of duty or quantitative limitations related to the classification under the applicable HTSUS subheading.

The U.S. Trade Representative will continue to consider the action taken in this investigation.

Joseph Barloon,

General Counsel, Office of the United States Trade Representative.

ANNEX I

A. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time January 12, 2021, U.S. note 21 to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified as provided herein:

1. U.S. note 21(a) to such subchapter is modified by deleting "9903.89.55" each place that it appears and inserting "9903.89.63" in lieu thereof.

2. U.S. note 21 to such subchapter is modified by inserting in alphabetical order:
   "(s) Subheading 9903.89.57 and superior text thereto shall apply to all of the following products of France and Germany:

   (1) Spirits obtained by distilling grape wine or grape marc (grape brandy), other than Pisco and Singani, in containers each holding not over 4 liters, valued over $38 per proof liter (provided for in subheading 2208.20.40); and

   (2) Products classified in the following 8-digit subheadings:

2204.21.20	2204.22.20	2204.29.61
2204.21.30	2204.22.40	2204.29.81
2204.21.60	2204.22.60	2204.30.00
2204.21.80	2204.22.80	

(t) For purposes of subheading 9903.89.61:

(i) "Fuselages and fuselage sections" means: (a) the complete, tube-like structure comprising the central body portion of an airplane, including accommodations for crew, passengers, and/or cargo, whether or not containing systems, insulation, or other articles; and (b) sections of articles described in (a) that have exterior side surfaces attached to exterior top/crown and bottom/keel surfaces, whether or not designed to be pressurized, and whether or not there are additional articles attached. The term "fuselages and fuselage sections" shall not cover airplane parts, components, or subassemblies *(e.g.,* aft pressure bulkheads, floor panels, seats) when imported unattached to the articles described in (a) and (b) of this subdivision.

(ii) "Wings and wing assemblies (other than wings having exterior surfaces of carbon composite material)" means: (a) left or right handed outboard wing structures with fixed structures, whether or not also including moveable structures, having exterior surfaces of other than carbon composite material; (b) center wing boxes having exterior surfaces of other than carbon composite material; and (c) wing assemblies that combine an outboard wing structure with a fixed structure (whether or not having moveable structure) and a center wing boxes, having exterior surfaces of other than carbon composite material. The term "wings and wing assemblies (other than wings having exterior surfaces of carbon composite material)" shall not cover airplane parts, components or subassemblies when imported unattached to the articles described in in (a), (b), or (c) of this subdivision.

(iii) "Horizontal and vertical stabilizers" means a horizontal or vertical stabilizer, whether or not attached to elevators or fuselage/tail cone/empennages structures. The term "horizontal and vertical stabilizers" does not cover elevators or rudders when imported unattached to a fuselage, tail cone, or empennage structure.

Such subheading shall not cover other parts of airplanes or helicopter not covered by the definitions set forth in this subdivision.".

B. Effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern standard time January 12, 2021, the following new tariff provisions are inserted in numerical sequence in subchapter III of chapter 99, with the material in the following new tariff provisions inserted in the columns entitled "Heading/Subheading", "Article Description", and "Rates of Duty 1-General", respectively:

Heading/ Subheading		Article description	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
		"Articles the product of France or Germany:			
9903.89.57		Provided for in subheadings enumerated in U.S. note 21(s) to this subchapter.....	The duty provided in the applicable subheading + 25%		
9903.89.59		Spirits obtained by distilling grape wine or grape marc (grape brandy), other than Pisco and Singani, in containers each holding not over 4 liters, valued over $3.43/liter (provided for in subheading 2208.20.40), the forgoing not described in subheading 9903.89.57.....	The duty provided in the applicable subheading		
		Articles the product of France or Germany:			
9903.89.61		Fuselages and fuselage sections, wings and wing assemblies (other than wings having exterior surfaces of carbon composite material), horizontal stabilizers, and vertical stabilizers as defined in U.S. note 21(t), suitable for use solely or principally with new airplanes and other aircraft of an unladen weight over 30,000 kg as described in subheading 9903.89.05 (described in statistical reporting number 8803.30.0030).....	The duty provided in the applicable subheading + 15%		
9903.89.63		Other parts of airplanes or helicopters (provided for in statistical reporting number 8803.30.0030), the foregoing not described in subheading 9903.89.61...	The duty provided in the applicable subheading"		

ANNEX II

Section 1 – Descriptive List of Changes from Annex II

Note: The product descriptions that are contained this Annex are provided for informational purposes only, and are not intended to delimit in any way the scope of the action, except as specified below. In all cases, the formal language in Annex 1 governs the tariff treatment of products covered by the action. Section 1 of this Annex describes the changes to the action that were undertaken as a result of Annex 1, as reflected in the informal list presented in Section 2 of this Annex.

Any questions regarding the scope of particular HTS subheadings should be referred to U.S. Customs and Border Protection. In the product descriptions, the abbreviation "nesoi" means "not elsewhere specified or included".

The following changes are made effective January 12, 2021.

a) The following products of France and Germany have been added to the action, and included in Part 18, which has been inserted in the descriptive list in Section 2.

HTS Subheading	Product Description
2204.21.20	Effervescent grape wine, in containers holding 2 liters or less
2204.21.30	Tokay wine (not carbonated) not over 14% alcohol, in containers not over 2 liters
2204.21.60	"Marsala" wine, over 14% vol. alcohol, in containers holding 2 liters or less
2204.21.80	Grape wine, other than "Marsala", not sparkling or effervescent, over 14% vol. alcohol, in containers holding 2 liters or less
2204.22.20	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume <=14% in containers holding over 2 liters but not over 4 liters
2204.22.40	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume >14% in containers holding over 2 liters but not over 4 liters
2204.22.60	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume <=14% in containers holding over 4 liters but not over 10 liters
2204.22.80	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume >14% in containers holding over 4 liters but not over 10 liters
2204.29.61	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume <=14% in containers holding >10 liters
2204.29.81	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume >14% in containers holding >10 liters
2204.30.00	Grape must, nesoi, in fermentation or with fermentation arrested otherwise than by addition of alcohol
2208.20.40**	Spirits obtained by distilling grape wine or grape marc (grape brandy), other than Pisco and Singani, in containers each holding not over 4 liters, valued over $38 per proof liter

**Only a portion of HS8 digit is to be covered

b) The following products of France and Germany have been added to the action, and included in Part 19, which has been inserted in the descriptive list in Section 2.

HTS Subheading	Product Description
8803.30.00**	Fuselages and fuselage sections, wings and wing assemblies (other than wings having exterior surfaces of carbon composite material), horizontal stabilizers, and vertical stabilizers as defined in U.S. note 21(t), suitable for use solely or principally with new airplanes and other aircraft of an unladen weight over 30,000 kg as described in subheading 9903.89.05 (described in statistical reporting number 8803.30.0030)

**Only a portion of HS8 digit is to be covered

Section 2 – Descriptive List of Action, reflecting changes as described in Annex 1

Note: The product descriptions that are contained this Annex are provided for informational purposes only, and are not intended to delimit in any way the scope of the action, except as specified below. In all cases, the formal language in Annex 1 and the notices published at 84 FR 54245, 84 FR 55998, 85 FR 10204, 85 FR 50866 governs the tariff treatment of products covered by the action.

Any questions regarding the scope of particular HTS subheadings should be referred to U.S. Customs and Border Protection. In the product descriptions, the abbreviation "nesoi" means "not elsewhere specified or included".

Part 1 – Products of France, Germany, Spain, or the United Kingdom described below are subject to additional import duties of 15 percent ad valorem.

Note: For purposes of the 8-digit subheading of HTS listed below, the product description defines and limits the scope of the proposed action.

HTS Subheading	Product Description
8802.40.00**	New airplanes and other new aircraft, as defined in U.S. note 21(b), (other than military airplanes or other military aircraft), of an unladen weight exceeding 30,000 kg (described in statistical reporting numbers 8802.40.0040, 8802.40.0060 or 8802.40.0070)

**Only a portion of HS8 digit is to be covered

Part 2 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0403.10.50	Yogurt, in dry form, whether or not flavored or containing added fruit or cocoa, not subject to gen note 15 or add. US note 10 to Ch.4

HTS Subheading	Product Description
0403.90.85	Fermented milk o/than dried fermented milk or o/than dried milk with added lactic ferments
0403.90.90	Curdled milk/cream/kephir & other fermentd or acid. milk/cream subject to add US note 10 to Ch.4
0405.20.20	Butter substitute dairy spreads, over 45% butterfat weight, subject to quota pursuant to chapter 4 additional US note 14
0406.10.28	Fresh (unripened/uncured) cheddar cheese, cheese/subs for cheese cont or proc from cheddar cheese, not subj to Ch4 US note 18, not GN15
0406.10.54	Fresh (unripened/uncured) Italian-type cheeses from cow milk, cheese/substitutes containing such Italian-type cheeses or processed therefrom, subj to Ch4 US note 21, not subject to general note 15
0406.10.58	Fresh (unrip./uncured) Italian-type cheeses from cow milk, cheese/substitutes cont or proc therefrom, not subj to Ch4 US note 21 or GN15
0406.10.68	Fresh (unripened/uncured) Swiss/Emmentaler cheeses, except those with eye formation, gruyere-process cheese and cheese cont or proc. from such, not subject to additional US note 22 to ch4.
0406.20.51	Romano, reggiano, provolone, provoletti, sbrinz and goya, made from cow's milk, grated or powdered, subject to additional US note 21 to Ch.4
0406.20.53	Romano, reggiano, provolone, provoletti, sbrinz and goya, made from cow's milk, grated or powdered, not subject to Ch4 US note 21 or GN15
0406.20.69	Cheese containing or processed from american-type cheese (except cheddar), grated or powdered, subject to additional US note 19 to Ch. 4
0406.20.77	Cheese containing or processed from italian-type cheeses made from cow's milk, grated or powdered, subject to additional US note 21 to Ch. 4
0406.20.79	Cheese containing or processed from italian-type cheeses made from cow's milk, grated or powdered, not subject to additional US note 21 to Ch. 4
0406.20.87	Cheese (including mixtures), nesoi, n/o 0.5 percent by wt. of butterfat, grated or powdered, not subject to additional US note 23 to Ch. 4
0406.20.91	Cheese (including mixtures), nesoi, o/0.5 percent by wt of butterfat, w/cow's milk, grated or powdered, not subject to additional US note 16 to Ch. 4
0406.30.05	Stilton cheese, processed, not grated or powdered, subject to additional US note 24 to Ch. 4
0406.30.18	Blue-veined cheese (except roquefort), processed, not grated or powdered, not subject to gen. note 15 or additional US note 17 to Ch. 4
0406.30.28	Cheddar cheese, processed, not grated or powdered, not subject to gen note 15 or to additional US note 18 to Ch. 4
0406.30.34	Colby cheese, processed, not grated or powdered, subject to additional US note 19 to Ch. 4
0406.30.38	Colby cheese, processed, not grated or powdered, not subject to gen note 15 or additional US note 19 to Ch. 4
0406.30.55	Processed cheeses made from sheep's milk, including mixtures of such cheeses, not grated or powdered

HTS Subheading	Product Description
0406.30.69	Processed cheese containing or processed from american-type cheese (except cheddar), not grated/powdered, subject to additional US note 19 to Ch. 4, not subject to GN15
0406.30.79	Processed cheese containing or processed from Italian-type, not grated/powdered, not subject to additional US note 21 to Ch. 4, not GN15
0406.40.44	Stilton cheese, nesoi, in original loaves, subject to additional US note 24 to Ch. 4
0406.40.48	Stilton cheese, nesoi, not in original loaves, subject to additional US note 24 to Ch. 4
0406.90.32	Goya cheese from cow's milk, not in original loaves, nesoi, not subject to gen. note 15 or to additional US note 21 to Ch. 4
0406.90.43	Reggiano, Parmesan, Provolone, and Provoletti cheese, nesoi, not from cow's milk, not subject to gen. note 15
0406.90.52	Colby cheese, nesoi, subject to additional US note 19 to Ch. 4 and entered pursuant to its provisions
0406.90.54	Colby cheese, nesoi, not subject to gen. note 15 or to add. US note 19 to Ch. 4
0406.90.68	Cheeses & subst. for cheese(incl. mixt.), nesoi, w/romano/reggiano/parmesan/provolone/etc, f/cow milk, not subj. Ch4 US note 21, not GN15
0406.90.72	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/ or from blue-veined cheese, subj. to add. US note 17 to Ch.4, not GN15
0406.90.74	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/ or from blue-veined cheese, not subj. to add. US note 17 to Ch.4, not GN15
0406.90.82	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/ or from Am. cheese except cheddar, subj. to add. US note 19 to Ch.4, not GN15
0406.90.92	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/ or from swiss, emmentaler or gruyere, not subj. Ch4 US note 22, not GN15
0406.90.94	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/butterfat n/o 0.5 percent by wt, not subject to additional US note 23 to Ch. 4, not GN15
0805.10.00	Oranges, fresh or dried
0805.21.00	Mandarins and other similar citrus hybrids including tangerines, satsumas
0805.22.00	Clementines, fresh or dried
0805.50.20	Lemons, fresh or dried
0812.10.00	Cherries, provisionally preserved, but unsuitable in that state for immediate consumption
0813.40.30	Cherries, dried
1602.49.10	Prepared or preserved pork offal, including mixtures
1605.53.05	Mussels, containing fish meats or in prepared meals
1605.56.05	Products of clams, cockles, and arkshells containing fish meat; prepared meals
1605.56.10	Razor clams, in airtight containers, prepared or preserved, nesoi
1605.56.15	Boiled clams in immediate airtight containers, the contents of which do not exceed 680 g gross weight
1605.56.20	Clams, prepared or preserved, excluding boiled clams, in immediate airtight containers, nesoi

HTS Subheading	Product Description
1605.56.30	Clams, prepared or preserved, other than in airtight containers
1605.56.60	Cockles and arkshells, prepared or preserved
1605.59.05	Products of molluscs, other than snails (except for sea snails), containing fish meat; prepared meals of molluscs, other than snails (except for sea snails)
1605.59.60	Molluscs nesoi, prepared or preserved

Part 3 – Products of Germany, Spain, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0203.29.40	Frozen meat of swine, nesoi
0404.10.05	Whey protein concentrates
0406.10.84	Fresh cheese, and substitutes for cheese, cont. cows milk, neosi, over 0.5 percent by wt. of butterfat, descr in add US note 16 to Ch 4, not GN15
0406.10.88	Fresh cheese, and substitutes for cheese, cont. cows milk, neosi, over 0.5 percent by wt. of butterfat, not descr in add US note 16 to Ch 4, not GN 15
0406.10.95	Fresh cheese, and substitutes for cheese, not cont. cows milk, neosi, over 0.5 percent by wt. of butterfat
0406.90.16	Edam and gouda cheese, nesoi, subject to additional US note 20 to Ch. 4
0406.90.56	Cheeses, nesoi, from sheep's milk in original loaves and suitable for grating
1509.10.20	Virgin olive oil and its fractions, whether or not refined, not chemically modified, weighing with the immediate container under 18 kg
1509.90.20	Olive oil, other than virgin olive oil, and its fractions, not chemically modified, weighing with the immediate container under 18 kg
2005.70.12	Olives, green, not pitted, in saline, not ripe
2005.70.25	Olives, green, in a saline solution, pitted or stuffed, not place packed

Part 4 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0403.10.90	Yogurt, not in dry form, whether or not flavored or containing add fruit or cocoa
0405.10.10	Butter subject to quota pursuant to chapter 4 additional US note 6
0405.10.20	Butter not subject to general note 15 and in excess of quota in chapter 4 additional U.S. note 6
0406.30.89	Processed cheese (incl. mixtures), nesoi, w/cow's milk, not grated or powdered, subject to add US note 16 to Ch. 4, not subject to GN15

HTS Subheading	Product Description
0811.90.80	Fruit, nesoi, frozen, whether or not previously steamed or boiled
1601.00.20	Pork sausages and similar products of pork, pork offal or blood; food preparations based on these products
2008.60.00	Cherries, otherwise prepared or preserved, nesoi
2008.70.20	Peaches (excluding nectarines), otherwise prepared or preserved, not elsewhere specified or included
2008.97.90	Mixtures of fruit or other edible parts of plants, otherwise prepared or preserved, nesoi
2009.89.65	Cherry juice, concentrated or not concentrated
2009.89.80	Juice of any single vegetable, other than tomato, concentrated or not concentrated

Part 5 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0405.20.30	Butter substitute dairy spreads, over 45 percent butterfat weight, not subj to gen note 15 and in excess of quota in ch. 4 additional US note 14
0405.20.80	Other dairy spreads, not butter substitutes or of a type provided for in chapter 4 additional US note 1
0406.30.85	Processed cheese (incl. mixtures), nesoi, not over 0.5 percent by wt. butterfat, not grated or powdered, subject to Ch4 US note 23, not GN15
0406.90.78	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/ or from cheddar cheese, not subj. to add. US note 18 to Ch.4, not GN15
1602.41.90	Prepared or preserved pork hams and cuts thereof, not containing cereals or vegetables, nesoi
1602.42.20	Pork shoulders and cuts thereof, boned and cooked and packed in airtight containers
1602.42.40	Prepared or preserved pork shoulders and cuts thereof, other than boned and cooked and packed in airtight containers
1602.49.40	Prepared or preserved pork, not containing cereals or vegetables, nesoi
1602.49.90	Prepared or preserved pork, nesoi

Part 6 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0405.90.10	Fats and oils derived from milk, other than butter or dairy spreads, subject to quota pursuant to chapter 4 additional US note 14

HTS Subheading	Product Description
0406.30.51	Gruyere-process cheese, processed, not grated or powdered, subject to additional US note 22 to Ch. 4
0406.30.53	Gruyere-process cheese, processed, not grated or powdered, not subject to gen note 15 or additional US note 22 to Ch. 4
0406.40.54	Blue-veined cheese, nesoi, in original loaves, subject to add. US note 17 to Ch. 4
0406.90.08	Cheddar cheese, neosi, subject to add. US note 18 to Ch. 4
0406.90.12	Cheddar cheese, nesoi, not subject to gen. note 15 of the HTS or to additional US note 18 to Ch. 4
0406.90.41	Romano, Reggiano, Parmesan, Provolone, and Provoletti cheese, nesoi, from cow's milk, subject to add. US note 21 to Ch. 4
0406.90.42	Romano, Reggiano, Parmesan, Provolone, and Provoletti cheese, nesoi, from cow's milk, not subj to GN 15 or Ch4 additional US note 21
0406.90.48	Swiss or Emmentaler cheese with eye formation, nesoi, not subject to gen. note 15 or to additional US note 25 to Ch. 4
0406.90.90	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/ or from swiss, emmentaler or gruyere, subj. to add. US note 22 to Ch.4, not GN15
0406.90.97	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/cow's milk, w/butterfat over 0.5 percent by wt, not subject to Ch4 US note 16, not subject to GN15
1605.53.60	Mussels, prepared or preserved
2007.99.70	Currant and berry fruit jellies
2008.40.00	Pears, otherwise prepared or preserved, nesoi
2009.89.20	Pear juice, concentrated or not concentrated

Part 7 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0406.90.46	Swiss or Emmentaler cheese with eye formation, nesoi, subject to add. US note 25 to Ch. 4

Part 8 – Products of Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0406.90.57	Pecorino cheese, from sheep's milk, in original loaves, not suitable for grating

Part 9 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0406.90.95	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/cows milk, w/butterfat over 0.5 percent by wt, subject to Ch 4 additional US note 16 (quota)

Part 10 – Products of France, Germany, Spain or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0711.20.18	Olives, n/pitted, green, in saline sol., in contain. > 8 kg, drained wt, for repacking or sale, subject to additional US note 5 to Ch. 7
0711.20.28	Olives, n/pitted, green, in saline sol., in contain. > 8 kg, drained wt, for repacking or sale, not subject to additional US note 5 to Ch. 7
0711.20.38	Olives, n/pitted, nesoi
0711.20.40	Olives, pitted or stuffed, provisionally preserved but unsuitable in that state for immediate consumption
2005.70.08	Olives, green, not pitted, in saline, not ripe, in containers holding over 8 kg for repkg, not subject to add. US note 4 to Ch. 20
2005.70.16	Olives, green, in saline, place packed, stuffed, in containers holding not over 1 kg, aggregate quantity n/o 2700 m ton/yr
2005.70.23	Olives, green, in saline, place packed, stuffed, not in containers holding 1 kg or less
2204.21.50	Wine other than Tokay (not carbonated), not over 14 percent alcohol, in containers not over 2 liters

Part 11 – Products of Germany described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
0901.21.00	Coffee, roasted, not decaffeinated
0901.22.00	Coffee, roasted, decaffeinated
1905.31.00	Sweet biscuits
2101.11.21	Instant coffee, not flavored
8201.40.60	Axes, bill hooks and similar hewing tools (o/than machetes), and base metal parts thereof
8203.20.20	Base metal tweezers
8203.20.60	Pliers (including cutting pliers but not slip joint pliers), pincers and similar tools
8203.30.00	Metal cutting shears and similar tools, and base metal parts thereof
8203.40.60	Pipe cutters, bolt cutters, perforating punches and similar tools, nesoi, and base metal parts thereof

HTS Subheading	Product Description
8205.40.00	Screwdrivers and base metal parts thereof
8211.93.00	Knives having other than fixed blades
8211.94.50	Base metal blades for knives having other than fixed blades
8467.19.10	Tools for working in the hand, pneumatic, other than rotary type, suitable for metal working
8467.19.50	Tools for working in the hand, pneumatic, other than rotary type, other than suitable for metal working
8468.80.10	Machinery and apparatus, hand-directed or -controlled, used for soldering, brazing or welding, not gas-operated
8468.90.10	Parts of hand-directed or -controlled machinery, apparatus and appliances used for soldering, brazing, welding or tempering
8514.20.40	Industrial or laboratory microwave ovens for making hot drinks or for cooking or heating food
9002.11.90	Objective lenses and parts & access. thereof, for cameras, projectors, or photographic enlargers or reducers, except projection, nesoi

Part 12 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
1602.49.20	Pork other than ham and shoulder and cuts thereof, not containing cereals or vegetables, boned and cooked and packed in airtight containers

Part 13 – Products of Germany or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
1905.32.00	Waffles and wafers
4901.10.00	Printed books, brochures, leaflets and similar printed matter in single sheets, whether or not folded
4908.10.00	Transfers (decalcomanias), vitrifiable
4911.91.20	Lithographs on paper or paperboard, not over 0.51 mm in thickness, printed not over 20 years at time of importation
4911.91.30	Lithographs on paper or paperboard, over 0.51 mm in thickness, printed not over 20 years at time of importation
4911.91.40	Pictures, designs and photographs, excluding lithographs on paper or paperboard, printed not over 20 years at time of importation
8429.52.10	Self-propelled backhoes, shovels, clamshells and draglines with a 360 degree revolving superstructure
8429.52.50	Self-propelled machinery with a 360 degree revolving superstructure, other than backhoes, shovels, clamshells and draglines

HTS Subheading	Product Description
8467.29.00	Electromechanical tools for working in the hand, other than drills or saws, with self-contained electric motor

Part 14 – Products of Germany, Ireland, Italy, Spain, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
2208.70.00	Liqueurs and cordials

Part 15 – Products of the United Kingdom described below are subject to additional import duties of 25 percent ad valorem:

Note: For purposes of 2208.30.30, the product description defines and limits the scope of the proposed action.

HTS Subheading	Product Description
2208.30.30**	Single-malt Irish and Scotch Whiskies
6110.11.00	Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted, of wool
6110.12.10	Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted, of Kashmir goats, wholly of cashmere
6110.20.20	Sweaters, pullovers and similar articles, knitted or crocheted, of cotton, nesoi
6110.30.30	Sweaters, pullovers and similar articles, knitted or crocheted, of manmade fibers, nesoi
6202.99.15	Rec perf outwear, women's/girls' anoraks, wind-breakers & similar articles, not k/c, tex mats (not wool, cotton or mmf), cont < 70 percent by wt of silk
6202.99.80	Women's/girls' anoraks, wind-breakers & similar articles, not k/c, of tex mats (not wool, cotton or mmf), cont < 70% by wt of silk,
6203.11.60	Men's or boys' suits of wool, not knitted or crocheted, nesoi, of worsted wool fabric, made of yarn with average fiber diameter of 18.5 micron or less
6203.11.90	Men's or boys' suits of wool or fine animal hair, not knitted or crocheted, nesoi
6203.19.30	Men's or boys' suits, of artificial fibers, nesoi, not knitted or crocheted
6203.19.90	Men's or boys' suits, of textile mats (except wool, cotton or mmf), containing under 70 percent by weight of silk or silk waste, not knit or crocheted
6208.21.00	Women's or girls' nightdresses and pajamas, not knitted or crocheted, of cotton
6211.12.40	Women's or girls' swimwear, of textile materials(except mmf), containing 70% or more by weight of silk or silk waste, not knit or crocheted

HTS Subheading	Product Description
6211.12.80	Women's or girls' swimwear, of textile materials(except mmf), containing under 70% by weight of silk or silk waste, not knit or crocheted
6301.30.00	Blankets (other than electric blankets) and traveling rugs, of cotton
6301.90.00	Blankets and traveling rugs, nesoi
6302.21.50	Bed linen, not knit or crocheted, printed, of cotton, cont any embroidery, lace, braid, edging, trimming, piping or applique work, n/napped
6302.21.90	Bed linen, not knit or croc, printed, of cotton, not cont any embroidery, lace, braid, edging, trimming, piping or applique work, not napped

**Only a portion of HS8 digit is to be covered

Part 16 – Products of France or Germany described below are subject to additional import duties of 25 percent ad valorem:

HTS Subheading	Product Description
8214.90.60	Butchers' or kitchen chopping or mincing knives (o/than cleavers w/their handles)
2007.99.05	Lingonberry and raspberry jams
2007.99.10	Strawberry jam
2007.99.15	Currant and other berry jams, nesoi
2007.99.20	Apricot jam
2007.99.25	Cherry jam
2007.99.35	Peach jam
2007.99.60	Strawberry pastes and purees, being cooked preparations

Part 17 – Products of Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, or the United Kingdom described below are subject to additional import duties of 25 percent ad valorem.

HTS Subheading	Product Description
0406.90.99	Cheeses & subst. for cheese (incl. mixt.), nesoi, w/o cows milk, w/butterfat over 0.5 percent by wt, not subject to GN15

Part 18 – Products of France or Germany described below are subject to additional import duties of 25 percent ad valorem:

Note: For purposes of 2208.20.40, the product description defines and limits the scope of the proposed action.

HTS Subheading	Product Description
2204.21.20	Effervescent grape wine, in containers holding 2 liters or less
2204.21.30	Tokay wine (not carbonated) not over 14% alcohol, in containers not over 2 liters
2204.21.60	"Marsala" wine, over 14% vol. alcohol, in containers holding 2 liters or less
2204.21.80	Grape wine, other than "Marsala", not sparkling or effervescent, over 14% vol. alcohol, in containers holding 2 liters or less
2204.22.20	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume <=14% in containers holding over 2 liters but not over 4 liters
2204.22.40	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume >14% in containers holding over 2 liters but not over 4 liters
2204.22.60	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume <=14% in containers holding over 4 liters but not over 10 liters
2204.22.80	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume >14% in containers holding over 4 liters but not over 10 liters
2204.29.61	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume <=14% in containers holding >10 liters
2204.29.81	Wine of fresh grapes, other than sparkling wine, of an alcoholic strength by volume >14% in containers holding >10 liters
2204.30.00	Grape must, nesoi, in fermentation or with fermentation arrested otherwise than by addition of alcohol
2208.20.40**	Spirits obtained by distilling grape wine or grape marc (grape brandy), other than Pisco and Singani, in containers each holding not over 4 liters, valued over $38 per proof liter

**Only a portion of HS8 digit is to be covered

Part 19 – Products of France or Germany described below are subject to additional import duties of 15 percent ad valorem:
Note: For purposes of the 8-digit subheading of HTS listed below, the product description defines and limits the scope of the proposed action.

HTS Subheading	Product Description
8803.30.00**	Fuselages and fuselage sections, wings and wing assemblies (other than wings having exterior surfaces of carbon composite material), horizontal stabilizers, and vertical stabilizers as defined in U.S. note 21(t), suitable for use solely or principally with new airplanes and other aircraft of an unladen weight over 30,000 kg as described in subheading 9903.89.05 (described in statistical reporting number 8803.30.0030)

**Only a portion of HS8 digit is to be covered

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination of Trade Surplus in Certain Sugar and Syrup Goods and Sugar-Containing Products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Colombia, and Panama

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: In accordance with the Harmonized Tariff Schedule of the United States (HTSUS), the Office of the United States Trade Representative (USTR) is providing notice of its determination of the trade surplus in certain sugar and syrup goods and sugar-containing products of Chile, Morocco, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Peru, Colombia and Panama. The level of a country's trade surplus in these goods relates to the quantity of sugar and syrup goods and sugar-containing products for which the United States grants preferential tariff treatment under (i) the United States-Chile Free Trade Agreement (Chile FTA); (ii) the United States-Morocco Free Trade Agreement (Morocco FTA); (iii) the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA–DR); (iv) the United States-Peru Trade Promotion Agreement (Peru TPA); (v) the United States-Colombia Trade Promotion Agreement (Colombia TPA); and (vi) the United States-Panama Trade Promotion Agreement (Panama TPA).

DATES: This notice is applicable on January 1, 2021.

FOR FURTHER INFORMATION CONTACT: Erin H. Nicholson, Office of Agricultural Affairs, (202) 395–9419 or *Erin.H.Nicholson@ustr.eop.gov.*

SUPPLEMENTARY INFORMATION:

I. Chile FTA

Pursuant to section 201 of the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108–77; 19 U.S.C. 3805 note), Presidential Proclamation No. 7746 of December 30, 2003 (68 FR 75789) implemented the Chile FTA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Chile FTA.

Note 12(a) to subchapter XI of HTSUS chapter 99 requires USTR annually to publish a determination of the amount of Chile's trade surplus, by volume, with all sources for goods in HTSUS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.20, 1702.30, 1702.40, 1702.60, 1702.90, 1806.10, 2101.12, 2101.20, and 2106.90, except that Chile's imports of goods classified under HTSUS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Chile FTA are not included in the calculation of Chile's trade surplus. Proclamation 8771 of December 29, 2011 (77 FR 413) reclassified HTSUS subheading 1701.11 as 1701.13 and 1701.14.

Note 12(b) to subchapter XI of HTSUS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Chile entered under subheading 9911.17.05 in any calendar year (CY) (beginning in CY2015) is the quantity of goods equal to the amount of Chile's trade surplus in subdivision (a) of the note. During CY2019, the most recent year for which data is available, Chile's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 633,441 metric tons according to data published by its customs authority, the Servicio Nacional de Aduana. Based on this data, USTR has determined that Chile's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) to subchapter XI of HTSUS chapter 99, goods of Chile are not eligible to enter the United States duty-free under subheading 9911.17.05 in CY2021.

II. Morocco FTA

Pursuant to section 201 of the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. 108–302; 19 U.S.C. 3805 note), Presidential Proclamation No. 7971 of December 22, 2005 (70 FR 76651) implemented the Morocco FTA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Morocco FTA.

Note 12(a) to subchapter XII of HTSUS chapter 99 requires USTR annually to publish a determination of the amount of Morocco's trade surplus, by volume, with all sources for goods in HTSUS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.40, and 1702.60, except that Morocco's imports of U.S. goods classified under HTSUS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the Morocco FTA are not included in the calculation of Morocco's trade surplus. Proclamation 8771 of December 29, 2011 (77 FR 413) reclassified HTSUS subheading 1701.11 as 1701.13 and 1701.14.

Note 12(b) to subchapter XII of HTSUS chapter 99 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.05 in an amount equal to the lesser of Morocco's trade surplus or the specific quantity set out in that note for that calendar year.

Note 12(c) to subchapter XII of HTSUS chapter 99 provides preferential tariff treatment for certain sugar and syrup goods and sugar-containing products of Morocco entered under subheading 9912.17.10 through 9912.17.85 in an amount equal to the amount by which Morocco's trade surplus exceeds the specific quantity set out in that note for that calendar year.

During CY2019, the most recent year for which data is available, Morocco's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 694,075 metric tons according to data published by its customs authority, the Office des Changes. Based on this data, USTR has determined that Morocco's trade surplus is negative. Therefore, in accordance with U.S. Note 12(b) and U.S. Note 12(c) to subchapter XII of HTSUS chapter 99, goods of Morocco are not eligible to enter the United States duty-free under subheading 9912.17.05 or at preferential tariff rates under subheading 9912.17.10 through 9912.17.85 in CY2021.

II. CAFTA–DR

Pursuant to section 201 of the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109–53; 19 U.S.C. 4031), Presidential Proclamation No. 7987 of February 28, 2006 (71 FR 10827), Presidential Proclamation No. 7991 of March 24, 2006 (71 FR 16009), Presidential Proclamation No. 7996 of March 31, 2006 (71 FR 16971), Presidential Proclamation No. 8034 of June 30, 2006 (71 FR 38509), Presidential Proclamation No. 8111 of February 28, 2007 (72 FR 10025), Presidential Proclamation No. 8331 of December 23, 2008 (73 FR 79585), and Presidential Proclamation No. 8536 of June 12, 2010 (75 FR 34311), implemented the CAFTA–DR on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the CAFTA–DR.

Note 25(b)(i) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of each CAFTA–DR country's trade surplus, by volume, with all sources for goods in HTSUS

subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40, and 1702.60, except that each CAFTA–DR country's exports to the United States of goods classified under HTSUS subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 and its imports of goods classified under HTSUS subheadings 1702.40 and 1702.60 that qualify for preferential tariff treatment under the CAFTA–DR are not included in the calculation of that country's trade surplus.

U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar and syrup goods and sugar-containing products of each CAFTA–DR country entered under subheading 9822.05.20 in an amount equal to the lesser of that country's trade surplus or the specific quantity set out in that note for that country and that calendar year.

A. Costa Rica

During CY2019, the most recent year for which data is available, Costa Rica's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 92,924 metric tons according to data published by the Costa Rican Customs Department, Ministry of Finance. Based on this data, USTR has determined that Costa Rica's trade surplus is 92,924 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Costa Rica for CY2021 is 14,300 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Costa Rica that may be entered duty-free under subheading 9822.05.20 in CY2021 is 14,300 metric tons (*i.e.,* the amount that is the lesser of Costa Rica's trade surplus and the specific quantity set out in that note for Costa Rica for CY2021).

B. Dominican Republic

During CY2019, the most recent year for which data is available, the Dominican Republic's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 16,676 metric tons according to data published by the National Directorate of Customs (DGA). Based on this data, USTR has determined that the Dominican Republic's trade surplus is negative. Therefore, in accordance with U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98, goods of the Dominican Republic are not eligible to enter the United States duty-free under subheading 9822.05.20 in CY2021.

C. El Salvador

During CY2019, the most recent year for which data is available, El Salvador's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 420,282 metric tons according to data published by the Central Bank of El Salvador. Based on this data, USTR has determined that El Salvador's trade surplus is 420,282 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for El Salvador for CY2021 is 36,720 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of El Salvador that may be entered duty-free under subheading 9822.05.20 in CY2021 is 36,720 metric tons (*i.e.,* the amount that is the lesser of El Salvador's trade surplus and the specific quantity set out in that note for El Salvador for CY2021).

D. Guatemala

During CY2019, the most recent year for which data is available, Guatemala's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 1,768,149 metric tons according to data published by the Guatemalan Sugar Association (ASAZGUA) and Bank of Guatemala. Based on this data, USTR has determined that Guatemala's trade surplus is 1,768,149 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Guatemala for CY2021 is 50,760 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Guatemala that may be entered duty-free under subheading 9822.05.20 in CY2021 is 50,760 metric tons (*i.e.,* the amount that is the lesser of Guatemala's trade surplus and the specific quantity set out in that note for Guatemala for CY2021).

E. Honduras

During CY2019, the most recent year for which data is available, Honduras' exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 127,399 metric tons according to data published by the Central Bank of Honduras. Based on this data, USTR has determined that Honduras' trade surplus is 127,399 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Honduras for CY2021 is 10,400 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Honduras that may be entered duty-free under subheading 9822.05.20 in CY2021 is 10,400 metric tons (*i.e.,* the amount that is the lesser of Honduras' trade surplus and the specific quantity set out in that note for Honduras for CY2021).

F. Nicaragua

During CY2019, the most recent year for which data is available, Nicaragua's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 242,463 metric tons according to data published by the National Committee of Sugar Producers (CNPA). Based on this data, USTR has determined that Nicaragua's trade surplus is 242,463 metric tons. The specific quantity set out in U.S. Note 25(b)(ii) to subchapter XXII of HTSUS chapter 98 for Nicaragua for CY 2021 is 28,600 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Nicaragua that may be entered duty-free under subheading 9822.05.20 in CY2021 is 28,600 metric tons (*i.e.,* the amount that is the lesser of Nicaragua's trade surplus and the specific quantity set out in that note for Nicaragua for CY2021).

IV. Peru TPA

Pursuant to section 201 of the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138; 19 U.S.C. 3805 note), Presidential Proclamation No. 8341 of January 16, 2009 (74 FR 4105) implemented the Peru TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Peru TPA.

Note 28(c) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Peru's trade surplus, by volume, with all sources for goods in HTSUS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40, and 1702.60, except that Peru's imports of U.S. goods classified under HTSUS subheadings 1702.40 and 1702.60 that are originating goods under the Peru TPA and Peru's exports to the United States of goods classified under HTSUS subheadings 1701.12, 1701.13, 1701.14, 1701.91, and 1701.99 are not included in the calculation of Peru's trade surplus.

Note 28(d) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Peru entered under subheading 9822.06.10 in an amount equal to the lesser of Peru's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2019, the most recent year for which data is available, Peru's

imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 127,341 metric tons according to data published by the National Superintendence of Customs and Tax Administration (SUNAT). Based on this data, USTR has determined that Peru's trade surplus is negative. Therefore, in accordance with U.S. Note 28(d) to subchapter XXII of HTSUS chapter 98, goods of Peru are not eligible to enter the United States duty-free under subheading 9822.06.10 in CY2021.

V. Colombia TPA

Pursuant to section 201 of the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112–42; 19 U.S.C. 3805 note), Presidential Proclamation No. 8818 of May 14, 2012 (77 FR 29519) implemented the Colombia TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Colombia TPA.

Note 32(b) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Colombia's trade surplus, by volume, with all sources for goods in HTSUS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40 and 1702.60, except that Colombia's imports of U.S. goods classified under subheadings 1702.40 and 1702.60 that are originating goods under the Colombia TPA and Colombia's exports to the United States of goods classified under subheadings 1701.12, 1701.13, 1701.14, 1701.91 and 1701.99 are not included in the calculation of Colombia's trade surplus.

Note 32(c)(i) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Colombia entered under subheading 9822.08.01 in an amount equal to the lesser of Colombia's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2019, the most recent year for which data is available, Colombia's exports of the sugar and syrup goods and sugar-containing products described above exceeded its imports of those goods by 338,814 metric tons according to data published by the Colombian National Tax and Customs Directorate (DIAN). Based on this data, USTR has determined that Colombia's trade surplus is 338,814 metric tons. The specific quantity set out in U.S. Note 32(c)(i) to subchapter XXII of HTSUS chapter 98 for Colombia for CY 2021 is 56,750 metric tons. Therefore, in accordance with that note, the aggregate quantity of goods of Colombia that may be entered duty-free under subheading 9822.08.01 in CY2021 is 56,750 metric tons (*i.e.,* the amount that is the lesser of Colombia's trade surplus and the specific quantity set out in that note for Colombia for CY2021).

VI. Panama TPA

Pursuant to section 201 of the United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. 112–43; 19 U.S.C. 3805 note), Presidential Proclamation No. 8894 of October 29, 2012 (77 FR 66505) implemented the Panama TPA on behalf of the United States and modified the HTSUS to reflect the tariff treatment provided for in the Panama TPA.

Note 35(a) to subchapter XXII of HTSUS chapter 98 requires USTR annually to publish a determination of the amount of Panama's trade surplus, by volume, with all sources for goods in HTSUS subheadings 1701.12, 1701.13, 1701.14, 1701.91, 1701.99, 1702.40 and 1702.60, except that Panama's imports of U.S. goods classified under subheadings 1702.40 and 1702.60 that are originating goods under the Panama TPA and Panama's exports to the United States of goods classified under subheadings 1701.12, 1701.13, 1701.14, 1701.91 and 1701.99 are not included in the calculation of Panama's trade surplus.

Note 35(c) to subchapter XXII of HTSUS chapter 98 provides duty-free treatment for certain sugar goods of Panama entered under subheading 9822.09.17 in an amount equal to the lesser of Panama's trade surplus or the specific quantity set out in that note for that calendar year.

During CY2019, the most recent year for which data is available, Panama's imports of the sugar and syrup goods and sugar-containing products described above exceeded its exports of those goods by 753 metric tons according to data published by the National Institute of Statistics and Census, Office of the General Comptroller of Panama; and the Ministry of Commerce and Industry of Panama. Based on this data, USTR has determined that Panama's trade surplus is negative. Therefore, in accordance with that note, goods of Panama are not eligible to enter the United States duty-free under subheading 9822.09.17 in CY2021.

Gregory Doud,

Chief Agricultural Negotiator, Office of the United States Trade Representative.

[FR Doc. 2020–29224 Filed 1–5–21; 8:45 am]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2000–8203; FMCSA–2004–17195; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2010–0082; FMCSA–2010–0187; FMCSA–2011–0299; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2012–0280; FMCSA–2013–0165; FMCSA–2013–0168; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0296; FMCSA–2014–0298; FMCSA–2015–0056; FMCSA–2016–0028; FMCSA–2016–0029; FMCSA–2016–0030; FMCSA–2016–0206; FMCSA–2016–0208; FMCSA–2016–0212; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; FMCSA–2018–0014; FMCSA–2018–0015; FMCSA–2018–0017; FMCSA–2018–0207]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to renew exemptions for 63 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates provided below.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2000–

8203; FMCSA–2004–17195; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2010–0082; FMCSA–2010–0187; FMCSA–2011–0299; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2012–0280; FMCSA–2013–0165; FMCSA–2013–0168; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0296; FMCSA–2014–0298; FMCSA–2015–0056; FMCSA–2016–0028; FMCSA–2016–0029; FMCSA–2016–0030; FMCSA–2016–0206; FMCSA–2016–0208; FMCSA–2016–0212; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; FMCSA–2018–0014; FMCSA–2018–0015; FMCSA–2018–0017; FMCSA–2018–0207, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

B. Privacy Act

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

II. Background

On November 18, 2020, FMCSA published a notice announcing its decision to renew exemptions for 63 individuals from the vision requirement in 49 CFR 391.41(b)(10) to operate a CMV in interstate commerce and requested comments from the public (85 FR 73593). The public comment period ended on December 18, 2020, and no comments were received.

FMCSA has evaluated the eligibility of these applicants and determined that renewing these exemptions would achieve a level of safety equivalent to, or greater than, the level that would be achieved by complying with the current regulation § 391.41(b)(10).

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

III. Discussion of Comments

FMCSA received no comments in this proceeding.

IV. Conclusion

Based on its evaluation of the 63 renewal exemption applications and comments received, FMCSA confirms its decision to exempt the following drivers from the vision requirement in § 391.41(b)(10).

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of December and are discussed below. As of December 3, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 54 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (63 FR 196; 63 FR 30285; 65 FR 20245; 65 FR 57230; 65 FR 66293; 67 FR 57266; 67 FR 67234; 69 FR 17263; 69 FR 31447; 69 FR 33997; 69 FR 52741; 69 FR 53493; 69 FR 61292; 69 FR 62741; 69 FR 62742; 71 FR 27033; 71 FR 53489; 71 FR 55820; 71 FR 62147; 71 FR 62148; 73 FR 28186; 73 FR 35194; 73 FR 35201; 73 FR 38499; 73 FR 48273; 73 FR 48275; 73 FR 51336; 73 FR 61925; 73 FR 65009; 73 FR 74565; 75 FR 25919; 75 FR 27623; 75 FR 27624; 75 FR 39729; 75 FR 44050; 75 FR 44051; 75 FR 47883; 75 FR 52061; 75 FR 57105; 75 FR 59327; 75 FR 63257; 75 FR 66423; 76 FR 73769; 77 FR 3547; 77 FR 29447; 77 FR 36338; 77 FR 46153; 77 FR 46793; 77 FR 52381; 77 FR 56261; 77 FR 56262; 77 FR 59245; 77 FR 60010; 77 FR 64583; 77 FR 64841; 77 FR 65933; 77 FR 68199; 78 FR 47818; 78 FR 63302; 78 FR 63307; 78 FR 77780; 79 FR 14331; 79 FR 1457179 FR 18392; 79 FR 27043; 79 FR 27681; 79 FR 28588; 79 FR 29498; 79 FR 35212; 79 FR 35220; 79 FR 38649; 79 FR 38659; 79 FR 46153; 79 FR 47175; 79 FR 51642; 79 FR 51643; 79 FR 53514; 79 FR 56097; 79 FR 56117; 79 FR 58856; 79 FR 59348; 79 FR 64001; 79 FR 68199; 79 FR 72754; 80 FR 59225; 80 FR 59230; 80 FR 63839; 81 FR 1284; 81 FR 20433; 81 FR 28138; 81 FR 39320; 81 FR 40634; 81 FR 42054; 81 FR 45214; 81 FR 60115; 81 FR 66720; 81 FR 66722; 81 FR 66726; 81 FR 70253; 81 FR 71173; 81 FR 72642; 81 FR 80161; 81 FR 81230; 81 FR 90050; 81 FR 91239; 81 FR 96180; 81 FR 96191; 81 FR 96196; 83 FR 6922; 83 FR 24146; 83 FR 24585; 83 FR 28320; 83 FR 28325; 83 FR 28332; 83 FR 28335; 83 FR 33292; 83 FR 34661; 83 FR 34667; 83 FR 34677; 83 FR 40638; 83 FR 40648; 83 FR 45749; 83 FR 45750; 83 FR 53724; 83 FR 53732; 83 FR 54644; 83 FR 56137; 83 FR 56902; 84 FR 2326):

John W. Arnold (KY)
Paul J. Bannon (DE)
Keith D. Blackwell (TX)
Tracy L. Bowers (IA)
Gary O. Brady (WV)
Bryan Brockus (ID)
Thomas F. Caithamer (IL)
Kenneth C. Caldwell (NY)
Gerard J. Cormier (MA)
Layne C. Coscorrosa (WA)
Eric DeFrancesco (PA)
Michael C. Doheny (CT)
Homero Dominguez (TX)
Roger A. Duester (TX)
Todd C. Grider (IN)
Michael J. Haubert (WI)
Raymond E. Hogue (PA)
Matthew D. Hormann (MN)
Charles S. Huffman (KS)
Spencer B. Jacobs (TX)
Clarence H. Jacobsma (IN)
Larry Johnsonbaugh, Jr. (PA)
Theodore Kirby (MD)
Kelly R. Knopf, Sr. (SC)
Eric M. Kohrs (IL)
Richard A. Kolodziejczyk (CT)
Sherell J. Landry (TX)
Timothy D. Lundvall (NE)
Matthew J. Mantooth (KY)
Brian D. McClanahan (IL)
David G. Meyers (NY)
Ross A. Miceli II (PA)
James J. Monticello (IN)
Aaron F. Naylor (PA)
James M. O'Brien (ME)
Billy R. Oguynn (AL)
Richard A. Peterson (OR)
Jamey D. Reed (TX)
Charles O. Rhodes (FL)
Juan A. Rodriguez (CT)
Gordon G. Roth (KS)
Terry L. Rubendall (PA)
Daniel W. Schafer (PA)
Klifford N. Siemens (KS)
Chad M. Smith (IA)
Eric D. Smith (GA)
Daniel W. Toppings (WV)
Bart M. Valiante (CT)
James W. Van Ryswyk (IA)
John T. White, Jr. (NC)
Hubert Whittenburg (MO)
John D. Woods (MI)
Aaron E. Wright (MI)
James C. Wright (MN)

The drivers were included in docket numbers FMCSA–1998–3637; FMCSA–2000–7006; FMCSA–2000–8203; FMCSA–2004–17195; FMCSA–2004–17984; FMCSA–2004–18885; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2010–0082; FMCSA–2010–0187; FMCSA–2011–0299; FMCSA–2012–0214; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2013–0165; FMCSA–2013–0168; FMCSA–2014–0003; FMCSA–2014–0004; FMCSA–2014–0005; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0296; FMCSA–2015–0056; FMCSA–2016–0028; FMCSA–2016–0029; FMCSA–2016–0030; FMCSA–2016–0206; FMCSA–2016–0208; FMCSA–2018–0011; FMCSA–2018–0012; FMCSA–2018–0013; FMCSA–2018–0014; FMCSA–2018–0015; FMCSA–2018–0017. Their exemptions were applicable as of December 3, 2020, and will expire on December 3, 2022.

As of December 10, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following four individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (83 FR 56140; 84 FR 2309):

Alejandro R. Almaguer (FL)
Abdallah A. Alserhan (IL)
Denis Cuzimencov (NC)
Steven M. Huddleston (NM)

The drivers were included in docket number FMCSA–2018–0207. Their exemptions were applicable as of December 10, 2020, and will expire on December 10, 2022.

As of December 20, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (77 FR 64839; 77 FR 75494; 79 FR 73393; 81 FR 96180; 84 FR 2326):

Noah E. Bowen (OH); and Emin Toric (GA)

The drivers were included in docket number FMCSA–2012–0280. Their exemptions were applicable as of December 20, 2020, and will expire on December 20, 2022.

As of December 25, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (79 FR 69985; 80 FR 8927; 81 FR 96180; 84 FR 2326):

Thurman T. Clayton (LA); and Tig G. Cornell (ID)

The drivers were included in docket number FMCSA–2014–0298. Their exemptions were applicable as of December 25, 2020, and will expire on December 25, 2022.

As of December 30, 2020, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (81 FR 86063; 82 FR 12683; 84 FR 2326):

Michal Golebiowski (IL)

The driver was included in docket number FMCSA–2016–0212. The exemption was applicable as of December 30, 2020, and will expire on December 30, 2022.

In accordance with 49 U.S.C. 31315(b), each exemption will be valid for 2 years from the effective date unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained prior to being granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–29250 Filed 1–5–21; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2020–0015]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of applications for exemption; request for comments.

SUMMARY: FMCSA announces receipt of applications from seven individuals for an exemption from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) to operate a commercial motor vehicle (CMV) in interstate commerce. If granted, the exemptions will enable these individuals to operate CMVs in interstate commerce without meeting the vision requirement in one eye.

DATES: Comments must be received on or before February 5, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2020–0015 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/docket?D=FMCSA-2020-0015.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2020–0015), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0015.* Click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov/docket?D=FMCSA-2020-0015* and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

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

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The seven individuals listed in this notice have requested an exemption from the vision requirement in 49 CFR 391.41(b)(10). Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting an exemption will achieve the required level of safety mandated by statute.

The physical qualification standard for drivers regarding vision found in § 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

On July 16, 1992, the Agency first published the criteria for the Vision Waiver Program, which listed the conditions and reporting standards that CMV drivers approved for participation would need to meet (57 FR 31458). The current Vision Exemption Program was established in 1998, following the enactment of amendments to the statutes governing exemptions made by § 4007 of the Transportation Equity Act for the 21st Century, Public Law 105–178, 112 Stat. 107, 401 (June 9, 1998). Vision exemptions are considered under the procedures established in 49 CFR part 381 subpart C, on a case-by-case basis upon application by CMV drivers who do not meet the vision standards of § 391.41(b)(10).

To qualify for an exemption from the vision requirement, FMCSA requires a person to present verifiable evidence that he/she has driven a commercial vehicle safely in intrastate commerce with the vision deficiency for the past 3 years. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his/her past record of crashes and traffic violations. Copies of the studies may be found at *https://www.regulations.gov/docket?D=FMCSA-1998-3637.*

FMCSA believes it can properly apply the principle to monocular drivers, because data from the Federal Highway Administration's (FHWA) former waiver study program clearly demonstrated the driving performance of experienced monocular drivers in the program is better than that of all CMV drivers collectively.[1] The fact that experienced monocular drivers demonstrated safe driving records in the waiver program supports a conclusion that other monocular drivers, meeting the same qualifying conditions as those required by the waiver program, are also likely to have adapted to their vision deficiency and will continue to operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that crash rates for the same individual exposed to certain risks for two different time periods vary only slightly (See Bates and Neyman, University of California Publications in Statistics, April 1952). Other studies demonstrated theories of predicting crash proneness from crash history coupled with other factors. These factors—such as age, sex, geographic location, mileage driven and conviction history—are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future crashes (See Weber, Donald C., ''Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process,'' Journal of American Statistical Association, June 1971). A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall crash predictor for both concurrent and nonconcurrent events is the number of single convictions. This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

III. Qualifications of Applicants

Johnny J. Brown

Mr. Brown, 59, has corneal scarring in his right eye due to a traumatic incident in 1971. The visual acuity in his right eye is no light perception, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, ''He has no light perception in the right eye due to an injury he had in 1971, but his condition is stable. In my medical opinion Mr. Brown meets all the requirements to operate a commercial vehicle at this time.'' Mr. Brown reported that he has driven buses for 25 years, accumulating 125,000 miles. He holds a Class B CDL from Mississippi. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Gordon L. Hendricks

Mr. Hendricks, 60, has had amblyopia in his left eye since childhood. The visual acuity in his right eye is 20/20, and in his left eye, 20/100. Following an

[1] A thorough discussion of this issue may be found in a FHWA final rule published in the **Federal Register** on March 26, 1996 and available on the internet at *https://www.govinfo.gov/content/pkg/FR-1996-03-26/pdf/96-7226.pdf.*

examination in 2020, his optometrist stated, ''Mr. Hendricks has a condition called Refractive Amblyopia; which is the inability of one eye to see as well as the other. In my opinion, there is not any condition that would prevent Mr. Hendricks from operating a commercial vehicle safely.'' Mr. Hendricks reported that he has driven straight trucks for 8 years, accumulating 960,000 miles, and tractor-trailer combinations for 2 years, accumulating 150,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Justin T. Hoben

Mr. Hoben, 24, has ectopia lentis in his left eye due to Marfan's Syndrome since childhood. The visual acuity in his right eye is 20/40, and in his left eye, 20/60. Following an examination in 2020, his optometrist stated, ''In my medical opinion, Justin T [sic] Hoben has sufficient vision to operate a commercial vehicle.'' Mr. Hoben reported that he has driven straight trucks for 5 years, accumulating 10,000 miles, and tractor-trailer combinations for 5 years, accumulating 10,000 miles. He holds a Class A CDL from Illinois. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Burl V. Ingebretsen

Mr. Ingebretsen, 74, has had a retinal detachment in his right eye since 2016. The visual acuity in his right eye is 20/200, and in his left eye, 20/20. Following an examination in 2020, his optometrist stated, ''In my opinion, Burl has sufficient vision to perform driving tasks required for a commercial license.'' Mr. Ingebretsen reported that he has driven straight trucks for 54 years, accumulating 1.78 million miles, and tractor-trailer combinations for 34 years, accumulating 3.4 million miles. He holds a Class A CDL from Minnesota. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Weldon D. Rudder

Mr. Rudder, 37, has had amblyopia in his right eye since birth. The visual acuity in his right eye is 20/80, and in his left eye, 20/20. Following an examination in 2020, his ophthalmologist stated, ''I certify in my medical opinion that Weldon Rudder has sufficient vision to perform the driving tasks required to operate a commercial vehicle.'' Mr. Rudder reported that he has driven straight trucks for 3 years, accumulating 60,000 miles and tractor-trailer combinations for 3 years, accumulating 60,000 miles. He holds a Class A CDL from Oklahoma. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

Patrick W. Sargent

Mr. Sargent, 54, had a retinal detachment in his right eye due to a traumatic incident in 2017. The visual acuity in his right eye is 20/50, and in his left eye, 20/20. Following an examination in 2020, his ophthalmologist stated, ''Given the near perfect vision in his left eye, which was measured at 20/25 on his last exam with no retinal or optic nerve pathology, I believe there is sufficient evidence that he can perform the driving tasks required to operate a commercial vehicle.'' Mr. Sargent reported that he has driven straight trucks for 35 years, accumulating 56,000 miles, tractor-trailer combinations for 30 years, accumulating 165,000 miles, and buses for 27 years, accumulating 199,800 miles. He holds a Class A CDL from Montana. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

John F. Skrobarczyk

Mr. Skrobarczyk, 61, has had optic nerve hypoplasia in his left eye since birth. The visual acuity in his right eye is 20/20, and in his left eye, 20/400. Following an examination in 2020, his ophthalmologist stated, ''In my opinion Mr. Skobarczyk has sufficient vision to operate a commercial vehicle.'' Mr. Skrobarczyk reported that he has driven tractor-trailer combinations for 3 years, accumulating 105,000 miles. He holds a Class A CDL from Texas. His driving record for the last 3 years shows no crashes and no convictions for moving violations in a CMV.

IV. Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315(b), FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments and material received before the close of business on the closing date indicated under the **DATES** section of the notice.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–29246 Filed 1–5–21; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2001–11426; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2006–24783; FMCSA–2006–26066; FMCSA–2007–0071; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2008–0340; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0354; FMCSA–2010–0385; FMCSA–2012–0039; FMCSA–2012–0161; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2012–0279; FMCSA–2013–0168; FMCSA–2013–0170; FMCSA–2014–0002; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0299; FMCSA–2014–0300; FMCSA–2016–0028; FMCSA–2016–0030; FMCSA–2016–0207; FMCSA–2016–0208; FMCSA–2016–0209; FMCSA–2016–0210; FMCSA–2018–0010; FMCSA–2018–0207]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 66 individuals from the vision requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) for interstate commercial motor vehicle (CMV) drivers. The exemptions enable these individuals to continue to operate CMVs in interstate commerce without meeting the vision requirements in one eye.

DATES: Each group of renewed exemptions are applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before February 5, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2000–7006, Docket No. FMCSA–2000–7165, Docket No. FMCSA–2001–11426, Docket No. FMCSA–2002–12294, Docket No. FMCSA–2004–18885, Docket No. FMCSA–2004–19477, Docket No. FMCSA–2005–21711, Docket No. FMCSA–2006–24783, Docket No. FMCSA–2006–26066, Docket No. FMCSA–2007–0071, Docket No. FMCSA–2008–0021, Docket No. FMCSA–2008–0106, Docket No. FMCSA–2008–0174, Docket No. FMCSA–2008–0266, Docket No. FMCSA–2008–0292, Docket No. FMCSA–2008–0340, Docket No.

FMCSA–2010–0161, Docket No. FMCSA–2010–0187, Docket No. FMCSA–2010–0201, Docket No. FMCSA–2010–0287, Docket No. FMCSA–2010–0354, Docket No. FMCSA–2010–0385, Docket No. FMCSA–2012–0039, Docket No. FMCSA–2012–0161, Docket No. FMCSA–2012–0215, Docket No. FMCSA–2012–0216, Docket No. FMCSA–2012–0279, Docket No. FMCSA–2013–0168, Docket No. FMCSA–2013–0170, Docket No. FMCSA–2014–0002, Docket No. FMCSA–2014–0006, Docket No. FMCSA–2014–0007, Docket No. FMCSA–2014–0010, Docket No. FMCSA–2014–0011, Docket No. FMCSA–2014–0296, Docket No. FMCSA–2014–0299, Docket No. FMCSA–2014–0300, Docket No. FMCSA–2016–0028, Docket No. FMCSA–2016–0030, Docket No. FMCSA–2016–0207, Docket No. FMCSA–2016–0208, Docket No. FMCSA–2016–0209, Docket No. FMCSA–2016–0210, Docket No. FMCSA–2018–0010, or Docket No. FMCSA–2018–0207 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2001–11426; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2006–24783; FMCSA–2006–26066; FMCSA–2007–0071; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2008–0340; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0354; FMCSA–2010–0385; FMCSA–2012–0039; FMCSA–2012–0161; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2012–0279; FMCSA–2013–0168; FMCSA–2013–0170; FMCSA–2014–0002; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0299; FMCSA–2014–0300; FMCSA–2016–0028; FMCSA–2016–0030; FMCSA–2016–0207; FMCSA–2016–0208; FMCSA–2016–0209; FMCSA–2016–0210; FMCSA–2018–0010; FMCSA–2018–0207), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2001–11426; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2006–24783; FMCSA–2006–26066; FMCSA–2007–0071; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2008–0340; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0354; FMCSA–2010–0385; FMCSA–2012–0039; FMCSA–2012–0161; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2012–0279; FMCSA–2013–0168; FMCSA–2013–0170; FMCSA–2014–0002; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0299; FMCSA–2014–0300; FMCSA–2016–0028; FMCSA–2016–0030; FMCSA–2016–0207; FMCSA–2016–0208; FMCSA–2016–0209; FMCSA–2016–0210; FMCSA–2018–0010; FMCSA–2018–0207, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

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II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding vision found in 49 CFR 391.41(b)(10) states that a person is physically qualified to drive a CMV if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of a least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing red, green, and amber.

The 66 individuals listed in this notice have requested renewal of their exemptions from the vision standard in § 391.41(b)(10), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 66 applicants has satisfied the renewal conditions for obtaining an exemption from the vision standard (see 65 FR 20245; 65 FR 33406; 65 FR 57230; 65 FR 57234; 67 FR 10471; 67 FR 19798; 67 FR 46016; 67 FR 57266; 67 FR 57627; 69 FR 19611; 69 FR 51346; 69 FR 52741; 69 FR 53493; 69 FR 62742; 69 FR 64806; 70 FR 2705; 70 FR 48797; 70 FR 61493; 71 FR 26602; 71 FR 32183; 71 FR 41310; 71 FR 50970; 71 FR 53489; 71 FR 62147; 71 FR 62148; 71 FR 63379; 72 FR 1050; 72 FR 1051; 72 FR 1056; 72 FR 64273; 73 FR 6242; 73 FR 6244; 73 FR 15567; 73 FR 16950; 73 FR 16952; 73 FR 27015; 73 FR 27018; 73 FR 35197; 73 FR 35198; 73 FR 36955; 73 FR 38498; 73 FR 38499; 73 FR 48273; 73 FR 48275; 73 FR 51336; 73 FR 51689; 73 FR 61922; 73 FR 61925; 73 FR 61925; 73 FR 63047; 73 FR 74565; 73 FR 75803; 73 FR 75807; 73 FR 76439; 73 FR 78421; 73 FR 78423; 74 FR 6209; 74 FR 62632; 75 FR 9477; 75 FR 19674; 75 FR 22179; 75 FR 36778; 75 FR 36779; 75 FR 39725; 75 FR 44051; 75 FR 47883; 75 FR 50799; 75 FR 52062; 75 FR 54958; 75 FR 59327; 75 FR 59327; 75 FR 61833; 75 FR 63257; 75 FR 64396; 75 FR 69737; 75 FR 70078; 75 FR 72863; 75 FR 77591; 75 FR 77942; 75 FR 77949; 75 FR 79079; 75 FR 79083; 75 FR 79084; 76 FR 1499; 76 FR 2190; 76 FR 4413; 76 FR 5425; 76 FR 70215; 77 FR 13689; 77 FR 20879; 77 FR 23797; 77 FR 31427; 77 FR 36338; 77 FR 38384; 77 FR 41879; 77 FR 46153; 77 FR 48590; 77 FR 52381; 77 FR 52389; 77 FR 52391; 77 FR 56261; 77 FR 60008; 77 FR 60010; 77 FR 64582; 77 FR 64583; 77 FR 64583; 77 FR 64841; 77 FR 65933; 77 FR 68200; 77 FR 68202; 77 FR 71671; 77 FR 74273; 77 FR 74730; 77 FR 74733; 77 FR 74734; 77 FR 75496; 77 FR 76166; 78 FR 797; 78 FR 63302; 78 FR 64280; 78 FR 67454; 78 FR 77780; 79 FR 4803; 79 FR 10606; 79 FR 10609; 79 FR 14331; 79 FR 22003; 79 FR 23797; 79 FR 35212; 79 FR 35218; 79 FR 35220; 79 FR 37843; 79 FR 38659; 79 FR 38661; 79 FR 41735; 79 FR 45868; 79 FR 46153; 79 FR 47175; 79 FR 51643; 79 FR 53514; 79 FR 56097; 79 FR 56099; 79 FR 56104; 79 FR 56117; 79 FR 58856; 79 FR 59348; 79 FR 59357; 79 FR 64001; 79 FR 65759; 79 FR 65760; 79 FR 70928; 79 FR 72754; 79 FR 72756; 79 FR 73397; 79 FR 73686; 79 FR 73687; 79 FR 73689; 79 FR 74169; 80 FR 2473; 80 FR 3305; 80 FR 3723; 80 FR 9304; 80 FR 18693; 80 FR 63869; 80 FR 80443; 81 FR 20435; 81 FR 28138; 81 FR 39320; 81 FR 45214; 81 FR 66720; 81 FR 66726; 81 FR 70248; 81 FR 70251; 81 FR 70253; 81 FR 71173; 81 FR 72664; 81 FR 80161; 81 FR 81230; 81 FR 90046; 81 FR 90050; 81 FR 91239; 81 FR 94013; 81 FR 96165; 81 FR 96178; 81 FR 96180; 81 FR 96191; 81 FR 96196; 82 FR 13048; 83 FR 3861; 83 FR 6925; 83 FR 18633; 83 FR 28325; 83 FR 28342; 83 FR 34661; 83 FR 53724; 83 FR 56140; 83 FR 56902; 84 FR 2309; 84 FR 2311; 84 FR 2314). They have submitted evidence showing that the vision in the better eye continues to meet the requirement specified at § 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past 2 years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of February and are discussed below. As of February 5, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following 63 individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (65 FR 20245; 65 FR 33406; 65 FR 57230; 65 FR 57234; 67 FR 10471; 67 FR 19798; 67 FR 46016; 67 FR 57266; 67 FR 57627; 69 FR 19611; 69 FR 51346; 69 FR 52741; 69 FR 53493; 69 FR 62742; 69 FR 64806; 70 FR 2705; 70 FR 48797; 70 FR 61493; 71 FR 26602; 71 FR 32183; 71 FR 41310; 71 FR 50970; 71 FR 53489; 71 FR 62147; 71 FR 62148; 71 FR 63379; 72 FR 1050; 72 FR 1051; 72 FR 1056; 72 FR 64273; 73 FR 6242; 73 FR 6244; 73 FR 15567; 73 FR 16950; 73 FR 16952; 73 FR 27015; 73 FR 27018; 73 FR 35197; 73 FR 35198; 73 FR 36955; 73 FR 38498; 73 FR 38499; 73 FR 48273; 73 FR 48275; 73 FR 51336; 73 FR 51689; 73 FR 61922; 73 FR 61925; 73 FR 61925; 73 FR 63047; 73 FR 74565; 73 FR 75803; 73 FR 75807; 73 FR 76439; 73 FR 78421; 73 FR 78423; 74 FR 6209; 74 FR 62632; 75 FR 9477; 75 FR 19674; 75 FR 22179; 75 FR 36778; 75 FR 36779; 75 FR 39725; 75 FR 44051; 75 FR 47883; 75 FR 50799; 75 FR 52062; 75 FR 54958; 75 FR 59327; 75 FR 59327; 75 FR 61833; 75 FR 63257; 75 FR 64396; 75 FR 69737; 75 FR 70078; 75 FR 72863; 75 FR 77591; 75 FR 77942; 75 FR 77949; 75 FR 79079;

75 FR 79083; 75 FR 79084; 76 FR 1499; 76 FR 2190; 76 FR 4413; 76 FR 5425; 76 FR 70215; 77 FR 13689; 77 FR 20879; 77 FR 23797; 77 FR 31427; 77 FR 36338; 77 FR 38384; 77 FR 41879; 77 FR 46153; 77 FR 48590; 77 FR 52381; 77 FR 52389; 77 FR 52391; 77 FR 56261; 77 FR 60008; 77 FR 60010; 77 FR 64582; 77 FR 64583; 77 FR 64583; 77 FR 64841; 77 FR 65933; 77 FR 68200; 77 FR 68202; 77 FR 71671; 77 FR 74273; 77 FR 74730; 77 FR 74733; 77 FR 74734; 77 FR 75496; 77 FR 76166; 78 FR 797; 78 FR 63302; 78 FR 64280; 78 FR 67454; 78 FR 77780; 79 FR 4803; 79 FR 10606; 79 FR 10609; 79 FR 14331; 79 FR 22003; 79 FR 23797; 79 FR 35212; 79 FR 35218; 79 FR 35220; 79 FR 37843; 79 FR 38659; 79 FR 38661; 79 FR 41735; 79 FR 45868; 79 FR 46153; 79 FR 47175; 79 FR 51643; 79 FR 53514; 79 FR 56097; 79 FR 56099; 79 FR 56104; 79 FR 56117; 79 FR 58856; 79 FR 59348; 79 FR 59357; 79 FR 64001; 79 FR 65759; 79 FR 65760; 79 FR 70928; 79 FR 72754; 79 FR 72756; 79 FR 73397; 79 FR 73686; 79 FR 73687; 79 FR 73689; 79 FR 74169; 80 FR 3305; 80 FR 9304; 80 FR 63869; 80 FR 80443; 81 FR 20435; 81 FR 28138; 81 FR 39320; 81 FR 45214; 81 FR 66720; 81 FR 66726; 81 FR 70248; 81 FR 70251; 81 FR 70253; 81 FR 71173; 81 FR 72664; 81 FR 80161; 81 FR 81230; 81 FR 90046; 81 FR 90050; 81 FR 91239; 81 FR 94013; 81 FR 96165; 81 FR 96178; 81 FR 96180; 81 FR 96191; 81 FR 96196; 82 FR 13048; 83 FR 3861; 83 FR 6925; 83 FR 18633; 83 FR 28325; 83 FR 28342; 83 FR 34661; 83 FR 53724; 83 FR 56140; 83 FR 56902; 84 FR 2309; 84 FR 2311; 84 FR 2314):

Lennie D. Baker, Jr. (NC)
Donald L. Blakeley II (NV)
Timothy Bradford (TN)
Scott Brady (FL)
Marty R. Brewster (KS)
David S. Brumfield (KY)
Todd A. Carlson (MN)
Dionicio Carrera (TX)
Juan Castanon (NM)
Scott F. Chalfant (DE)
Derrick L. Cowan (NC)
Dorothy J. Crum (OH)
Louis J. Cullen (NJ)
Larry G. Davis (TN)
Christopher L. Depuy (OH)
Craig E. Dorrance (MT)
Lucious J. Erwin (TX)
James H. Facemyre (WV)
Hector O. Flores (MD)
Larry J. Folkerts (IA)
Christopher K. Foot (NV)
Kelvin Frandin Bombu (KY)
Stanley W. Goble (IA)
John P. Grum (PA)
William R. Guida (PA)
Walter D. Hague, Jr. (VA)
Eric C. Hammer (MO)
Billy R. Hampton (NC)
Clifford J. Harris (VA)
Nylo K. Helberg (ND)
Robert K. Ipock (NC)
Jesse P. Jamison (TN)
Perry D. Jensen (WI)
Robert E. Kelley (WA)
Lewis A. Kielhack (IL)
Gregory L. Kockelman (MN)
Matthew B. Lairamore (OK)
Bradley W. Lovelace (NC)
Duane R. Martin (PA)
John C. McLaughlin (SD)
Rodney M. Pegg (PA)
Chad M. Quarles (AL)
Joseph L. Rigsby (AL)
Joe A. Root (MN)
Preston S. Salisbury (MT)
Benny L. Sanchez (CA)
Randal C. Schmude (WI)
James C. Sharp (PA)
Joseph B. Shaw, Jr. (VA)
Sylvester Silver (VA)
Kenneth D. Sisk (NC)
Loren Smith (SD)
Paul W. Sorenson (UT)
David C. Stitt (KS)
Gary R. Thomas (OH)
Richard T. Traigle (LA)
David J. Triplett (KY)
Melvin V. Van Meter (PA)
Nicholas J. Vance (OH)
Michael J. Welle (MN)
Carl V. Wheeler (NC)
Earl L. White, Jr. (NH)
Joseph F. Wood (MS)

The drivers were included in docket numbers FMCSA–2000–7006; FMCSA–2000–7165; FMCSA–2001–11426; FMCSA–2002–12294; FMCSA–2004–18885; FMCSA–2004–18885; FMCSA–2004–19477; FMCSA–2005–21711; FMCSA–2006–24783; FMCSA–2006–26066; FMCSA–2007–0071; FMCSA–2008–0021; FMCSA–2008–0106; FMCSA–2008–0174; FMCSA–2008–0266; FMCSA–2008–0292; FMCSA–2008–0340; FMCSA–2010–0161; FMCSA–2010–0187; FMCSA–2010–0201; FMCSA–2010–0287; FMCSA–2010–0354; FMCSA–2010–0385; FMCSA–2012–0039; FMCSA–2012–0161; FMCSA–2012–0215; FMCSA–2012–0216; FMCSA–2012–0279; FMCSA–2013–0168; FMCSA–2013–0170; FMCSA–2014–0002; FMCSA–2014–0006; FMCSA–2014–0007; FMCSA–2014–0010; FMCSA–2014–0011; FMCSA–2014–0296; FMCSA–2014–0299; FMCSA–2016–0028; FMCSA–2016–0030; FMCSA–2016–0207; FMCSA–2016–0208; FMCSA–2016–0209; FMCSA–2016–0210; FMCSA–2018–0010; FMCSA–2018–0207. Their exemptions are applicable as of February 5, 2021, and will expire on February 5, 2023.

As of February 18, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following two individuals have satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (80 FR 2473; 80 FR 18693; 82 FR 13048; 84 FR 2314):

Keith A. Looney (AR) and Van C. Mac (IL)

The drivers were included in docket number FMCSA–2014–0030. Their exemptions are applicable as of February 18, 2021, and will expire on February 18, 2023.

As of February 25, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315, the following individual has satisfied the renewal conditions for obtaining an exemption from the vision requirement in the FMCSRs for interstate CMV drivers (69 FR 64806; 70 FR 2705; 72 FR 1056; 73 FR 76439; 75 FR 79084; 77 FR 75496; 80 FR 3723; 82 FR 13048; 84 FR 2314):

Lester W. Carter (CA)

The driver was included in docket number FMCSA–2004–19477. The exemption is applicable as of February 25, 2021, and will expire on February 25, 2023.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must undergo an annual physical examination (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a certified medical examiner (ME), as defined by § 390.5, who attests that the driver is otherwise physically qualified under § 391.41; (2) each driver must provide a copy of the ophthalmologist's or optometrist's report to the ME at the time of the annual medical examination; and (3) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file or keep a copy of his/her driver's qualification if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or

regulation that conflicts with this exemption with respect to a person operating under the exemption.

VI. Conclusion

Based upon its evaluation of the 66 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the vision requirement in § 391.41(b)(10), subject to the requirements cited above. In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–29245 Filed 1–5–21; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2006–25854; FMCSA–2010–0203; FMCSA–2015–0323; FMCSA–2016–0007; FMCSA–2016–0008; FMCSA–2018–0051; FMCSA–2018–0052; FMCSA–2018–0056]

Qualification of Drivers; Exemption Applications; Epilepsy and Seizure Disorders

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew exemptions for 10 individuals from the requirement in the Federal Motor Carrier Safety Regulations (FMCSRs) that interstate commercial motor vehicle (CMV) drivers have ''no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a CMV.'' The exemptions enable these individuals who have had one or more seizures and are taking anti-seizure medication to continue to operate CMVs in interstate commerce.

DATES: Each group of renewed exemptions were applicable on the dates stated in the discussions below and will expire on the dates stated in the discussions below. Comments must be received on or before February 5, 2021.

ADDRESSES: You may submit comments identified by the Federal Docket Management System (FDMS) Docket No. FMCSA–2006–25854, Docket No. FMCSA–2010–0203, Docket No. FMCSA–2015–0323, Docket No. FMCSA–2016–0007, Docket No. FMCSA–2016–0008, Docket No. FMCSA–2018–0051, Docket No. FMCSA–2018–0052, or Docket No. FMCSA–2018–0056 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations; U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Ms. Christine A. Hydock, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE, Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., ET, Monday through Friday, except Federal holidays. If you have questions regarding viewing or submitting material to the docket, contact Dockets Operations, (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (Docket No. FMCSA–2006–25854, FMCSA–2010–0203, FMCSA–2015–0323, FMCSA–2016–0007, FMCSA–2016–0008, FMCSA–2018–0051, FMCSA–2018–0052, or FMCSA–2018–0056), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2006–25854, FMCSA–2010–0203, FMCSA–2015–0323, FMCSA–2016–0007, FMCSA–2016–0008, FMCSA–2018–0051, FMCSA–2018–0052, or FMCSA–2018–0056, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

B. Viewing Documents and Comments

To view comments, as well as any documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov.* Insert the docket number, FMCSA–2006–25854, FMCSA–2010–0203, FMCSA–2015–0323, FMCSA–2016–0007, FMCSA–2016–0008, FMCSA–2018–0051, FMCSA–2018–0052, or FMCSA–2018–0056, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy Act

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

II. Background

Under 49 U.S.C. 31136(e) and 31315(b), FMCSA may grant an exemption from the FMCSRs for no longer than a 5-year period if it finds such exemption would likely achieve a

level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption. The statute also allows the Agency to renew exemptions at the end of the 5-year period. FMCSA grants medical exemptions from the FMCSRs for a 2-year period to align with the maximum duration of a driver's medical certification.

The physical qualification standard for drivers regarding epilepsy found in 49 CFR 391.41(b)(8) states that a person is physically qualified to drive a CMV if that person has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause the loss of consciousness or any loss of ability to control a CMV.

In addition to the regulations, FMCSA has published advisory criteria [1] to assist medical examiners in determining whether drivers with certain medical conditions are qualified to operate a CMV in interstate commerce.

The 10 individuals listed in this notice have requested renewal of their exemptions from the epilepsy and seizure disorders prohibition in § 391.41(b)(8), in accordance with FMCSA procedures. Accordingly, FMCSA has evaluated these applications for renewal on their merits and decided to extend each exemption for a renewable 2-year period.

III. Request for Comments

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b), FMCSA will take immediate steps to revoke the exemption of a driver.

IV. Basis for Renewing Exemptions

In accordance with 49 U.S.C. 31136(e) and 31315(b), each of the 10 applicants has satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition. The 10 drivers in this notice remain in good standing with the Agency, have maintained their medical monitoring and have not exhibited any medical issues that would compromise their ability to safely operate a CMV during the previous 2-year exemption period. In addition, for Commercial Driver's License (CDL) holders, the Commercial Driver's License Information System and the Motor Carrier Management Information System are searched for crash and violation data. For non-CDL holders, the Agency reviews the driving records from the State Driver's Licensing Agency. These factors provide an adequate basis for predicting each driver's ability to continue to safely operate a CMV in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of 2 years is likely to achieve a level of safety equal to that existing without the exemption.

In accordance with 49 U.S.C. 31136(e) and 31315(b), the following groups of drivers received renewed exemptions in the month of January and are discussed below.

As of January 1, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following eight individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Scott D. Engelman (PA)
Scott I. Habeck (SD)
Todd W. Hines (OH)
Jordan M. Hyster (OH)
Everett J. Letourneau (ND)
Scott A. Ready, Sr. (WI)
Douglas J. Simms, Jr. (NC)
Ronald E. Wagner (OH)

The drivers were included in docket number FMCSA–2015–0323, FMCSA–2016–0007, FMCSA–2016–0008, FMCSA–2018–0051, FMCSA–2018–0052, and FMCSA–2018–0056. Their exemptions are applicable as of January 1, 2021, and will expire on January 1, 2023.

As of January 1, 2021, and in accordance with 49 U.S.C. 31136(e) and 31315(b), the following two individuals have satisfied the renewal conditions for obtaining an exemption from the epilepsy and seizure disorders prohibition in the FMCSRs for interstate CMV drivers:

Brian Porter (PA)
Michael W. Thomas (KS)

The drivers were included in docket number FMCSA–2006–25854 and FMCSA–2010–0203. Their exemptions are applicable as of January 15, 2021, and will expire on January 15, 2023.

V. Conditions and Requirements

The exemptions are extended subject to the following conditions: (1) Each driver must remain seizure-free and maintain a stable treatment during the 2-year exemption period; (2) each driver must submit annual reports from their treating physicians attesting to the stability of treatment and that the driver has remained seizure-free; (3) each driver must undergo an annual medical examination by a certified ME, as defined by § 390.5; and (4) each driver must provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy of his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the exemption when driving, for presentation to a duly authorized Federal, State, or local enforcement official. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315(b).

VI. Preemption

During the period the exemption is in effect, no State shall enforce any law or regulation that conflicts with this exemption with respect to a person operating under the exemption.

VII. Conclusion

Based on its evaluation of the 10 exemption applications, FMCSA renews the exemptions of the aforementioned drivers from the epilepsy and seizure disorders prohibition in § 391.41(b)(8). In accordance with 49 U.S.C. 31136(e) and 31315(b), each exemption will be valid for 2 years unless revoked earlier by FMCSA.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2020–29258 Filed 1–5–21; 8:45 am]

BILLING CODE 4910–EX–P

[1] These criteria may be found in APPENDIX A TO PART 391—MEDICAL ADVISORY CRITERIA, section H. *Epilepsy:* § 391.41(b)(8), paragraphs 3, 4, and 5, which is available on the internet at *https://www.gpo.gov/fdsys/pkg/CFR-2015-title49-vol5/pdf/CFR-2015-title49-vol5-part391-appA.pdf.*

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket FTA–2021–0001]

Notice of Establishment of Emergency Relief Docket for Calendar Year 2021

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice.

SUMMARY: By this notice, the Federal Transit Administration (FTA) is establishing an Emergency Relief Docket for calendar year 2021, so that grant

recipients and sub-recipients affected by a national or regional emergency or disaster may request temporary relief from FTA administrative and statutory requirements.

FOR FURTHER INFORMATION CONTACT:

Bonnie L. Graves, Attorney-Advisor, Office of Chief Counsel, Federal Transit Administration, 90 Seventh Street, Ste. 15–300, San Francisco, CA 94103; phone: (202) 366–0944, fax: (415) 734–9489, or email, *Bonnie.Graves@dot.gov.*

SUPPLEMENTARY INFORMATION:

Pursuant to 49 CFR 601.42, FTA is establishing the Emergency Relief Docket for calendar year 2021. In the case of a national or regional emergency or disaster, or in anticipation of such an event, when FTA requirements impede a recipient or sub-recipient's ability to respond to the emergency or disaster, a recipient or sub-recipient may submit a request for relief from specific FTA requirements.

If FTA determines that a national or regional emergency or disaster has occurred, or in anticipation of such an event, FTA will place a message on its web page (*http://www.transit.dot.gov*) indicating that the Emergency Relief Docket has been opened and including the docket number.

All petitions for relief from FTA administrative or statutory requirements must be posted in the docket in order to receive consideration by FTA. The docket is publicly available and can be accessed 24 hours a day, seven days a week, via the internet at *www.regulations.gov.* Any recipient or sub-recipient submitting petitions for relief or comments to the docket must include the agency name (Federal Transit Administration) and docket number FTA–2021–0001.

Interested parties may consult 49 CFR part 601, subpart D for information on FTA's emergency procedures for public transportation systems. FTA strongly encourages recipients and sub-recipients to contact their FTA regional office and notify FTA of the intent to submit a petition to the docket.

A recipient or sub-recipient seeking relief has three avenues for submitting a petition. First, a recipient or sub-recipient may submit a petition for waiver of FTA requirements to *www.regulations.gov,* for posting in the docket (FTA–2021–0001). Alternatively, a recipient or sub-recipient may submit a petition in duplicate (two copies) to the FTA Administrator, via U.S. mail or hand delivery to Federal Transit Administration, 1200 New Jersey Ave. SE, Washington, DC 20590; via fax to (202) 366–3472; or via email to *Bonnie.Graves@dot.gov;* or via U.S. mail or hand delivery to the DOT Docket Management Facility, 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590. Thirdly, in the event that a recipient or sub-recipient needs to request immediate relief and does not have access to electronic means to request that relief, the recipient or sub-recipient may contact any FTA regional office or FTA headquarters and request that FTA staff submit the petition on its behalf.

Federal public transportation law at 49 U.S.C. 5324(d) provides that a grant awarded under Section 5324, or under 49 U.S.C. 5307 or 49 U.S.C. 5311, that is made to address an emergency shall be subject to the terms and conditions the Secretary determines are necessary. This language allows FTA to waive certain statutory, as well as administrative, requirements. An FTA recipient or sub-recipient receiving financial assistance under 49 U.S.C. 5324, 5307, or 5311 that is affected by a national or regional emergency or disaster may request a waiver of provisions of Chapter 53 of Title 49 of the United States Code in connection with such financial assistance, when a recipient or sub-recipient demonstrates that the requirement(s) will limit a recipient's or sub-recipient's ability to respond to a national or regional emergency or disaster.

Pursuant to 49 CFR 601.42, a recipient or sub-recipient must include certain information when requesting a waiver of statutory or administrative requirements. A petition for relief shall:

(a) Include the agency name (Federal Transit Administration) and docket number FTA–2021–0001;

(b) Identify the recipient or sub-recipient and its geographic location;

(c) Identify the section of Chapter 53 of Title 49 of the United States Code, or the portion of an FTA policy statement, circular, guidance document or rule, from which the recipient or sub-recipient seeks relief;

(d) Specifically address how a requirement in Chapter 53 of Title 49 of the United States Code, or an FTA requirement in a policy statement, circular, agency guidance or rule, will limit a recipient's or sub-recipient's ability to respond to a national or regional emergency or disaster; and

(e) Specify if the petition for relief is one-time or ongoing, and if ongoing identify the time period for which the relief is requested. The time period may not exceed three months; however, additional time may be requested through a second petition for relief.

Pursuant to 49 CFR 601.46, a petition for relief from administrative requirements will be conditionally granted for a period of three (3) business days from the date it is submitted to the Emergency Relief Docket. FTA will review the petition after the expiration of the three business days and review any comments submitted regarding the petition. FTA may contact the recipient or sub-recipient that submitted the request for relief, or any party that submits comments to the docket, to obtain more information prior to making a decision. FTA shall then post a decision to the Emergency Relief Docket. FTA's decision will be based on whether the petition meets the criteria for use of these emergency procedures, the substance of the request, and any comments submitted regarding the petition. If FTA does not respond to the request for relief to the docket within three business days, the recipient or sub-recipient may assume its petition is granted for a period not to exceed three months until and unless FTA states otherwise.

A petition for relief from statutory requirements will not be conditionally granted and requires a written decision from the FTA Administrator. Further, recipients seeking a waiver from Buy America requirements must follow the procedures in 49 CFR part 661. Buy America waivers will not be granted through the Emergency Relief Docket.

An FTA decision, either granting or denying a petition, shall be posted in the Emergency Relief Docket and shall reference the document number of the petition to which it relates. FTA reserves the right to reconsider any decision made pursuant to these emergency procedures based upon its own initiative, based upon information or comments received subsequent to the three-business day comment period, or at the request of a recipient or sub-recipient upon denial of a request for relief. FTA shall notify the recipient or sub-recipient if FTA plans to reconsider a decision.

Pursuant to FTA's Charter Rule at 49 CFR 604.2(f), recipients and sub-recipients may assist with evacuations or other movement of people that might otherwise be considered charter transportation when that transportation is in response to an emergency declared by the President, governor or mayor, or in an emergency requiring immediate action prior to a formal declaration, even if a formal declaration of an emergency is not eventually made by the President, governor or mayor. Therefore, a request for relief is not necessary in order to provide this service. However, if the emergency lasts more than 45 calendar days and the recipient will continue to provide service that would otherwise be

considered charter service, the recipient or sub-recipient shall follow the procedures set out in this notice.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Recipients and sub-recipients should refer to FTA's regulations, including 49 CFR part 601, for requirements for submitting a request for emergency relief.

Issued in Washington, DC.

K. Jane Williams,

Deputy Administrator.

[FR Doc. 2020–29252 Filed 1–5–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Form 15227

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice; supplement.

SUMMARY: The IRS published a document in the **Federal Register** on September 8, 2020, concerning requests for comments on Form 15227. This form does not require an Office of Management and Budget (OMB) control number, further public comments are not being solicited.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Martha R. Brinson, at (202) 317–5753, or at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *Martha.R.Brinson@irs.gov.*

SUPPLEMENTARY INFORMATION: The IRS published a document at 85 FR 55579 in the **Federal Register** of September 8, 2020, concerning requests for comments on Form 15227. Under 5 CFR 1320.3(h)(1), the form does not require an OMB control number, further public comments are not being solicited.

Approved: December 16, 2020.

Chakinna B. Clemons,

Supervisory Tax Analyst.

[FR Doc. 2020–28145 Filed 1–5–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Internal Revenue Service Request for the Annual Return/Report of Employee Benefit Plan

AGENCY: Departmental Offices, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury will submit the following information collection requests to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. The public is invited to submit comments on these requests.

DATES: Comments should be received on or before February 5, 2021 to be assured of consideration.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Copies of the submissions may be obtained from Molly Stasko by emailing *PRA@treasury.gov,* calling (202) 622–8922, or viewing the entire information collection request at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

Internal Revenue Service (IRS)

Title: Annual Return/Report of Employee Benefit Plan.

OMB Control Number: 1545–1610.

Type of Review: Revision of a currently approved collection.

Description: The Annual Return/Report of Employee Benefit Plan is an annual information return filed by employee benefit plans. The IRS uses this information for a variety of matters, including ascertainment whether a qualified retirement plan appears to conform to requirements under the Internal Revenue Code or whether the plan should be audited for compliance. Form 5500–EZ (OMB Number: 1545–0956) is an annual return filed by a one participant (owners/partners and their spouses) retirement plan or a foreign plan to satisfy certain annual reporting and filing requirements imposed by the Internal Revenue Code (Code). The IRS uses this data to determine if the plan appears to be operating properly as required under the Code or whether the plan should be audited. The revisions to the collection are: not releasing Form 5500–SUP; adding a checkbox to Form 5500, 5500–SF, and Form 5500–EZ for an initial plan retroactively adopted as permitted by SECURE Act section 201; and adding checkboxes for an extension of time to Form 5500–EZ.

Form: 5500 and Schedules.

Affected Public: Businesses or other for-profit organization, Individuals and Households, and Not-for-profit institutions.

Estimated Number of Respondents: 929,000.

Frequency of Response: Annually.

Estimated Total Number of Annual Responses: 929,000.

Estimated Total Annual Burden Hours: 934,830 hours.

Authority: 44 U.S.C. 3501 *et seq.*

Dated: December 31, 2020.

Molly Stasko,

Treasury PRA Clearance Officer.

[FR Doc. 2020–29304 Filed 1–5–21; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Federal Advisory Committee Act, 5 U.S.C. App.2, that a meeting of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board (JBL/CS SMRB) will be held Wednesday, January 21, 2021, via WebEx. The meeting will begin at 3:00 p.m. and end at 5:00 p.m. Eastern daylight time. The meeting will have an open session from 3:00 p.m. until 3:30 p.m. and a closed session from 3:30 p.m. until 5:00 p.m.

The JBL/CS provides expert review of the scientific quality, budget, safety and mission-relevance of investigator-initiated research applications submitted for VA merit review consideration and to offer advice for research program officials on program priorities and policies.

The purpose of the open session is to meet with the JBL/CS Service Directors to discuss the overall policies and process for scientific review, as well as disseminate information among the Board members regarding the VA research priorities.

The purpose of the closed session is to provide recommendations on the scientific quality, budget, safety and mission relevance of investigator-initiated research applications submitted for VA merit review evaluation. Applications submitted for review include various medical specialties within the general areas of biomedical, behavioral and clinical science research. The JBL/CS SMRB meeting will be closed to the public for the review, discussion, and evaluation of initial and renewal research applications, which involve reference to staff and consultant critiques of research applications. Discussions will deal with scientific merit of each application and qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Additionally, premature disclosure of research information could significantly obstruct implementation of proposed agency action regarding the research applications. As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing the subcommittee meetings is in accordance with Title 5 U.S.C. 552b(c)(6) and (9)(B).

Members of the public who wish to attend the open JBL/CS SMRB meeting should join via WebEx at: Meeting number (access code): 199 200 0800, meeting password: 2cZMnrsy?36. *https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=ma78d899af04fa76dfb51da583d406ef3.* Those who would like to obtain a copy of the minutes from the closed subcommittee meetings and rosters of the subcommittee members should contact Pauline Cilladi-Rehrer, MSBA, Designated Federal Officer, (14RD), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, at 202–443–5607 or at *Pauline.Cilladi-Rehrer@va.gov.*

Dated: December 30, 2020.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2020–29228 Filed 1–5–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Allowance for Private Purchase of an Outer Burial Receptacle in Lieu of a Government-Furnished Graveliner for a Grave in a VA National Cemetery

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is updating the monetary allowance payable for qualifying interments that occur during calendar year (CY) 2021, which applies toward the private purchase of an outer burial receptacle (or ''graveliner'') for use in a VA national cemetery. The allowance is equal to the average cost of Government-furnished graveliners less any VA administrative costs. The purpose of this notice is to notify interested parties of the average cost of Government-furnished graveliners; administrative costs that relate to processing and paying the allowance; and the amount of the allowance payable for qualifying interments that occur during CY 2021.

FOR FURTHER INFORMATION CONTACT: Mr. William Carter, Chief of Budget Execution Division, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420. The telephone number is 202–461–9764 (this is not a toll-free number).

DATES: This notice is effective January 1, 2021.

SUPPLEMENTARY INFORMATION: VA is authorized by 38 U.S.C. 2306(e)(3) and (4) to provide a monetary allowance for the private purchase of an outer burial receptacle for use in a VA national cemetery where its use is authorized. The allowance for qualified interments that occur during CY 2021 is the average cost of Government-furnished graveliners in fiscal year (FY) 2020, less the administrative cost incurred by VA in processing and paying the allowance in lieu of the Government-furnished graveliner.

The average cost of Government-furnished graveliners is determined by taking VA's total cost during a fiscal year for single-depth graveliners that were procured for placement at the time of interment and dividing it by the total number of such graveliners procured by VA during that fiscal year. The calculation excludes both graveliners pre-placed in gravesites as part of the cemetery gravesite development projects and all double-depth graveliners. Using this method of computation, the average cost was determined to be $381.00 for FY 2020.

The administrative cost is based on the costs incurred by VA during CY 2020 that relate to processing and paying an allowance in lieu of the Government-furnished graveliner. This cost has been determined to be $9.00.

Therefore, the allowance payable for qualifying interments occurring during CY 2021, is $372.00.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Brooks D. Tucker, Assistant Secretary for Congressional and Legislative Affairs, Performing the Delegable Duties of the Chief of Staff, Department of Veterans Affairs, approved this document on December 31, 2020, for publication.

Luvenia Potts,

Regulation Development Coordinator, Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

[FR Doc. 2020–29302 Filed 1–5–21; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 86 Wednesday,

No. 3 January 6, 2021

Part II

Department of the Treasury

Office of the Comptroller of the Currency

12 CFR Part 3

Federal Reserve System

12 CFR Parts 217 and 252

Federal Deposit Insurance Corporation

12 CFR Part 324

Regulatory Capital Treatment for Investments in Certain Unsecured Debt Instruments of Global Systemically Important U.S. Bank Holding Companies, Certain Intermediate Holding Companies, and Global Systemically Important Foreign Banking Organizations; Total Loss-Absorbing Capacity Requirements; Final Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket ID OCC–2018–0019]

RIN 1557–AE38

FEDERAL RESERVE SYSTEM

12 CFR Parts 217 and 252

[Regulation Q; Docket No. R–1655]

RIN 7100–AF43

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 324

RIN 3064–AE79

Regulatory Capital Treatment for Investments in Certain Unsecured Debt Instruments of Global Systemically Important U.S. Bank Holding Companies, Certain Intermediate Holding Companies, and Global Systemically Important Foreign Banking Organizations; Total Loss-Absorbing Capacity Requirements

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); the Board of Governors of the Federal Reserve System (Board); and the Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The OCC, Board, and FDIC (collectively, the agencies) are adopting a final rule that applies to advanced approaches banking organizations with the aim of reducing both interconnectedness within the financial system and systemic risks. The final rule requires deduction from a banking organization's regulatory capital for certain investments in unsecured debt instruments issued by foreign or U.S. global systemically important banking organizations (GSIBs) for the purposes of meeting minimum total loss-absorbing capacity (TLAC) requirements and, where applicable, long-term debt requirements, or for investments in unsecured debt instruments issued by GSIBs that are *pari passu* or subordinated to such debt instruments. In addition, the Board is adopting changes to its TLAC rules to clarify requirements and correct drafting errors.

DATES: The final rule is effective on April 1, 2021.

FOR FURTHER INFORMATION CONTACT:

OCC: Andrew Tschirhart, Risk Expert (202) 649–6370, Capital and Regulatory Policy; or Carl Kaminski, Special Counsel, or Jean Xiao, Attorney, Chief Counsel's Office, (202) 649–5490, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

Board: Constance M. Horsley, Deputy Associate Director, (202) 452–5239; Juan Climent, Assistant Director, (202) 872–7526; Mark Handzlik, Manager, (202) 475–6636; Sean Healey, Lead Financial Institution Policy Analyst, (202) 912–4611; Division of Supervision and Regulation; or Benjamin McDonough, Assistant General Counsel (202) 452–2036; or Mark Buresh, Senior Counsel (202) 452–5270, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For the hearing impaired only, Telecommunication Device for the Deaf (TDD), (202) 263–4869.

FDIC: Benedetto Bosco, Chief, Capital Policy Section; *bbosco@fdic.gov;* Richard Smith, Capital Markets Policy Analyst, *rismith@fdic.gov; regulatorycapital@fdic.gov;* Capital Markets Branch, Division of Risk Management Supervision, (202) 898–6888; or Michael Phillips, Counsel, *mphillips@fdic.gov;* Catherine Wood, Counsel, *cawood@fdic.gov;* or Ryan Rappa, Counsel, *rrappa@fdic.gov,* Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), and Federal Deposit Insurance Corporation (FDIC) (together, the agencies) are issuing a final rule to revise the regulatory capital rule in a manner substantially consistent with a proposed rule issued in April 2019 (proposal).[1] The final rule addresses the regulatory capital treatment of investments by advanced approaches banking organizations in unsecured debt instruments issued by foreign or U.S. global systemically important banking organizations (GSIBs) for the purposes of meeting minimum total loss-absorbing capacity (TLAC) requirements and, as applicable, long-term debt requirements, or of investments in unsecured debt instruments issued by GSIBs that are *pari passu* or subordinated to such debt instruments (covered debt instruments).[2] Consistent with the proposal, the exposures of an advanced approaches banking organization to covered debt instruments generally are subject to deduction from the banking

[1] *See* 84 FR 13814 (April 8, 2019).

[2] When the proposal was issued, a banking organization was an ''advanced approaches banking organization'' if it had total assets of at least $250 billion, or if it had consolidated on-balance sheet foreign exposures of at least $10 billion, or if it was a subsidiary of a depository institution, bank holding company, savings and loan holding company or intermediate holding company that was an advanced approaches banking organization. *See* 78 FR 62018, 62204 (October 11, 2013), 78 FR 55340, 55523 (September 10, 2013). *See also* 12 CFR part 3 (OCC); 12 CFR part 217 (Board); and 12 CFR part 324 (FDIC). In November 2019, the agencies issued a final rule to revise the criteria for determining the applicability of regulatory capital and liquidity requirements for large U.S. banking organizations and the U.S. intermediate holding companies of certain foreign banking organizations, including the application of the advanced approaches (interagency tailoring final rule). Under this final rule, advanced approaches banking organizations include those banking organizations subject to Category I standards (those banking organizations that qualify as U.S. GSIBs) or Category II standards (banking organizations with (1) at least $700 billion in total consolidated assets or (2) at least $75 billion in cross-jurisdictional activity and more than $100 billion in total consolidated assets), and a subsidiary depository institution of such a banking organization. *See* 84 FR 59230 (November 1, 2019).

organization's regulatory capital. The final rule includes certain adjustments to the proposal in response to comments. The final rule aims to reduce both interconnectedness within the financial system and systemic risks.

II. Background

A. Capital Requirements

The agencies' regulatory capital rule (capital rule) imposes minimum capital requirements on banking organizations measured through risk-based and leverage capital ratios.[3] These regulatory capital ratios consist of regulatory capital measures relative to risk-weighted assets and total assets, respectively.[4] The numerators of the regulatory capital ratios include various adjustments and deductions to balance-sheet-based regulatory capital components.

The capital rule includes two broad categories of deductions from regulatory capital related to investments in the capital instruments of financial institutions by advanced approaches banking organizations.[5] First, it requires a banking organization to deduct any investment in its own regulatory capital instruments and any investment in regulatory capital instruments held reciprocally with another financial institution (reciprocal cross holding).[6] Second, it requires a banking organization to deduct investments in capital instruments issued by unconsolidated financial institutions that would qualify as regulatory capital if issued by the banking organization itself.[7] For the purpose of the latter deduction, a banking organization may be required to deduct the entire amount of the investment, or it may be required to deduct only the portion of the investment that exceeds a certain threshold.[8] These deductions are intended to reduce interconnectedness and contagion risk among financial institutions by discouraging banking organizations from investing in the capital of other financial institutions.

For deductions related to investments in the capital of unconsolidated financial institutions, a banking organization must deduct from the component of regulatory capital for which the instrument qualifies or would qualify if it were issued by the banking organization that is holding the exposure.[9] For example, an advanced approaches banking organization that owns 10 percent or less of the common stock of an unconsolidated financial institution is said to have a ''non-significant investment'' in the capital of the unconsolidated financial institution. If the advanced approaches banking organization invests in tier 2 instruments issued by the unconsolidated financial institution, then it must deduct from its own tier 2 capital the amount, if any, by which the investment, combined with other non-significant investments in the capital of other unconsolidated financial institutions, exceeds 10 percent of the sum of the banking organization's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under section __.22(a) through __.22(c)(3), net of associated deferred tax liabilities (DTLs) (10 percent threshold for non-significant investments). Any non-significant investments in the capital of unconsolidated financial institutions that are not deducted from regulatory capital are risk-weighted in accordance with the capital rule.[10]

B. TLAC Rule

In December 2016, the Board issued a final rule to require the largest domestic and foreign banking organizations operating in the United States to maintain a minimum amount of total loss-absorbing capacity (TLAC), consisting of tier 1 capital (excluding minority interest) and certain long-term debt instruments (TLAC rule).[11] The TLAC rule applies to a U.S. top-tier bank holding company identified under the Board's rules as a global systemically important bank holding company (covered BHC) or a top-tier U.S. intermediate holding company subsidiary of a global systemically important foreign banking organization (foreign GSIB) with $50 billion or more in U.S. non-branch assets (covered IHC) (collectively, covered banking organizations).

The objective of the TLAC rule is to enhance financial stability by reducing the impact of the failure of covered banking organizations by requiring such organizations to have sufficient loss-absorbing capacity on both a going-concern and a gone-concern basis. The TLAC rule includes requirements that a covered banking organization maintain outstanding minimum levels of TLAC and long-term debt.[12] TLAC is the sum of the tier 1 capital instruments issued directly by the covered banking organization (excluding minority interest) and the long-term debt issued directly by the covered banking organization. Under the TLAC rule, long-term debt is generally unsecured debt that is issued directly by a covered banking organization, has no features that would interfere with an orderly resolution proceeding, has a remaining maturity of at least one year, and is governed by U.S. law, among other provisions.[13]

Long-term debt instruments under the TLAC rule are capable of absorbing losses in resolution (*i.e.,* on a gone-concern basis). This is because the debt holders' claim on a banking organization's assets may not receive full payment in a resolution, receivership, insolvency, or similar proceeding.[14] This potential loss-

[3] Banking organizations subject to the agencies' capital rule include national banks, state member banks, insured state nonmember banks, savings associations, and top-tier bank holding companies, intermediate holding companies, and savings and loan holding companies domiciled in the United States, but exclude banking organizations subject to the Board's Small Bank Holding Company and Savings and Loan Holding Company Policy Statement (12 CFR part 225, appendix C), qualifying community banking organizations that elect to comply with the agencies' community bank leverage ratio framework, and certain savings and loan holding companies that are substantially engaged in insurance underwriting or commercial activities or that are estate trusts, and bank holding companies and savings and loan holding companies that are employee stock ownership plans.

[4] *See* 12 CFR 3.10(a) (OCC); 12 CFR 217.10(a) (Board); and 12 CFR 324.10(a) (FDIC). In addition to the generally applicable leverage ratio, advanced approaches banking organizations are subject to a supplementary leverage ratio, which measures a banking organization's tier 1 capital relative to its on-balance sheet and certain off-balance sheet exposures.

[5] A different deduction framework applies to non-advanced approaches banking organizations. *See* 84 FR 35234 (July 22, 2019).

[6] *See* 12 CFR 3.22(c)(1) (OCC); 12 CFR 217.22(c)(1) (Board); and 12 CFR 324.22(c)(1) (FDIC).

[7] *See* 12 CFR 3.22(c)(2) (OCC); 12 CFR 217.22(c)(2) (Board); and 12 CFR 324.22(c)(2) (FDIC).

[8] *See* 12 CFR 3.22(c)(3), (c)(5), and (c)(6) (OCC); 12 CFR 217.22(c)(3), (c)(5), and (c)(6) (Board); and 12 CFR 324.22(c)(3), (c)(5), and (c)(6) (FDIC).

[9] *See* 12 CFR part 3, subparts D, E, or F, as applicable (OCC); 12 CFR part 217, subparts D, E, and F, as applicable (Board); and 12 CFR part 324, subparts D, E, or F, as applicable (FDIC).

[10] *See* 12 CFR part 3, subparts D, E, or F, as applicable (OCC); 12 CFR part 217, subparts D, E, and F, as applicable (Board); and 12 CFR part 324, subparts D, E, or F, as applicable (FDIC).

[11] *See* 82 FR 8266 (January 24, 2017); 12 CFR part 252, subparts G and P. The TLAC rule's TLAC and long-term debt requirements took effect on January 1, 2019.

[12] *See* 12 CFR 252.62 and 252.63; 12 CFR 252.162 and 252.165. The requirements applicable under the TLAC rule to covered BHCs and covered IHCs are similar but not identical.

[13] Long-term debt issued by a covered IHC to affiliates of the covered IHC is subject to notable additional requirements, including the inclusion of a provision allowing the Board to order the conversion of the debt into common equity tier 1 capital of the covered IHC. *See* 12 CFR 252.163.

[14] The internal debt conversion provision included in covered IHC long-term debt issued to affiliates performs a similar function outside of a resolution proceeding.

absorbing capacity of long-term debt is part of the rationale for the deduction approach for investments in such debt instruments under this final rule.[15]

Given the ability of long-term debt to absorb the losses of a covered banking organization in a resolution, receivership, insolvency, or similar proceeding, the Board proposed regulatory capital deductions for investments by Board-regulated banking organizations in long-term debt issued under the TLAC rule when it initially proposed the TLAC rule in 2015.[16] The Board did not finalize these limitations when it issued the final TLAC rule because it needed additional time to work with the OCC and the FDIC to develop a proposed interagency approach regarding the regulatory capital treatment for investments in certain debt instruments issued by covered banking organizations.

III. Overview of Notice of Proposed Rulemaking and Comments

In April 2019, the agencies issued a proposal to address, for purposes of the capital rule, the systemic risks posed by an advanced approaches banking organization's investments in covered debt instruments and to create an incentive for advanced approaches banking organizations to limit their exposure to GSIBs. The deductions required under the proposal would have affected the capital ratios of advanced approaches banking organizations. Without the proposed changes, investments in covered debt instruments issued by covered BHCs, foreign GSIBs, and covered IHCs are generally not subject to deduction and would generally be subject to a risk weight of 100 percent.

An investment in a covered debt instrument, as defined in the proposal, by an advanced approaches banking organization would have been treated as an investment in a tier 2 capital instrument for purposes of the existing deduction framework. As a result, an investment in a covered debt instrument would have been subject to deduction from the advanced approaches banking organization's own tier 2 capital.

The existing corresponding deduction approach in the capital rule would have been amended to apply any required deduction by advanced approaches banking organizations of an investment in a covered debt instrument that exceeded certain thresholds, consistent with the deduction framework for investments in the capital of unconsolidated financial institutions. In addition, the existing deduction approaches under the capital rule would have been amended to apply to an advanced approaches banking organization's reciprocal cross holdings of covered debt instruments; that is, an advanced approaches banking organization would have deducted from its own tier 2 capital any reciprocal cross holdings of covered debt instruments with another banking organization. The existing deduction approaches under the capital rule would have also been amended to apply to a covered BHC's investments in its own covered debt instruments. Similarly, the existing deduction approaches under the capital rule would have also been amended to apply to a covered IHC subject to the advanced approaches (advanced approaches covered IHC) and its investments in its own covered debt instruments.

The proposal also included certain exclusions from deduction. Importantly, the proposal would have allowed advanced approaches banking organizations to exclude from deduction investments in covered debt instruments, subject to certain qualifying and measurement criteria, that are five percent or less of the sum of advanced approaches banking organization's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under section __.22(a) through __.22(c)(3), net of associated DTLs (five percent exclusion). As discussed in the preamble to the proposal, the agencies designed the exclusion from deduction to support deep and liquid markets for covered debt instruments issued by GSIBs. In the case of a U.S. GSIB, it would have applied the proposed exclusion only to ''excluded covered debt instruments,'' which were defined in the proposal as covered debt instruments held for 30 business days or less and held for the purpose of short-term resale or with the intent of benefiting from actual or expected short-term price movements, or to lock in arbitrage profits. This provision was intended to limit the five percent exclusion for U.S. GSIBs to covered debt instruments held in connection with market making activities. Advanced approaches banking organizations that are not U.S. GSIBs would not have been subject to this limit on the use of the five percent exclusion. Under the proposal's five percent exclusion, all advanced approaches banking organizations could exclude covered debt instruments measured on a gross long basis from the deduction framework up to a cap of five percent of the banking organization's common equity tier 1 capital.

The proposal would have revised section __.22(c), (f), and (h) of the capital rule to incorporate the proposed deduction approach for investments in covered debt instruments, and added several new definitions to section __.2 to effectuate these deductions. Further, the definition of ''investment in the capital of an unconsolidated financial institution'' would have been amended to correct a typographical error.

Collectively, the agencies received ten public comment letters from trade associations, public interest groups, private individuals, and other interested parties. As further detailed below, commenters generally supported the overarching goal of the proposal to reduce interconnectedness by creating an incentive for advanced approaches banking organizations to limit their exposure to GSIBs. However, commenters also expressed certain general concerns with the proposal and noted specific concerns with certain technical aspects of it.

The agencies are jointly finalizing a regulatory capital treatment for investments in covered debt instruments that applies to advanced approaches banking organizations. The final rule is substantially consistent with the proposal, with certain modifications in response to comments as well as some technical clarifications.

IV. Summary of the Final Rule

The final rule applies to advanced approaches banking organizations and generally requires deductions from capital for direct, indirect, and synthetic exposures to covered debt instruments and any other unsecured debt instruments *pari passu* or subordinated to covered debt instruments.[17] Under the final rule, an advanced approaches banking organization treats investments in covered debt instruments as investments in tier 2 capital instruments for purposes of applying the corresponding deduction approach in

[15] Long-term debt under the TLAC rule may also qualify as tier 2 capital under the capital rule, if it satisfies the eligibility criteria for tier 2 capital.

[16] The proposal of the TLAC rule in 2015 was issued solely by the Board. Therefore, the proposed regulatory capital deductions in that proposal would have only applied to Board-regulated banking organizations, which include bank holding companies, intermediate holding companies, savings and loan holdings companies, and state member banks.

[17] As discussed further in section V.C.2 below, the final rule excludes certain unsecured debt instruments issued by foreign GSIBs from the scope of the final rule. Specifically, the final rule generally excludes from the definition of covered debt instrument an unsecured debt instrument that cannot be written down or converted into equity (*i.e.,* bailed in) under a special resolution regime.

the capital rule. Deduction from capital is required for:

- Investments in a covered BHC's or advanced approaches covered IHC's own covered debt instruments, as applicable;
- Reciprocal cross holdings with another financial institution of covered debt instruments;
- Investments in covered debt instruments of a financial institution while also holding 10 percent or more of the financial institution's common stock; and
- Investments in covered debt instruments that, together with investments in the capital of unconsolidated financial institutions, exceed 10 percent of the investing advanced approaches banking organization's common equity tier 1 capital.
- Under the final rule, an advanced approaches banking organization may exclude from deduction investments in certain covered debt instruments up to five percent of its common equity tier 1 capital, as measured on a gross long basis.[18] Usage of the five percent exclusion is tailored, depending on whether the advanced approaches banking organization is a U.S. GSIB.

For U.S. GSIBs, only ''excluded covered debt instruments'' are eligible for the five percent exclusion in the final rule. Generally, ''excluded covered debt instruments'' in the final rule are investments in covered debt instruments that are held in accordance with market making activities, as identified using criteria from the regulations implementing section 13 of the Bank Holding Company Act (commonly known as the Volcker Rule) as discussed in more detail in section V.E. below. A U.S. GSIB's direct or indirect exposure to a covered debt instrument is an excluded covered debt instrument if the exposure is held for 30 or fewer business days and held in connection with market making-related activities. A U.S. GSIB's holding of a synthetic exposure to a covered debt instrument is not limited to 30 business days in order to qualify as an excluded covered debt instrument.

For advanced approaches banking organizations that are not U.S. GSIBs, any direct, indirect, or synthetic exposure to a covered debt instrument issued by an unconsolidated financial institution that is a non-significant investment is eligible for the five percent exclusion in the final rule.

The final rule revises section __.22(c), (f), and (h) of the capital rule to incorporate the deduction approach for investments in covered debt instruments. As with the proposal, several new definitions are added to section __.2 in the final rule to effectuate these deductions. More information on these specific revisions to the capital rule are provided below.

V. Regulatory Capital Treatment for Advanced Approaches Banking Organizations' Investments in Covered Debt Instruments

A. Scope of Application

The proposal would have applied the deduction framework for covered debt instruments to advanced approaches banking organizations. Since the proposal was issued, the agencies issued the interagency tailoring final rule that included revisions to the scope of advanced approaches banking organizations.[19] As a result of the interagency tailoring final rule, ''advanced approaches banking organizations'' include those banking organizations subject to Category I standards (*i.e.,* those banking organizations that qualify as U.S. GSIBs), Category II standards (*i.e.,* banking organizations with (1) at least $700 billion in total consolidated assets or (2) at least $75 billion in cross-jurisdictional activity and at least $100 billion in total consolidated assets), or a subsidiary depository institution of a banking organization subject to Category I or II standards. Some commenters suggested that the agencies should apply the proposal to all banking organizations subject to the capital rule. Other commenters suggested the agencies apply the proposal to all banking organizations subject to Category I through IV standards, as defined in the interagency tailoring final rule.[20]

After considering the comments, the agencies are continuing to limit the scope of this rule to advanced approaches banking organizations, as revised by the interagency tailoring final rule. As explained in the proposal, the systemic risks associated with banking organizations' investments in covered debt instruments is greatest for the banking organizations covered by the proposal. However, the agencies acknowledge the possibility of potential systemic risks associated with other banking organizations' investments in covered debt instruments and will continue to evaluate whether additional steps are warranted to address such risks.

B. Deduction From Tier 2 Capital

Under the agencies' capital rule, a banking organization must deduct from regulatory capital any investments in its own capital instruments and in the capital of other financial institutions that it holds reciprocally. Other investments in the capital of unconsolidated financial institutions are subject to deduction to the extent they exceed certain thresholds.

Under the proposal, an investment in a covered debt instrument by an advanced approaches banking organization would have been treated as an investment in a tier 2 capital instrument for purposes of the deduction framework, and therefore, would have been subject to deduction from the advanced approaches banking organization's own tier 2 capital. The existing corresponding deduction approach in the capital rule would have been amended to apply to any deduction by advanced approaches banking organizations of an investment in a covered debt instrument that exceeded certain thresholds, as if the covered debt instrument were a tier 2 capital instrument. In addition, the existing deduction approaches under the capital rule would have been amended to apply to a covered BHC's or advanced approaches covered IHC's investments in its own covered debt instruments, and to advanced approaches banking organizations' reciprocal cross holdings of covered debt instruments with other financial institutions. Such investments and cross holdings would be deducted from an advanced approaches banking organization's own tier 2 capital, as applicable.

Some commenters expressed concerns that deducting a covered debt instrument from an advanced approaches banking organization's own tier 2 capital is insufficiently restrictive. As an alternative, these commenters recommended that advanced approaches banking organizations deduct investments in covered debt instruments from their own common equity tier 1 capital. Some commenters suggested that the prohibition of all holdings of covered debt instruments by advanced approaches banking organizations would be more appropriate. Other commenters expressed concerns that deducting a covered debt instrument from an advanced approaches banking organization's own tier 2 capital is overly restrictive. These commenters asserted that a covered BHC or advanced approaches covered IHC should be able to effectuate deductions

[18] *See* 12 CFR 3.22(h)(2) (OCC); 12 CFR 217.22(h)(2) (Board); 12 CFR 324.2(h)(2) (FDIC).

[19] *See* 84 FR 59230 (November 1, 2019).

[20] *See* 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); 12 CFR 324.2 (FDIC).

from its own TLAC-eligible long-term debt rather than its own tier 2 capital.

Requiring deduction of a covered debt instrument from tier 2 capital should be a sufficiently prudent and simple approach that discourages advanced approaches banking organizations' investments in such instruments and thereby supports the objectives of reducing both interconnectedness within the financial system and systemic risks. Effectuating deductions from a covered BHC's or advanced approaches covered IHC's own TLAC-eligible debt, rather than own tier 2 capital, could disproportionately favor the largest and most internationally active banking organizations. A less complex banking organization, such as a non-GSIB advanced approaches banking organization, would make all deductions related to an investment in a covered debt instrument from its own tier 2 capital, since non-GSIBs are not required to issue TLAC-eligible debt. Further, allowing covered BHCs and advanced approaches covered IHCs to deduct from their own TLAC-eligible debt creates additional balance sheet capacity for these banking organizations to invest in covered debt instruments issued by other GSIBs relative to non-GSIB advanced approaches banking organizations, thereby undermining a goal of the final rule to reduce interconnectedness among large and internationally active banking organizations. The disproportionate effects of allowing deduction from own TLAC-eligible debt would be further exacerbated if the agencies were to expand the scope of the final rule in the future as described above.

As such, the agencies are finalizing, as proposed, the requirement that an advanced approaches banking organization treat an investment in a covered debt instrument as an investment in a tier 2 capital instrument, and therefore, deduct such investment from its own tier 2 capital.

C. Amendments to Definitions

The proposal would have added or amended certain definitions in section _ _.2 of the capital rule to implement the proposed deduction approach.

1. Definition of ''Covered Debt Instrument'' for Covered BHC and Covered IHC Issuance

Under the proposal, a ''covered debt instrument'' would have been defined to include an unsecured debt instrument that is:

(1) Issued by a covered BHC and that is an ''eligible debt security'' for purposes of the TLAC rule,[21] or that is *pari passu* or subordinated to any ''eligible debt security'' issued by the covered BHC; or

(2) Issued by a covered IHC and that is an ''eligible Covered IHC debt security'' for purposes of the TLAC rule,[22] or that is *pari passu* or subordinated to any ''eligible Covered IHC debt security'' issued by the covered IHC.

Under the proposal, a covered debt instrument would not have included a debt instrument that qualifies as tier 2 capital under the capital rule.

Some commenters requested that *pari passu* or subordinated unsecured debt instruments be excluded from the definition of ''covered debt instrument.'' Commenters argued that it is not practical to determine whether a given instrument is *pari passu* or subordinated to TLAC-eligible debt issued by a covered BHC or covered IHC and whether a given debt instrument was an eligible long-term debt instrument under the TLAC rule. Further, commenters argued that because the TLAC rule limits the amount of debt that a covered BHC or covered IHC can issue that is not TLAC-eligible but is *pari passu* with or subordinated to TLAC-eligible debt, significant amounts of such debt should not be outstanding.

Treating unsecured debt instruments that are *pari passu* or subordinated to TLAC-eligible debt instruments as ''covered debt instruments'' is important, given that these liabilities will incur losses ahead of or proportionally with TLAC-eligible debt. Excluding these *pari passu* and subordinated instruments from the regulatory deduction treatment would understate the degree of risk of these investments. Advanced approaches banking organizations should be able to determine whether an instrument qualifies as TLAC under applicable standards, or whether an instrument is *pari passu* or subordinated to a company's TLAC-eligible debt instruments based on public information and routine due diligence. Accordingly, the agencies are finalizing as proposed the above prongs of the definition of covered debt instrument for covered BHC and covered IHC debt issuances.

2. Definition of ''Covered Debt Instrument'' for Foreign GSIB Issuance

A ''covered debt instrument'' also would have included any unsecured debt instrument issued by a foreign GSIB or any of its subsidiaries, other than its covered IHC, for the purpose of absorbing losses or recapitalizing the issuer or any of its subsidiaries in connection with a resolution, receivership, insolvency, or similar proceeding of the issuer or any of its subsidiaries (foreign TLAC-eligible debt). Further, covered debt instruments would have also included any debt instrument that is *pari passu* or subordinated to any foreign TLAC-eligible debt, other than an unsecured debt instrument that is included in the regulatory capital of the issuer.

Commenters suggested that the scope of the definition of ''covered debt instrument'' should be revised to include only foreign TLAC-eligible debt as determined under applicable home-country standards.[23] Commenters stated that the proposed scope of the definition is broader than necessary because the issuance of such liabilities is subject to the Financial Stability Board (FSB)'s TLAC term sheet's limitation on issuance of excluded liabilities.[24] Some commenters suggested that liabilities issued by foreign GSIBs that are ''excluded liabilities'' under the FSB's TLAC term sheet should be excluded from the proposal's definition of covered debt instrument and therefore exempted from the deduction framework.[25]

[21] *See* 12 CFR 252.61.

[22] *See* 12 CFR 252.161.

[23] The Basel Committee's *TLAC Holdings* standard excludes from the definition of ''other TLAC liabilities'' instruments that are *pari passu* to (1) excluded liabilities and (2) other instruments that are eligible for recognition as external TLAC by virtue of the exemptions to the subordination requirements in the Financial Stability Board's TLAC term sheet. *See* section 66.c of the *TLAC Holdings* standard. Only a proportion of instruments that are eligible to be recognized as external TLAC by virtue of the subordination exemptions may be considered TLAC under the *TLAC Holdings* standard. The proportion equals the ratio of (1) the debt instruments issued by a GSIB that rank *pari passu* to excluded liabilities and that are recognized as external TLAC by the GSIB, to (2) the debt instruments issued by the GSIB that rank *pari passu* to excluded liabilities and that would be recognized as external TLAC if the subordination requirement was not applied. As stated in the proposal, the agencies believe that implementation of the proportional deduction approach used in the Basel Committee's *TLAC Holdings* standard would have introduced too much complexity and operational burden to the capital rule; the final rule does not implement the proportional deduction approach. *See* Basel Committee for Banking Supervision and Regulation, ''TLAC Holdings'' (October 12, 2016), available at *https://www.bis.org/bcbs/publ/d387.pdf.* (*TLAC Holdings* standard).

[24] *See* Financial Stability Board, ''Principles on Loss-absorbing and Recapitalisation Capacity of G–SIBs in Resolution—Total Loss-absorbing Capacity (TLAC) Term Sheet,'' (November 9, 2015), available at *https://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf.*

[25] Under the FSB's TLAC term sheet, ''excluded liabilities'' do not qualify as TLAC and therefore are not subject to deduction under the *TLAC Holdings*

Some commenters reiterated that it is not practical for banking organizations to determine whether a given instrument is *pari passu* or subordinated to foreign TLAC-eligible debt as such a determination requires complex analyses of foreign law with respect to insolvency regimes and creditor hierarchies. Commenters also asserted that there could be unintended consequences of including instruments that are *pari passu* or subordinated to foreign TLAC-eligible debt, including interference with ordinary interbank transactions. As a result, banking organizations would make conservative assumptions and treat all unsecured debt instruments issued by foreign GSIBs as subject to the deduction framework. Therefore, commenters suggested that the final rule should not include instruments *pari passu* or subordinated to foreign TLAC-eligible debt in the definition of ''covered debt instruments.''

For the same reasons discussed above with respect to instruments issued by covered BHCs and covered IHCs, the final rule defines debt instruments that are *pari passu* or subordinated to foreign TLAC-eligible debt as ''covered debt instruments.'' As discussed, such instruments would incur losses ahead of or proportionally with foreign TLAC-eligible debt and therefore should be subject to the deduction framework.

However, the agencies recognize the commenters' concerns and revise in two ways the definition of covered debt instruments issued by foreign GSIBs and their subsidiaries, other than covered IHCs. First, the final rule provides that an instrument is a covered debt instrument if it is ''eligible for use to comply with an applicable law or regulation'' requiring the issuance of a minimum amount of instruments to absorb losses or to recapitalize the issuer or any of its subsidiaries in connection with a resolution, receivership, insolvency, or similar proceeding. The proposal's definition would not have explicitly considered whether the instrument is eligible for use to comply with such a law or regulation.

Second, the final rule revises the definition of a covered debt instrument to exclude certain unsecured debt instruments from the scope of the definition. If the issuer may be subject to a special resolution regime, in its jurisdiction of incorporation or organization, that addresses the failure or potential failure of a financial company and foreign TLAC-eligible debt is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument, then an instrument is *pari passu* or subordinated to foreign TLAC-eligible debt if that instrument is eligible to be written down or converted into equity or another capital instrument under that special resolution regime ahead of or proportionally with any foreign TLAC-eligible debt. These revisions reflect the FSB's TLAC term sheet's focus on having instruments and liabilities that should be readily available for bail-in, and that instruments that cannot be bailed in effectively rank senior to foreign TLAC-eligible debt in bail-in.[26]

These revisions should reduce the burden associated with determining whether unsecured debt instruments are *pari passu* or subordinated to foreign TLAC-eligible debt. For purposes of the final rule, an advanced approaches banking organization can rely on the terms of any special resolution regime and other applicable laws or regulations for purposes of determining the applicability of the final rule's deduction framework for an unsecured debt instrument. For example, if the applicable law or regulation specifies the seniority of instruments that must be issued, the advanced approaches banking organization can rely on that specification of seniority in determining whether a different instrument is *pari passu* or subordinated to TLAC-eligible debt instruments.

These revisions also address concerns raised by commenters that the proposal could have interfered with ordinary interbank transactions. For example, if the special resolution regime applicable to a foreign GSIB provides that deposits are excluded from bail-in, those deposits are not covered debt instruments subject to the final rule's deduction framework.

3. Other Definitions

Similar to the measurement of investments in the capital of unconsolidated financial institutions, an ''investment in a covered debt instrument'' would have been defined in the proposal as a net long position in a covered debt instrument, including direct, indirect, and synthetic exposures to such covered debt instruments. Investments in covered debt instruments would have excluded underwriting positions held for five business days or less. In addition, the proposal would have amended the definitions of ''indirect exposure'' and ''synthetic exposure'' in the capital rule to add exposures to covered debt instruments.[27] The agencies received no comments on these technical elements of the proposal, and are finalizing, as proposed, the definitions for ''investment in a covered debt instrument,'' ''indirect exposure,'' and ''synthetic exposure.''

D. Investments in Covered Banking Organizations' Own Covered Debt Instruments and Reciprocal Cross Holdings

Under the agencies' capital rule, a banking organization must deduct from regulatory capital an investment in its own capital instruments and investments in the capital of other financial institutions that it holds reciprocally under sections __.22(c)(1) and (3), respectively. The proposal would have amended section 217.22(c)(1) to require a covered BHC or a covered IHC to deduct from tier 2 capital its investments in its own covered debt instruments. The proposal also would have amended section __.22(c)(3) to require advanced approaches banking organizations to deduct from tier 2 capital any investment in a covered debt instrument that is held reciprocally with another financial institution.

As described earlier, some commenters expressed concerns that deducting a covered debt instrument from an advanced approaches banking organization's own tier 2 capital is overly restrictive, including in cases of deductions for investments in its own covered debt instruments, as applicable,

standard, even if they rank *pari passu* or subordinated to a TLAC instrument. Excluded liabilities include deposits, liabilities arising from derivatives, and structured notes, among other items. The TLAC rule prohibits or limits covered banking organizations from entering into financial arrangements that may compromise an orderly resolution process, including limiting the amount of liabilities to unaffiliated companies.

[26] Generally, a resolution regime that is consistent with the FSB's *Key Attributes of Effective Resolution Regimes for Financial Institutions* would be a special resolution regime that addresses the failure or potential failure of a financial company. *See* Financial Stability Board, ''Key Attributes of Effective Resolution Regimes for Financial Institutions,'' (October 15, 2014), *https://www.fsb.org/wp-content/uploads/r_141015.pdf.* Current examples of special resolution regimes that address the failure or potential failure of a financial company are those included in the International Swaps and Derivatives Association (ISDA) 2015 Universal Resolution Stay Protocol and the ISDA 2018 U.S. Resolution Stay Protocol. *See* ISDA 2015 Universal Resolution Stay Protocol (November 4, 2015), *http://assets.isda.org/media/ac6b533f-3/5a7c32f8-pdf;* ISDA 2018 U.S. Resolution Stay Protocol (July 31, 2018), *https://www.isda.org/a/CIjEE/3431552_40ISDA-2018-U.S.-Protocol-Final.pdf.*

[27] *See* 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); and 12 CFR 324.2 (FDIC) (''investment in the capital of an unconsolidated financial institution,'' ''investment in the banking organization's own capital instrument,'' ''indirect exposure,'' and ''synthetic exposure'').

and reciprocal cross holdings with other financial institutions. These commenters asserted that a covered BHC or a covered IHC should be able to effectuate deductions from its own TLAC-eligible long-term debt rather than its own tier 2 capital for these investments.

Requiring a deduction of a covered debt instrument from tier 2 capital for deductions related to investments in an advanced approaches banking organization's own covered debt instruments and reciprocal cross holdings should be a sufficiently prudent and simple approach that discourages advanced approaches banking organizations' investments in such instruments, as applicable, and thereby supports the objectives of reducing both interconnectedness within the financial system and systemic risks. As mentioned earlier, effectuating deductions from a covered BHC's or a covered IHC's own TLAC-eligible debt, rather than its own tier 2 capital, could disproportionately favor the largest and most internationally active banking organizations. As such, the agencies are finalizing, as proposed, that an advanced approaches banking organization will generally deduct investments in own covered debt instruments, as applicable, and reciprocal cross holdings with other financial institutions in covered debt instruments from its own tier 2 capital.

Commenters asked that the final rule include a separate deduction threshold for market making activities in an advanced approaches banking organization's own covered debt instruments capped at five percent of a covered BHC's or advanced approaches covered IHC's own common equity tier 1 capital. Commenters stated that such a threshold is necessary to better facilitate deep and liquid markets for TLAC-eligible debt instruments. Further, commenters claimed that GSIBs are often the biggest market makers in their own covered debt instruments and, under the U.S. GAAP accounting standard, their own holdings of covered debt instruments are not always eliminated in full in consolidation. In cases where a GSIB's investments in its own covered debt instruments are not fully extinguished, the exposure amount can be greater than zero and therefore subject to deduction from tier 2 capital under the proposal.

Commenters stated that a separate five percent threshold for market making in an advanced approaches banking organization's own covered debt instruments in the final rule would prevent a capital deduction for such investments. However, finalizing the rule with a separate threshold for investments in an advanced approaches banking organization's own covered debt instruments could create additional balance sheet capacity for covered BHCs and advanced approaches covered IHCs to increase their investments in covered debt instruments issued by other GSIBs. Such an approach would not align with the proposal's goal of reducing interconnectedness and systemic risks among large and internationally active banking organizations. Therefore, the final rule does not implement this suggested change.

E. Significant and Non-Significant Investments in Covered Debt Instruments

Under sections __.22(c)(5) and (6) of the capital rule, an advanced approaches banking organization must deduct from regulatory capital certain investments in the capital of unconsolidated financial institutions. The calculation of the deduction depends on whether the banking organization has a ''significant'' or a ''non-significant'' investment, with ''significant'' defined as ownership of more than 10 percent of the common stock of the unconsolidated financial institution and ''non-significant'' defined as ownership of 10 percent or less of the common stock of the unconsolidated financial institution.[28] When a banking organization has a ''significant investment'' in an unconsolidated financial institution, the banking organization must deduct from regulatory capital any investment in the capital of the unconsolidated financial institution that is not in the form of common stock as measured on a net long basis, and the banking organization must also deduct from regulatory capital any investment in the capital of the unconsolidated financial institution in the form of common stock that exceeds 10 percent of the advanced approaches banking organization's own common equity tier 1 capital as measured on a net long basis.[29] If an advanced approaches banking organization has one or more ''non-significant investments'' in unconsolidated financial institutions, it must aggregate such investments and deduct from regulatory capital any amount that exceeds the 10 percent threshold for non-significant investments, as measured on a net long basis.[30]

The proposal would have amended the capital rule to require an advanced approaches banking organization with an investment in a covered debt instrument issued by an unconsolidated financial institution to deduct the investment from tier 2 capital if the advanced approaches banking organization has a significant investment in the capital of the unconsolidated financial institution. The agencies received no comments on deductions for significant investments in the capital of an unconsolidated financial institution and are finalizing this aspect of the rule as proposed.

The proposal would have amended the capital rule to require an advanced approaches banking organization with an investment in a covered debt instrument in a financial institution in which the advanced approaches banking organization does not also have a significant investment in the form of common stock to include such investment in the covered debt instrument in the aggregate amount of non-significant investments in the capital of unconsolidated financial institutions. As under the existing capital rule, the proposal would have required an advanced approaches banking organization to deduct from regulatory capital the amount by which the aggregate amount of non-significant investments in the capital of unconsolidated financial institutions and such covered debt instruments exceeds the 10 percent threshold for non-significant investments. Any investment in a covered debt instrument subject to deduction would have been deducted according to the corresponding deduction approach described below in section V.F. Any investment in a covered debt instrument not subject to deduction would have been included in risk-weighted assets, generally with a 100 percent risk weight.

Some commenters suggested that the agencies recalibrate the 10 percent threshold for non-significant investments in consideration of the expanded scope of instruments that would be included within that threshold under the proposal. For

[28] *See* 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); 12 CFR 324.2 (FDIC) (''significant investment in the capital of an unconsolidated financial institution'' and ''non-significant investment in the capital of an unconsolidated financial institution'').

[29] *See* 12 CFR 3.22(c)(6) and (d)(2)(i)(C) (OCC); 12 CFR 217.22(c)(6) and (d)(2)(i)(C) (Board); and 12 CFR 324.22(c)(6) and (d)(2)(i)(C) (FDIC). In addition to the 10 percent threshold, a banking organization could be subject to additional deductions for significant investments in financial institutions in the form of common stock, if the amount not deducted under the 10 percent limit, combined with mortgage servicing assets and deferred tax assets that are not deducted, exceed 15 percent of the banking organization's common equity tier 1 capital. *See* 12 CFR 3.22(d) (OCC); 12 CFR 217.22(d) (Board); and 12 CFR 324.22(d) (FDIC).

[30] *See* 12 CFR 3.22(c)(5) (OCC); 12 CFR 217.22(c)(5) (Board); and 12 CFR 324.2(c)(5) (FDIC).

example, some commenters asked the agencies to expand the non-significant investments threshold to 10 percent of an advanced approaches banking organization's own total capital from 10 percent of its own common equity tier 1 capital. Changing the non-significant investments threshold in the manner the commenters suggested could undermine a main goal of the proposal—to reduce interconnectedness among large and internationally active banking organizations. Accordingly, the final rule requires an advanced approaches banking organization with an investment in a covered debt instrument in a financial institution in which the advanced approaches banking organization does not have a significant investment to include such investment in the aggregate amount of non-significant investments in the capital of unconsolidated financial institutions, as proposed. Further, the final rule requires an advanced approaches banking organization to deduct from regulatory capital the amount by which the aggregate amount of non-significant investments in the capital of unconsolidated financial institutions exceeds the 10 percent threshold for non-significant investments, as proposed.

The proposal would have included limited exclusions from the 10 percent threshold for non-significant investments' deduction approach. The exclusions would have depended on whether an advanced approaches banking organization is a U.S. GSIB or a subsidiary of a U.S. GSIB (U.S. GSIB banking organization). To help support a deep and liquid market for covered debt instruments, the proposal would have permitted U.S. GSIB banking organizations to exclude limited amounts of market making exposures (''excluded covered debt instruments'') from the 10 percent threshold for non-significant investments deduction. For example, a U.S. GSIB could have excluded covered debt instruments from the aggregate amount of non-significant investments in the capital of unconsolidated financial institutions. The aggregate amount of the exclusion, measured on a gross long basis, was limited to five percent of the GSIB's own common equity tier 1 capital (market making exclusion). If the aggregate amount of excluded covered debt instruments were more than five percent of the common equity tier 1 capital, then the excess over five percent would have been subject to deduction from tier 2 capital on a gross long basis. In addition, if an excluded covered debt instrument were held for more than 30 business days or ceased to be held in connection with market making activities, then the excluded covered debt instrument would have been subject to deduction from tier 2 capital on a gross long basis. Finally, in order to dissuade regulatory arbitrage, the proposal would not have allowed U.S. GSIB banking organizations to subsequently move ''excluded covered debt instruments'' from the market making exclusion to the 10 percent threshold for non-significant investments.

Commenters stressed the importance of derivatives to market making activities in securities, particularly covered debt instruments issued by GSIBs. In market making transactions, U.S. GSIBs will often act as financial intermediaries between clients, transferring risks related to covered debt instruments. This risk transfer is often conducted through offsetting derivative transactions or directly buying and selling covered debt instruments. Commenters stated that this market making activity supports deep and liquid markets for covered debt instruments by allowing investors to reduce (or gain) exposure to covered debt instruments without actually selling (or buying) the securities. Derivatives are essential to such activities because they allow market makers to establish and hedge these exposures.

As such, these commenters asserted that the agencies should eliminate the proposed 30-business-day requirement because it would make the proposed market making exclusion unavailable for many market making activities that support the depth and liquidity of the markets for TLAC-eligible debt, in particular synthetic exposures from derivatives used in market making activities. These commenters noted that bona fide market making activities, including derivative- and hedging-related activities, often involve holding exposures for longer than 30 business days. Commenters further indicated that the 30-business-day requirement would also create incentives for U.S. GSIB banking organizations to arbitrage the final rule by exiting and reestablishing hedge positions to avoid a mandatory deduction from tier 2 capital if the position is held for more than 30 business days. Commenters indicated that re-establishing hedge positions would result in costs to banking organizations and clients without reducing the risks associated with the transactions. Additionally, these commenters indicated that the vast majority of market making activity in covered debt instruments is in the form of derivative exposures. Therefore, retaining the 30-business-day requirement would arguably make the five percent exclusion inoperable for most market making activities in covered debt instruments. As an alternative to the proposed market making standard and the proposed 30-business-day requirement, commenters suggested the agencies use the regulatory framework implementing the Volcker Rule to identify which positions in covered debt instruments are held for market making purposes and eliminate the 30-business-day requirement. These commenters stated that this approach would promote effectiveness, simplicity, and efficiency in the regulation.

After considering commenters' suggestions to eliminate the proposed 30-business-day requirement for market making in covered debt instruments, the agencies have revised the proposal by removing the 30-business-day requirement for market making in the form of ''synthetic exposures'' as defined in the agencies' capital rule.[31] Synthetic market making exposures, such as derivatives, may frequently be held for more than 30 business days. Removing the 30-business-day requirement for synthetic exposures would, relative to the proposal, better align with the proposal's goal of supporting deep and liquid markets for covered debt instruments by allowing synthetic exposures arising from market making activities to be included in the market making exclusion, subject to limits. As discussed, this exclusion is limited to five percent of common equity tier 1 capital, measured on a gross long basis. These limits are consistent with financial stability goals of avoiding asset fire sales in times of stress, encouraging risk-mitigating hedges, and reducing interconnectedness while still supporting deep and liquid markets for TLAC-eligible debt instruments. Accordingly, the final rule reflects this change. However, the agencies continue to believe that the 30-business-day requirement is an appropriate metric to identify market making positions in ''direct'' investments in covered debt instruments (*i.e.,* holding the instrument on the banking organization's balance sheet) and ''indirect'' investments in covered debt instruments (*i.e.,* exposure to the instrument through investment funds).[32] Direct investments in covered

[31] *See* 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); 12 CFR 324.2 (FDIC) (''synthetic exposure'').

[32] *See* 12 CFR 3.2 (OCC); 12 CFR 217.2 (Board); 12 CFR 324.2 (FDIC) (''investment in the capital of

Continued

debt instruments held in connection with market making should turn over regularly and the agencies seek to dis-incentivize long-term direct and indirect exposures to covered debt instruments, given the risk of write-down or conversion to equity of such instruments.

Therefore, the final rule retains the 30-business-day requirement for ''direct'' and ''indirect'' investments in excluded covered debt instruments, but not for ''synthetic'' investments in excluded covered debt instruments. This change from the proposal should balance the goals of limiting interconnectedness among the largest and most internationally active banking organizations and promoting the liquidity of TLAC-eligible debt instruments. Additionally, the agencies clarify that there is no requirement under the final rule to assign investments in covered debt instruments held in connection with market making as ''excluded covered debt instruments.'' To the extent a U.S. GSIB banking organization has available capacity, all investments in covered debt instruments could be held on a net long basis as non-significant investments in the capital of an unconsolidated financial institution subject to the 10 percent threshold for non-significant investments.

After consideration of comments, the agencies also have revised the rule to use the Volcker Rule exemption for market making activities to identify covered debt instruments held for market making for purposes of qualifying for the final rule's market making exclusion. Relative to the proposal, this change should decrease compliance burden by allowing banking organizations to use a single methodology for identifying market making activities, rather than two similar, but non-identical regulatory standards.

This approach would capture essentially the same set of exposures as the proposal's standard. However, the final rule's definition of ''excluded covered debt instrument'' differs from the proposal by referring to the relevant provisions of each agency's rule implementing the market making exemption in the Volcker Rule.[33]

The proposal also included a simpler deduction approach for advanced approaches banking organizations that are not U.S. GSIB banking organizations given that these banking organizations pose less systemic risks than U.S. GSIBs. Unlike a U.S. GSIB, these banking organizations can include any non-significant investments in covered debt instruments of unconsolidated financial institutions in the five percent exclusion (*i.e.,* use of the exclusion is not restricted to only those investments held in connection to market making activities). Any amount in excess of this five percent exclusion would be subject to the 10 percent threshold for non-significant investments deduction on a net long basis. The agencies did not receive comments on this provision of the proposal. Therefore, the final rule implements the five percent exclusion for advanced approaches banking organizations that are not U.S. GSIBs as proposed.

As noted above, an advanced approaches banking organization could exclude certain investments in covered debt instruments, as applicable, from the 10 percent threshold for non-significant investments calculation and potential deduction under section __.22(c)(4) if the aggregate amount of covered debt instruments, measured by gross long position, were five percent or less of its common equity tier 1 capital. To achieve consistency with the *TLAC Holdings* standard and with the calculation of the 10 percent threshold for non-significant investments deduction, the agencies are modifying the calculation for determining the amount of covered debt instruments that can be omitted from the 10 percent threshold for non-significant investments calculation. Under the final rule, an advanced approaches banking organization can omit covered debt instruments from the 10 percent threshold calculation and potential deduction under section __.22(c)(4) if the aggregate amount of covered debt instruments, measured by gross long position, is five percent or less of the sum of the banking organization's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under section __.22(a) through __.22(c)(3), net of associated deferred tax liabilities (DTLs). This includes, for example, deductions related to goodwill, intangibles, and deferred tax assets, and adjustments related to accumulated net gains and losses on cash flow hedges. The agencies believe that to achieve consistency and clarity throughout the deduction framework, the amount of covered debt instruments that can be omitted from the 10 percent threshold for non-significant investments calculation should be computed using the same basis as the 10 percent threshold for non-significant investments calculation itself.

The agencies intend to monitor advanced approaches banking organizations' holdings of covered debt instruments in the form of synthetic exposures to ensure that the capital held for these positions is commensurate with risk and that such holdings do not raise safety and soundness concerns. Further, to better understand advanced approaches banking organizations' risk from exposures to the capital of unconsolidated financial institutions, the agencies may issue an information collection proposal to collect quarterly data on advanced approaches banking organizations' non-significant investments in the capital of unconsolidated financial institutions and excluded covered debt instruments, as applicable.

Some commenters disagreed with the proposal's design of the exclusions for covered debt instruments, which measures positions on a gross long basis. These commenters suggested that the measurement of the exclusions for covered debt instruments be based on the ''net long position,'' in accordance with the agencies' capital rule, which allows gross long positions to be offset against qualifying short positions.[34] The commenters noted that the 10 percent threshold for non-significant investments is based on the ''net long position'' and suggested that the exclusions for covered debt instrument be consistent with that standard. Further, commenters stated that finalizing the exclusions for covered debt instruments based on a net long position measurement basis would allow advanced approaches banking organizations to better support the depth and liquidity of market making in TLAC-eligible debt instruments, because market making activities are typically well hedged and a ''net long position'' would allow more positions to qualify for the exclusions.

The final rule maintains measurement of the exclusions for covered debt instruments based on the gross long position. Moving to a ''net long position'' measurement could undermine the agencies' goal of reducing interconnectedness among large and internationally active banking organizations as it would allow such banking organizations to accumulate exposure to covered debt instruments significantly beyond the threshold envisioned in the proposal. Further, advanced approaches banking

an unconsolidated financial institution'' and ''indirect exposure'').

[33] *See* 12 CFR 44.4 (OCC); 12 CFR 248.4 (Board); 12 CFR 351.4 (FDIC).

[34] *See* 12 CFR 3.22(h) (OCC); 12 CFR 217.22(h) (Board); 12 CFR 324.22(h) (FDIC).

organizations are able to assign hedged covered debt instrument exposures to the 10 percent threshold for non-significant investments on a net long basis. The optional exclusions remain available to support market making activities such as accumulating short term cash positions to meet customer demand and to acquire additional long positions in covered debt instruments to facilitate market stabilization during times of stress. Such an approach is consistent with financial stability goals of avoiding asset fire sales in times of stress, encouraging risk-mitigating hedges, and reducing interconnectedness while still supporting deep and liquid markets for TLAC-eligible debt instruments.

F. Corresponding Deduction Approach

Under the corresponding deduction approach, a banking organization must apply any required deduction to the component of capital for which the underlying instrument would qualify if it were issued by the banking organization.[35] If the banking organization does not have enough of the component of capital to fully effect the deduction, the corresponding deduction approach provides that any amount of the investment that has not already been deducted would be deducted from the next, more subordinated component of capital.[36] If, for example, a banking organization has insufficient amounts of tier 2 capital and additional tier 1 capital to effect a required deduction, the banking organization would need to deduct from common equity tier 1 capital the amount of the investment that exceeds the tier 2 and additional tier 1 capital of the banking organization.[37] The proposal would have amended the corresponding deduction approach in section __.22(c)(2) of the capital rule to specify that an investment in a covered debt instrument by an advanced approaches banking organization would have been subject to the corresponding deduction approach, with the covered debt instrument treated as a tier 2 capital instrument. Some commenters disagreed with this approach and, instead, asked the agencies to treat investments in covered debt instruments as a common equity tier 1 capital instrument or, as applicable, allow deductions under the corresponding deduction approach from own TLAC-eligible debt instruments.

As stated earlier, requiring a deduction of a covered debt instrument from tier 2 capital should serve as a sufficiently prudent and simple approach that dis-incentivizes advanced approaches banking organizations' investments in such instruments and thereby supports the objectives of reducing both interconnectedness within the financial system and systemic risks. Accordingly, the agencies are finalizing the proposal's amendments to the corresponding deduction approach in section __ .22(c)(2) of the capital rule

G. Net Long Position Calculation

The proposal would have followed the same general approach as currently provided under the agencies' capital rule regarding the calculation of the amount of any deduction and the treatment of guarantees and indirect investments for purposes of the deductions. Under the capital rule, the amount of a banking organization's investment in its own capital instrument or in the capital of an unconsolidated financial institution subject to deduction is the banking organization's net long position in the capital instrument as calculated under section __.22(h) of the capital rule. Under section __.22(h), a banking organization may net certain qualifying short positions in a capital instrument against a gross long position in the same instrument to determine the net long position.

The proposal would have modified section __.22(h) of the capital rule such that an advanced approaches banking organization would determine its net long position in an exposure to its own covered debt instrument, as applicable, or in a covered debt instrument issued by an unconsolidated financial institution in the same manner as currently provided for investments in an institution's own capital instruments or investments in the capital of an unconsolidated financial institution, respectively. Consistent with the capital rule, the calculation of a net long position under the proposal would have taken into account direct investments in covered debt instruments as well as indirect exposures to covered debt instruments held through investment funds.

A banking organization has three options under the capital rule to measure its gross long position in a capital instrument held indirectly through an investment fund.[38] The proposal would have amended section _ _.22(h)(2)(iii) of the capital rule to provide the same three options to determine the gross long position in a covered debt instrument held through an investment fund. The agencies received no comments on this aspect of the proposal and the final rule adopts the changes as proposed.

The agencies' capital rule sets qualifying criteria for recognizing short positions that can be netted against gross long positions; specifically, a short position must be in the ''same instrument'' as the gross long position and must meet minimum maturity requirements, among other requirements.[39] The proposal would not have changed these operational criteria for recognizing short positions in the calculation of a net long position. Some commenters advocated for changes to the capital rule's requirements for recognizing a short position under section __.22(h)(3). These commenters argued that the capital rule should be modified to not require short positions to be in the ''same instrument'' as the gross long position when calculating the net long position. Instead, commenters recommended that the final rule allow recognized short positions to be in any instrument that is *pari passu* or subordinated to the gross long position's instrument. These commenters recommended that this change should also apply to calculating the net long position of investments in covered debt instruments in the final rule.

The agencies have consistently maintained that recognition of short positions under the net long position calculation are required to be in the ''same instrument'' as a matter of prudent risk management and hedging practices. To recognize short positions in other than the ''same instrument'' would potentially undermine the effectiveness of risk mitigating hedges. Accordingly, the final rule adopts the calculation of the net long position as proposed.

Under the proposal, for purposes of any deduction required for an advanced approaches banking organization's investment in the capital of an unconsolidated financial institution, the amount of a covered debt instrument would have included any contractual obligations the advanced approaches banking organization has to purchase such covered debt instruments. The

[35] *See* 12 CFR 3.22(c)(2) (OCC); 12 CFR 217.22(c)(2) (Board); and 12 CFR 324.22(c)(2) (FDIC).

[36] *See* 12 CFR 3.22(c)(2) and (f) (OCC); 12 CFR 217.22(c)(2) and (f) (Board); and 12 CFR 324.22(c)(2) and (f) (FDIC).

[37] *See* 12 CFR 3.22(f) (OCC); 12 CFR 217.22(f) (Board); and 12 CFR 324.22(f) (FDIC).

[38] *See* 12 CFR 3.22(h)(2)(iii) (OCC); 12 CFR 217.12(h)(2)(iii) (Board); and 12 CFR 324.22(h)(2)(iii) (FDIC).

[39] *See* 12 CFR 3.22(h)(3) (OCC); 12 CFR 217.12(h)(3) (Board); and 12 CFR 324.22(h)(3) (FDIC).

agencies received no comment on this aspect of the proposal, and the final rule adopts this change as proposed.

VI. Technical Amendment and Other Comments

The agencies proposed amending the definition of ''investment in the capital of an unconsolidated financial institution'' in section __.2 of the capital rule to correct a drafting error in that definition. The agencies did not receive any comment with regard to the proposed technical amendment. However, in the period between the issuance of the proposal and this final rule, this technical amendment was implemented by the agencies' final rule to simplify the capital rule.[40]

A few commenters suggested that the proposal should go further in limiting the exposure of advanced approaches banking organizations to GSIBs, given their size and the risk their failure could pose to the financial system. These commenters argued that the final rule should ensure that the cost of TLAC debt better reflect heightened risks of GSIBs and that the agencies should require U.S. GSIBs to hold more common equity tier 1 capital. Other commenters suggested that the agencies consider existing elements of the regulatory framework—such as the single counterparty credit limit and the GSIB surcharge—when finalizing the deduction framework.

Under the capital rule, each agency has the authority to require a banking organization to hold additional capital based on the banking organization's risk profile.[41] Similarly, while other elements of the regulatory framework address the systemic risks of large, internationally active banking organizations or concentrations of exposures to counterparties, no existing regulation specifically address the risks associated with investments in TLAC-eligible debt instruments. The agencies, therefore, are finalizing the proposal to establish a regulatory capital treatment for investments in covered debt instruments with certain modifications, as previously described.

The proposal did not contemplate providing a transition period for implementation of the final rule by advanced approaches banking organizations. Some commenters requested that the agencies provide banking organizations with a transition period to ease compliance burden. Specifically, commenters requested that the agencies provide 18 months before banking organizations must effectuate the deduction treatment. These commenters asserted that a transition period would give banking organizations more time to build out systems to track which instruments are covered debt instruments and therefore subject to the deduction framework. A commenter requested that the agencies not require deduction of any unsecured debt instrument issued by a GSIB until the information necessary to determine whether the instrument is a covered debt instrument is available.

The agencies maintain the supervisory expectation that large and internationally active banking organizations should be deeply knowledgeable of the securities exposures on their own balance sheets, if only for the purposes of prudent risk management. The final rule will become effective on April 1, 2021. The agencies believe this effective date provides sufficient time for advanced approaches banking organizations to evaluate investments in covered debt instruments and apply the final rule's deduction treatment.

In addition to the above, the agencies are making certain technical amendments to section __.10 of the capital rule to more clearly differentiate between requirements applicable to advanced approaches banking organizations and those applicable to Category III banking organizations. In section __.10 of the capital rule, as amended by the recent interagency tailoring rule,[42] paragraphs (c)(1)–(3) describe the capital ratio calculations applicable to advanced approaches banking organizations, whereas paragraph 10(c)(4) of the capital rule describes the supplementary leverage ratio calculations applicable to both advanced approaches banking organizations and Category III banking organizations. To avoid confusion, the agencies are amending section __.10 of the capital rule such that paragraph (c) will provide only the supplementary leverage ratio requirements. The advanced approaches capital calculations will be moved to revised paragraph (d) of section __.10 of the capital rule. Current paragraph (d), *Capital adequacy,* will be re-designated as paragraph (e) of section __.10 of the capital rule. The agencies are also amending language in sections __.2 and __.121 of the capital rule to correct cross-references in light of the amendments described above. These technical amendments do not amend any substantive requirements applicable to banking organizations.

VII. Amendments to the Board's TLAC Rule

In 2018, the Board issued a notice of proposed rulemaking that, among other items, included minor proposed amendments to the Board's TLAC rule.[43] The proposal included revisions to ensure that the external TLAC risk-weighted buffer level, TLAC leverage buffer level, and the TLAC buffer level for covered IHCs would be amended to use the same haircuts applicable to LTD instruments that are currently used to calculate outstanding minimum required TLAC amounts, which do not include a 50 percent haircut on LTD instruments with a remaining maturity of between one and two years. Another proposed amendment was to ensure that the term ''external TLAC risk-weighted buffer'' is used consistently in the TLAC rule. The proposal also would have provided that a new covered IHC would always have three years to conform to most of the requirements of the TLAC rule, and to align the articulation of the methodology for calculating the covered IHC's LTD instrument amount with the same methodology used for GSIBs.

The Board received minimal comments on these proposed revisions to the TLAC rule within the comments received on its proposal overall and the comments received were supportive of the specific proposed revisions. As a result, the Board is issuing these revisions in the final rule without change from the proposal.

VIII. Changes to Regulatory Reporting

A. Deductions From Tier 2 Capital Related to Investments in Covered Debt Instruments and Excluded Covered Debt Instruments

In the April 2019 rulemaking, the Board proposed to modify the instructions to the Consolidated Financial Statements for Holding Companies (FR Y–9C), Schedule HC–R, Part I and Part II, to effectuate the deductions from regulatory capital for Board-regulated advanced approaches banking organizations related to investments in covered debt instruments and excluded covered debt instruments as described in the proposal.

Specifically, the Board would have modified the instructions of the FR Y–9C for Schedule HC–R, Part I, item 33, ''Tier 2 capital deductions.'' On the FR Y–9C, a covered BHC would have been required to deduct from tier 2 capital

[40] *See* 84 FR 35234 (July 22, 2019).

[41] *See* 12 CFR 3.1(d)(1) (OCC); 12 CFR 217.1(d)(1) (Board); 12 CFR 324.1(d)(1) (FDIC).

[42] 84 FR 59230 (November 1, 2019).

[43] 83 FR 17317, 17322 (April 19, 2018).

the aggregate amount of its investments in covered debt instruments that, when combined with the banking organization's other non-significant investments in the capital of unconsolidated financial institutions, exceed 10 percent of the common equity tier 1 capital of the banking organization. Also, if an excluded covered debt instrument were held by a covered BHC for more than 30 business days, or no longer held in connection with market making-related activities, the excluded covered debt instrument would have been deducted from tier 2 capital.

In addition, for purposes of the deduction requirements related to non-significant investments in the capital of unconsolidated financial institutions, Board-regulated advanced approaches banking organizations that are not covered BHCs would have been required to deduct from tier 2 capital those investments in covered debt instruments that exceed five percent of common equity tier 1 capital, and that also, when combined with the banking organization's other non-significant investments in unconsolidated financial institutions, exceed 10 percent of the common equity tier 1 capital of the banking organization. The Board also would have modified the instructions for calculating other deduction-related and risk-weighted asset line items to incorporate investments in covered debt instruments and excluded covered debt instruments, as applicable, by Board-regulated advanced approaches banking organizations.

In October 2019, the Federal Financial Institutions Examination Council (FFIEC) separately proposed to modify the Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices (FFIEC 031), Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only (FFEIC 041) (collectively with the FFIEC 031, the Call Report),[44] and Regulatory Capital Reporting for Institutions Subject to the Advanced Capital Adequacy Framework (FFIEC 101) in a manner consistent with the changes described above to the FR Y–9C to effectuate the proposal's deduction approach for investments in covered debt instruments and excluded covered debt instruments, as applicable.[45]

In March 2020, the Board separately proposed conforming changes to the FR Y–14 to effectuate the proposed deduction framework for investments in covered debt instruments.[46]

With respect to the FR Y–9C proposed changes, one commenter requested clarification on the sequencing of reporting changes related to effectuating deductions for covered debt instruments and the effective date of the final rule. Specifically, this commenter requested that the effective date of the final rule should precede any requirement to begin effectuating deductions related to investments in covered debt instruments on regulatory reports. The agencies confirm that the effective date of the final rule will precede any reporting requirements related to implementing the deduction framework for covered debt instruments. The Board received no comments on the FR Y–14 proposed changes.

As described above, reporting changes to effectuate the deduction framework for investments in covered debt instruments described in the proposal were proposed separately for the (1) FR Y–9C, (2) FFIEC 101 and Call Report, and (3) FR Y–14. The Board is finalizing as proposed, changes to the FR Y–9C and FR Y–14, to effectuate the deduction framework for investments in covered debt instruments in this **Federal Register** notice. The agencies will address comments submitted in connection with the FFIEC's October 2019 proposal when those forms and instructions are finalized in a separate **Federal Register** notice, consistent with the final rule.

B. Public Disclosure of Long-Term Debt and TLAC by Covered BHCs and Covered IHCs

In the April 2019 rulemaking, the Board also proposed to modify Schedule HC–R, Part I of the FR Y–9C by adding new data items that would publicly disclose: (1) The long-term debt and TLAC for covered BHCs and covered IHCs; (2) these banking organizations' long-term debt and TLAC ratios to ensure compliance with the TLAC rule; (3) TLAC buffers; and (4) amendments to the instructions for the calculation of eligible retained income (item 47), institution-specific capital buffer (items 46.a and 46.b), and distributions and discretionary bonus payments (item 48) for covered BHCs and covered IHCs.[47] Commenters suggested that the Board clarify in the final rule when changes to FR Y–9C related to long-term debt and TLAC reporting disclosures will become effective. Reporting changes for deductions related to investments in covered debt instruments on the FR Y–9C will not go into effect until after the final rule's effective date.

In March 2020, the Board separately proposed conforming changes to the FR Y–14 to disclose new items related to long-term debt and TLAC, as described above.[48]

In response to the proposal, commenters requested that the Board clarify how U.S. GSIBs are to calculate the TLAC rule's leverage ratios on the FR Y–9C report. More specifically, commenters suggested the Board clarify that U.S. GSIBs should not be required to report long-term debt and TLAC leverage ratios based on total assets because U.S. GSIBs' applicable long-term debt and TLAC leverage requirement is based on the denominator for the supplementary leverage ratio. Commenters noted that only covered IHCs are required to report the long-term debt and TLAC leverage ratios based on total assets. The Board confirms that reporting of the long-term debt and TLAC leverage requirement for U.S. GSIBs will only be based upon the supplementary leverage ratio denominator, consistent with the TLAC rule's leverage requirement. The Board received no comments on the FR Y–14 proposed changes.

The Board is finalizing the proposed changes to the FR Y–9C and FR Y–14 to require covered BHCs and covered IHCs to report their long-term debt and TLAC resources, with modifications in response to comment as described above, in this **Federal Register** notice.

Some commenters suggested the Board develop a more robust disclosure regime related to TLAC so that the level of risk is appropriately priced into these instruments. They stated that disclosures will incentivize GSIBs to meet their TLAC requirements with equity rather than debt instruments. Commenters offered suggestions for improving disclosures by noting that the agencies should collaborate with the Securities and Exchange Commission to require plain-language warnings regarding risk of bail-in to investors (1) when purchasing a TLAC instrument in their brokerage account and (2) in offering materials published by pension and mutual funds that invest in TLAC instruments. The Board does not have the authority to change disclosures required by the Securities and Exchange Commission related to securities issuances or sales to retail investors. The interagency statement on retail sales of nondeposit investments

[44] The proposed modifications would not affect the Consolidated Reports of Condition and Income for a Bank with Domestic Offices Only and Total Assets Less than $1 Billion (FFIEC 051) because banks and savings associations that are advanced approaches banking organizations are not eligible to file the FFIEC 051 report.

[45] *See* 84 FR 53227 (October 4, 2019).

[46] *See* 85 FR 15776 (March 19, 2020).

[47] *See* 84 FR 13823–13824 (April 8, 2019).

[48] *See* 85 FR 15776 (March 19, 2020).

products should ensure certain disclosures for retail sales programs involving mutual funds, annuities and other nondeposit investment products.[49] Further, the Board does not have the authority to mandate disclosures by pension or mutual funds. The final rule does not incorporate these suggestions.

IX. Regulatory Analyses

A. Paperwork Reduction Act

Certain provisions of the final rule contain ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (PRA).[50] In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently-valid Office of Management and Budget (OMB) control number.

The final rule revises section __.22(c), (f), and (h) of the capital rule to incorporate the proposed deduction approach for investments in covered debt instruments. Several new definitions are added to section __.2 to effectuate these deductions.

Each agency has an information collection related to its regulatory capital rules. The OMB control number for the OCC is 1557–0318, Board is 7100–0313, and FDIC is 3064–0153. The final rule will not, however, result in changes to burden under these information collections and therefore no submissions will be made under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320) for each of the agencies' regulatory capital rules.

In addition, the final rule requires changes to the Call Reports (OMB No. 1557–0081 (OCC), 7100–0036 (Board), and 3064–0052 (FDIC)), and the FFIEC 101 (OMB No. 1557–0239 (OCC), 7100–0319 (Board), and 3064–0159 (FDIC)), which will be addressed in one or more separate **Federal Register** notices.

The final rule requires changes to the Consolidated Financial Statements for Holding Companies (FR Y–9C; OMB No. 7100–0128) and the Capital Assessments and Stress Testing Reports (FR Y–14A/Q/M; OMB No. 7100–0341). The Board reviewed the final rule under the authority delegated to the Board by OMB.

Revised Collection (Board only)

Title of Information Collection: Consolidated Financial Statements for Holding Companies.

Agency form number: FR Y–9C, FR Y–9LP, FR Y–9SP, FR Y–9ES, and FR Y–9CS.

OMB control number: 7100–0128.

Effective date: June 30, 2021.

Frequency: Quarterly, semiannually, and annually.

Affected Public: Businesses or other for-profit.

Respondents: Bank holding companies (BHCs), savings and loan holding companies (SLHCs), securities holding companies (SHCs), and U.S. Intermediate Holding Companies (IHCs) (collectively, holding companies (HCs)).

Estimated number of respondents: FR Y–9C (non-advanced approaches (AA) HCs community bank leverage ratio (CBLR)) with less than $5 billion in total assets—71, FR Y–9C (non AA HCs CBLR) with $5 billion or more in total assets—35, FR Y–9C (non AA HCs non-CBLR) with less than $5 billion in total assets—84, FR Y–9C (non AA HCs non-CBLR) with $5 billion or more in total assets—154, FR Y–9C (AA HCs)—19, FR Y–9LP—434, FR Y–9SP—3,960, FR Y–9ES—83, FR Y–9CS—236.

Estimated average hours per response:

Reporting

FR Y–9C (non AA HCs CBLR) with less than $5 billion in total assets—29.17, FR Y–9C (non AA HCs CBLR) with $5 billion or more in total assets—35.14, FR Y–9C (non AA HCs non-CBLR) with less than $5 billion in total assets—41.01, FR Y–9C (non AA HCs non-CBLR) with $5 billion or more in total assets—46.98, FR Y–9C (AA HCs)—49.30, FR Y–9LP—5.27, FR Y–9SP—5.40, FR Y–9ES—0.50, FR Y–9CS—0.50.

Recordkeeping

FR Y–9C (non-advanced approaches HCs with less than $5 billion in total assets), FR Y–9C (non-advanced approaches HCs with $5 billion or more in total assets), FR Y–9C (advanced approaches HCs), and FR Y–9LP: 1.00 hour; FR Y–9SP, FR Y–9ES, and FR Y–9CS: 0.50 hours.

Estimated annual burden hours:

Reporting

FR Y–9C (non AA HCs CBLR) with less than $5 billion in total assets—8,284, FR Y–9C (non AA HCs CBLR) with $5 billion or more in total assets—4,920, FR Y–9C (non AA HCs non-CBLR) with less than $5 billion in total assets—13,779, FR Y–9C (non AA HCs non-CBLR) with $5 billion or more in total assets—28,940, FR Y–9C (AA HCs)—3,747, FR Y–9LP—9,149, FR Y–9SP—42,768, FR Y–9ES—42, FR Y–9CS—472.

Recordkeeping

FR Y–9C—1,452, FR Y–9LP—1,736, FR Y–9SP—3,960, FR Y–9ES—42, FR Y–9CS—472.

General description of report: The FR Y–9 family of reporting forms continues to be the primary source of financial data on holding companies (HCs) on which examiners rely between on-site inspections. Financial data from these reporting forms is used to detect emerging financial problems, review performance, conduct pre-inspection analysis, monitor and evaluate capital adequacy, evaluate HC mergers and acquisitions, and analyze an HC's overall financial condition to ensure the safety and soundness of its operations. The FR Y–9C serves as the standardized financial statements for certain consolidated holding companies. The Board requires HCs to provide standardized financial statements to fulfill the Board's statutory obligation to supervise these organizations. HCs file the FR Y–9C on a quarterly basis.

Legal authorization and confidentiality: The reporting and recordkeeping requirements associated with the FR Y–9 series of reports are authorized for BHCs pursuant to section 5 of the Bank Holding Company Act (''BHC Act''); for SLHCs pursuant to section 10(b)(2) and (3) of the Home Owners' Loan Act, 12 U.S.C. 1467a(b)(2) and (3), as amended by sections 369(8) and 604(h)(2) of the Dodd-Frank Wall Street and Consumer Protection Act (''Dodd-Frank Act''); for IHCs pursuant to section 5 of the BHC Act, as well as pursuant to sections 102(a)(1) and 165 of the Dodd-Frank Act; and for securities holding companies pursuant to section 618 of the Dodd-Frank Act. Except for the FR Y–9CS report, which is expected to be collected on a voluntary basis, the obligation to submit the remaining reports in the FR Y–9 series of reports and to comply with the recordkeeping requirements set forth in the respective instructions to each of the other reports, is mandatory.

With respect to the FR Y–9C report, Schedule HI's Memoranda item 7(g) ''FDIC deposit insurance assessments,'' Schedule HC–P's item 7(a) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to U.S. government agencies and government sponsored agencies,'' and Schedule HC–P's item 7(b) ''Representation and warranty reserves for 1–4 family residential mortgage loans sold to other parties'' are considered confidential commercial and

[49] *See* ''Interagency Statement on Retail Sales of Nondeposit Investment Products.'' OCC Bulletin 1994–13 (OCC); SR 94–11 (FIS) (Board); and FIL–9–94 (FDIC).

[50] 44 U.S.C. 3501–3521.

financial information. Such treatment is appropriate under exemption 4 of the Freedom of Information Act (''FOIA''), because these data items reflect commercial and financial information that is both customarily and actually treated as private by the submitter, and which the Board has previously assured submitters will be treated as confidential. It also appears that disclosing these data items may reveal confidential examination and supervisory information, and in such instances, the information also would be withheld pursuant to exemption 8 of the FOIA, which protects information related to the supervision or examination of a regulated financial institution.

In addition, for both the FR Y–9C report and the FR Y–9SP report, Schedule HC's Memoranda item 2.b., the name and email address of the external auditing firm's engagement partner, is considered confidential commercial information and protected by exemption 4 of the FOIA, if the identity of the engagement partner is treated as private information by HCs. The Board has assured respondents that this information will be treated as confidential since the collection of this data item was proposed in 2004.

Additionally, items on the FR Y–9C, Schedule HC–C for loans modified under Section 4013, data items Memorandum items 16.a, ''Number of Section 4013 loans outstanding''; and Memorandum items 16.b, ''Outstanding balance of Section 4013 loans'' are considered confidential. While the Board generally makes institution-level FR Y–9C report data publicly available, the Board is collecting Section 4013 loan information as part of condition reports for the impacted HCs and the Board considers disclosure of these items at the HC level would not be in the public interest. Such information is permitted to be collected on a confidential basis, consistent with 5 U.S.C. 552(b)(8). In addition, holding companies may be reluctant to offer modifications under Section 4013 if information on these modifications made by each holding company is publicly available, as analysts, investors, and other users of public FR Y–9C report information may penalize an institution for using the relief provided by the CARES Act. The Board may disclose Section 4013 loan data on an aggregated basis, consistent with confidentiality or as otherwise required by law.

Aside from the data items described above, the remaining data items collected on the FR Y–9C report and the FR Y–9SP report are generally not accorded confidential treatment. The data items collected on FR Y–9LP, FR Y–9ES, and FR Y–9CS reports, are also generally not accorded confidential treatment. As provided in the Board's Rules Regarding Availability of Information, however, a respondent may request confidential treatment for any data items the respondent believes should be withheld pursuant to a FOIA exemption. The Board will review any such request to determine if confidential treatment is appropriate, and will inform the respondent if the request for confidential treatment has been granted or denied.

To the extent the instructions to the FR Y–9C, FR Y–9LP, FR Y–9SP, and FR Y–9ES reports each respectively direct the financial institution to retain the workpapers and related materials used in preparation of each report, such material would only be obtained by the Board as part of the examination or supervision of the financial institution. Accordingly, such information is considered confidential pursuant to exemption 8 of the FOIA. In addition, the workpapers and related materials may also be protected by exemption 4 of the FOIA, to the extent such financial information is treated as confidential by the respondent.

Current Actions: As discussed in detail in section VIII above, several comments were received on the proposed changes to the FR Y–9C. Commenters requested that the effective date of the final rule precede proposed changes to regulatory reports. The agencies confirmed that the final rule will be effective before changes are implemented to regulatory reports. The final rule is effective April 1, 2021, and the changes to the FR Y–9C are effective June 30, 2021. Also, commenters requested that the Board clarify that U.S. GSIBs will report long-term debt and TLAC leverage requirements based upon the supplementary leverage ratio denominator. The Board agreed and clarified this requirement. Finally, some commenters suggested that the Board develop a more robust disclosure regime related to TLAC, including collaborating with the SEC. The Board did not accept this comment for the reasons noted above. Some of the item numbers below have changed since the proposed rule due to other FR Y–9C reporting changes to Schedule HC–R that have been implemented since that time.

To implement the reporting requirements of the final rule, the Board revises the FR Y–9C, Schedule HC–R, Part I, Regulatory Capital Components and Ratios, to amend instructions for line items 11, 17, 24, and 43 to effectuate the deductions from regulatory capital for advanced approaches holding companies related to investments in covered debt instruments and excluded covered debt instruments as described above. Further, the Board proposes to revise the FR Y–9C, Schedule HC–R, Part II, Risk-Weighted Assets, to amend instructions for line items 2(a), 2(b), 7, and 8 to incorporate investments in covered debt instruments and excluded debt instruments, as applicable, by advanced approaches holding companies in their calculation of risk-weighted assets.

In addition, the Board revises the FR Y–9C, Schedule HC–R, Part I, Regulatory Capital Components and Ratios, to create new line items and instructions to allow the BHCs of U.S. GSIBs and the IHCs of foreign GSIBs to publicly report their long-term debt (LTD) and total loss-absorbing capacity (TLAC) in accordance, respectively, with 12 CFR part 252, subpart G and 12 CFR part 252, subpart P. Specifically, new line items are created to report, as applicable, BHCs of U.S GSIBs' and IHCs of foreign GSIBs' (1) outstanding eligible LTD (item 50); (2) TLAC (item 51); (3) LTD standardized risk-weighted asset ratio (item 52, column A); (4) TLAC standardized risk-weighted asset ratio (item 52, column B); (5) LTD advanced approaches risk-weighted asset ratio (item 53, column A); (6) TLAC advanced approaches risk-weighted asset ratio (item 53, column B); (7) *IHCs of foreign GSIBs only:* LTD leverage ratio (item 54, column A); (8) *IHCs of foreign GSIBs only:* TLAC leverage ratio (item 54, column B); (9) LTD supplementary leverage ratio (item 55, column A); (10) TLAC supplementary leverage ratio (item 55, column B); (11) institution-specific TLAC risk-weighted asset buffer necessary to avoid limitations on distributions and discretionary bonus payments (item 57(a)); and (12) TLAC leverage buffer necessary to avoid limitations on distributions and discretionary bonus payments (item 57(b)). Existing line items 50(a), 50(b), 51, 52, and 53 are re-numbered to 56(a), 56(b), 58, 59, and 60, respectively, and instructions' references updated, to account for the proposed inclusion of the new data collection items described above. Finally, the instructions for re-numbered line item 59, ''Distributions and discretionary bonus payments during the quarter,'' are amended for the BHCs of U.S. GSIBs and the IHCs of foreign GSIBs to reflect maximum payout amounts that take into account a firm's TLAC risk-weighted and leverage buffers reported in line items 57(a) and 57(b), respectively. The final

reporting forms and instructions will become available in the near future on the Board's public website at *https://www.federalreserve.gov/apps/reportforms/review.aspx.*

Revised Collection (Board only)

Title of Information Collection: Capital Assessments and Stress Testing Reports.

Agency form number: FR Y–14A/Q/M.

OMB control number: 7100–0341.

Effective date: June 30, 2021.

Frequency: Annually, quarterly, and monthly.

Respondents: These collections of information are applicable to bank holding companies (BHCs), U.S. intermediate holding companies (IHCs), and savings and loan holding companies (SLHCs) [51] with $100 billion or more in total consolidated assets, as based on: (i) The average of the firm's total consolidated assets in the four most recent quarters as reported quarterly on the firm's Consolidated Financial Statements for Holding Companies (FR Y–9C; OMB No. 7100–0128); or (ii) if the firm has not filed an FR Y–9C for each of the most recent four quarters, then the average of the firm's total consolidated assets in the most recent consecutive quarters as reported quarterly on the firm's FR Y–9Cs. Reporting is required as of the first day of the quarter immediately following the quarter in which the respondent meets this asset threshold, unless otherwise directed by the Board.

Estimated number of respondents: FR Y–14A/Q: 36; FR Y–14M: 34.[52]

Estimated average hours per response: FR Y–14A: 929 hours; FR Y–14Q: 2,201 hours; FR Y–14M: 1,072 hours.

On-going Automation Revisions: 480 hours; FR Y–14 Attestation On-going Attestation: 2,560 hours.

Estimated annual burden hours: FR Y–14A: 33,444 hours; FR Y–14Q: 316,944 hours; FR Y–14M: 437,376 hours; FR Y–14 On-going Automation Revisions: 17,280 hours; FR Y–14 Attestation On-going Attestation: 33,280 hours.

General description of report: This family of information collections is composed of the following three reports:

- The FR Y–14A collects quantitative projections of balance sheet, income, losses, and capital across a range of macroeconomic scenarios and qualitative information on methodologies used to develop internal projections of capital across scenarios.[53]
- The quarterly FR Y–14Q collects granular data on various asset classes, including loans, securities, trading assets, and PPNR for the reporting period.
- The monthly FR Y–14M is comprised of three retail portfolio- and loan-level schedules, and one detailed address-matching schedule to supplement two of the portfolio and loan-level schedules.

The data collected through the FR Y–14A/Q/M reports provide the Board with the information needed to help ensure that large firms have strong, firm-wide risk measurement and management processes supporting their internal assessments of capital adequacy and that their capital resources are sufficient given their business focus, activities, and resulting risk exposures. The reports are used to support the Board's annual Comprehensive Capital Analysis and Review (CCAR) and Dodd Frank Act Stress Test (DFAST) exercises, which complement other Board supervisory efforts aimed at enhancing the continued viability of large firms, including continuous monitoring of firms' planning and management of liquidity and funding resources, as well as regular assessments of credit, market and operational risks, and associated risk management practices. Information gathered in this data collection is also used in the supervision and regulation of respondent financial institutions. Respondent firms are currently required to complete and submit up to 17 filings each year: One annual FR Y–14A filing, four quarterly FR Y–14Q filings, and 12 monthly FR Y–14M filings. Compliance with the information collection is mandatory.

Current actions: On March 19, 2020, the Board proposed to revise the FR Y–14 reports to collect TLAC and LTD information.[54] The Board did not receive any comments on the proposed TLAC and LTD revisions. The Board has modified the Capital Assessments and Stress Testing (FR Y–14A and Q; OMB No. 7100–0341) in a manner consistent with the changes described above to the FR Y–9C. In addition, the Board has renumbered items in the FR Y–14A, Schedule A.1.d (Capital) instructions to correspond with related items on the FR Y–9C. The Board has adopted, as proposed, the following revisions to FR Y–14A, Schedule A.1.d, and FR Y–14Q, Schedule D, effective for the June 30, 2021, as of date:

FR Y–14A, Schedule A.1.d (Capital)

In order to align Schedule A.1.d with the FR Y–9C, the Board has added the following items to Schedule A.1.d:

- ''Outstanding eligible long-term debt'';
- ''Total loss-absorbing capacity'';
- ''LTD and TLAC total risk-weighted assets ratios'';
- ''*IHCs of foreign GSIBs only:* LTD and TLAC leverage ratios'';
- ''LTD and TLAC supplementary leverage ratios'';
- ''Institution-specific TLAC buffer necessary to avoid limitations on distributions discretionary bonus payments'';
- ''TLAC risk-weighted buffer''; and
- ''TLAC leverage buffer.''

FR Y–14Q, Schedule D (Regulatory Capital)

The Board has revised the instructions for item 1 (''Aggregate amount of non-significant investments in the capital of unconsolidated financial institutions'') to require banking organizations subject to Category I and II standards to include covered debt instruments.

B. Regulatory Flexibility Act Analysis

OCC: The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* (RFA), requires an agency either to provide a final regulatory flexibility analysis with a final rule for which a general notice of proposed rulemaking is required or to certify that the final rule will not have a significant, economic impact on a substantial number of small entities. The Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA to

[51] SLHCs with $100 billion or more in total consolidated assets became members of the FR Y–14Q and FR Y–14M panels effective June 30, 2020, and will join the FR Y–14A panel effective December 31, 2020. *See* 84 FR 59032 (November 1, 2019).

[52] The estimated number of respondents for the FR Y–14M is lower than for the FR Y–14Q and FR Y– 14A because, in recent years, certain respondents to the FR Y–14A and FR Y–14Q have not met the materiality thresholds to report the FR Y–14M due to their lack of mortgage and credit activities. The Board expects this situation to continue for the foreseeable future.

[53] On October 10, 2019, the Board issued a final rule that eliminated the requirement for firms subject to Category IV standards to conduct and publicly disclose the results of a company-run stress test. *See* 84 FR 59032 (Nov. 1, 2019). That final rule maintained the existing FR Y–14 substantive reporting requirements for these firms in order to provide the Board with the data it needs to conduct supervisory stress testing and inform the Board's ongoing monitoring and supervision of its supervised firms. However, as noted in the final rule, the Board intends to provide greater flexibility to banking organizations subject to Category IV standards in developing their annual capital plans and consider further change to the FR Y–14 forms as part of a separate proposal. *See* 84 FR 59032, 59063.

[54] *See* 85 FR 15776 (March 19, 2020).

include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million of less) or to certify that the final rule would not have a significant economic impact on a substantial number of small entities.

As of December 31, 2019, the OCC supervises 745 small entities.[55]

As part of the OCC's analysis, we consider whether the final rule will have a significant economic impact on a substantial number of small entities, pursuant to the RFA Because the final rule only applies to advanced approaches banking organizations it will not impact any OCC-supervised small entities. Therefore, the final rule will not have a significant economic impact on a substantial number of small entities.

Therefore, the OCC certifies that the final rule will not have a significant economic impact on a substantial number of OCC-supervised small entities.

Board: The Regulatory Flexibility Act (RFA) generally requires that, in connection with a final rulemaking, an agency prepare and make available for public comment a final regulatory flexibility analysis describing the impact of the proposed rule on small entities. However, a final regulatory flexibility analysis is not required if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million that are independently owned and operated or owned by a holding company with less than or equal to $600 million in total assets.[56] For the reasons described below and under section 605(b) of the RFA, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities.[57] As of December 31, 2019, there were 2,799 bank holding companies, 171 savings and loan holding companies, and 497 state member banks that would fit the SBA's current definition of ''small entity'' for purposes of the RFA.

The Board has considered the potential impact of the final rule on small entities in accordance with the RFA. Based on its analysis and for the reasons stated below, the Board believes that this final rule will not have a significant economic impact on a substantial number of small entities.

As discussed in detail above, the final rule amends the capital rule to require advanced approaches banking organizations to deduct exposures to covered debt instruments issued by covered BHCs, covered IHCs, and foreign GSIBs and their subsidiaries. These deductions are subject to regulatory thresholds, as described above. Deductions related to investments in and exposures to covered debt instruments are effectuated by deduction from tier 2 capital according to the corresponding deduction approach, subject to applicable deduction thresholds. However, the assets of institutions subject to this final rule substantially exceed the $600 million asset threshold under which a banking organization is considered a ''small entity'' under SBA regulations.[58] Because the final rule is not likely to apply to any depository institution or company with assets of $600 million or less, it is not expected to apply to any small entity for purposes of the RFA. In light of the foregoing, the Board certifies that the final rule will not have a significant economic impact on a substantial number of small entities supervised.

FDIC: The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* generally requires an agency, in connection with a final rule, to prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of a final rule on small entities.[59] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Small Business Administration (SBA) has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million who are independently owned and operated or owned by a holding company with less than $600 million in total assets.[60] Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. For the reasons described below and under section 605(b) of the RFA, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

The FDIC supervises 3,270 institutions,[61] of which 2,492 are considered small entities for the purposes of RFA.[62]

This final rule will affect all institutions subject to the Category I and Category II capital standards, and their subsidiaries. The FDIC supervises one institution that is a subsidiary of an institution that is subject to the Category I capital standards, and no FDIC-supervised institutions are subsidiaries of institutions that are subject to the Category II capital standards.[63] The one FDIC-supervised institution that would be subject to this final rule is not considered a small entity for the purposes of the RFA since it is owned by a holding company with over $600 million in total assets. Since this final rule does not affect any FDIC-supervised institutions that are defined as small entities for the purposes of the RFA, the FDIC certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act[64] requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies have sought to present the final rule in a simple and straightforward manner and did not receive any

[55] The OCC calculated the number of small entities using the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $600 million and $41.5 million, respectively. Consistent with the General Principles of Affiliation, 13 CFR 121.103(a), the OCC counted the assets of affiliated financial institutions when determining whether to classify a national bank or Federal savings association as a small entity.

[56] *See* 13 CFR 121.201. Effective August 19, 2019, the SBA revised the size standards for banking organizations to $600 million in assets from $550 million in assets. 84 FR 34261 (July 18, 2019).

[57] 5 U.S.C. 605(b).

[58] With respect to the revisions to the Board's total loss-absorbing capacity rule, the scope of impacted institutions is different—Covered BHCs and Covered IHCs—but also only applies to institutions significantly above the threshold to be considered a ''small entity.''

[59] 5 U.S.C. 601 *et seq.*

[60] The SBA defines a small banking organization as having $600 million or less in assets, where ''a financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended, effective August 19, 2019). ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[61] FDIC-supervised institutions are set forth in 12 U.S.C. 1813(q)(2).

[62] Call Report data, June 30, 2020.

[63] Call Report data, June 30, 2020.

[64] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999).

comments on the use of plain language in the proposed rule.

D. OCC Unfunded Mandates Reform Act of 1995 Determination

The OCC analyzed the proposed rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA).[65] Under this analysis, the OCC considered whether the final rule includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted for inflation). Because the rule does not specifically require banks to modify their policies and procedures, the OCC has determined that there are no expenditures for the purposes of UMRA. Therefore, the OCC concludes that this final rule will not result in expenditures of $100 million or more annually by State, local, and Tribal governments, or by the private sector.[66]

E. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[67] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[68]

The Federal banking agencies considered the administrative burdens and benefits of the final rule and its elective framework in determining its effective date and administrative compliance requirements. As such, the final rule will be effective on April 1, 2021.

F. Congressional Review Act

For purposes of Congressional Review Act, the OMB makes a determination as to whether a final rule constitutes a ''major'' rule.[69] If a rule is deemed a ''major rule'' by the Office of Management and Budget (OMB), the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[70]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[71] As required by the Congressional Review Act, the agencies will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

List of Subjects

12 CFR Part 3

Administrative practice and procedure, Capital, National banks, Risk.

12 CFR Part 217

Administrative practice and procedure, Banks, Banking, Capital, Federal Reserve System, Holding companies.

12 CFR Part 252

Administrative practice and procedure, Banks, banking, Credit, Federal Reserve System, Holding companies, Investments, Qualified financial contracts, Reporting and recordkeeping requirements, Securities.

12 CFR Part 324

Administrative practice and procedure, Banks, banking, Capital adequacy, Reporting and recordkeeping requirements, Savings associations, State non-member banks.

Office of the Comptroller of the Currency

For the reasons set out in the joint preamble, the OCC amends 12 CFR part 3 as follows.

PART 3—CAPITAL ADEQUACY STANDARDS

■ 1. The authority citation for part 3 continues to read as follows:

Authority: 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, 5412(b)(2)(B), and Pub. L. 116–136, 134 Stat. 281.

■ 2. In § 3.2:
■ a. Add definitions in alphabetical order for ''Covered debt instrument'' and ''Excluded covered debt instrument'';
■ b. In the definition of ''Fiduciary or custodial and safekeeping accounts'', remove ''§ 3.10(c)(4)(ii)(J)'' and add ''§ 3.10(c)(2)(x)'' in its place;
■ c. Revise the definition of ''Indirect exposure'';
■ d. Add a definition in alphabetical order for ''Investment in a covered debt instrument'';
■ e. Revise the definition of ''Synthetic exposure''; and
■ f. In the definition of ''Total leverage exposure'', remove ''§ 3.10(c)(4)(ii)'' and add ''§ 3.10(c)(2)'' in its place.

The additions and revisions read as follows:

§ 3.2 Definitions.

* * * * *

Covered debt instrument means an unsecured debt instrument that is:

(1) Issued by a global systemically important BHC, as defined in 12 CFR 217.2, and that is an eligible debt security, as defined in 12 CFR 252.61, or that is *pari passu* or subordinated to any eligible debt security issued by the global systemically important BHC; or

(2) Issued by a Covered IHC, as defined in 12 CFR 252.161, and that is an eligible Covered IHC debt security, as defined in 12 CFR 252.161, or that is *pari passu* or subordinated to any eligible Covered IHC debt security issued by the Covered IHC; or

(3) Issued by a global systemically important banking organization, as defined in 12 CFR 252.2 other than a global systemically important BHC, as defined in 12 CFR 217.2; or issued by a subsidiary of a global systemically important banking organization that is not a global systemically important BHC, other than a Covered IHC, as defined in 12 CFR 252.161; and where

[65] 2 U.S.C. 1532.

[66] Based on available supervisory information, the OCC determined that no OCC-supervised advanced approaches institutions currently hold TLAC instruments. Thus, there would no cost of capital associated with the implementation of this proposal. The OCC estimates that, if implemented, non-mandated, but anticipated compliance costs associated with activities such as modifying procedures and internal audit would be less than $1 million.

[67] 12 U.S.C. 4802(a).

[68] 12 U.S.C. 4802.

[69] 5 U.S.C. 801 *et seq.*

[70] 5 U.S.C. 801(a)(3).

[71] 5 U.S.C. 804(2).

(i) The instrument is eligible for use to comply with an applicable law or regulation requiring the issuance of a minimum amount of instruments to absorb losses or recapitalize the issuer or any of its subsidiaries in connection with a resolution, receivership, insolvency, or similar proceeding of the issuer or any of its subsidiaries; or

(ii) The instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition; for purposes of this paragraph (3)(ii) of this definition, if the issuer may be subject to a special resolution regime, in its jurisdiction of incorporation or organization, that addresses the failure or potential failure of a financial company and any instrument described in paragraph (3)(i) of this definition is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument, then an instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition if that instrument is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument ahead of or proportionally with any instrument described in paragraph (3)(i) of this definition; and

(4) Provided that, for purposes of this definition, *covered debt instrument* does not include a debt instrument that qualifies as tier 2 capital pursuant to 12 CFR 3.20(d) or that is otherwise treated as regulatory capital by the primary supervisor of the issuer.

* * * * *

Excluded covered debt instrument means an investment in a covered debt instrument held by a national bank or Federal savings association that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, that:

(1) Is held in connection with market making-related activities permitted under 12 CFR 44.4, provided that a direct exposure or an indirect exposure to a covered debt instrument is held for 30 business days or less; and

(2) Has been designated as an excluded covered debt instrument by the national bank or Federal savings association that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, pursuant to 12 CFR 3.22(c)(5)(iv)(A).

* * * * *

Indirect exposure means an exposure that arises from the national bank's or Federal savings association's investment in an investment fund which holds an investment in the national bank's or Federal savings association's own capital instrument, or an investment in the capital of an unconsolidated financial institution. For an advanced approaches national bank or Federal savings association, indirect exposure also includes an investment in an investment fund that holds a covered debt instrument.

* * * * *

Investment in a covered debt instrument means a national bank's or Federal savings association's net long position calculated in accordance with § 3.22(h) in a covered debt instrument, including direct, indirect, and synthetic exposures to the debt instrument, excluding any underwriting positions held by the national bank or Federal savings association for five or fewer business days.

* * * * *

Synthetic exposure means an exposure whose value is linked to the value of an investment in the national bank or Federal savings association's own capital instrument or to the value of an investment in the capital of an unconsolidated financial institution. For an advanced approaches national bank or Federal savings association, synthetic exposure includes an exposure whose value is linked to the value of an investment in a covered debt instrument.

* * * * *

■ 3. Section 3.10 is amended by:

■ a. Revising paragraph (c);

■ b. Redesignating paragraph (d) as (e); and

■ c. Adding new paragraph (d).

The revision and addition read as follows:

§ 3.10 Minimum capital requirements.

* * * * *

(c) *Supplementary leverage ratio.* (1) A Category III national bank or Federal savings association or advanced approaches national bank or Federal savings association must determine its supplementary leverage ratio in accordance with this paragraph, beginning with the calendar quarter immediately following the quarter in which the national bank or Federal savings association is identified as a Category III national bank or Federal savings association. An advanced approaches national bank's or Federal savings association's or a Category III national bank's or Federal savings association's supplementary leverage ratio is the ratio of its tier 1 capital to total leverage exposure, the latter of which is calculated as the sum of:

(i) The mean of the on-balance sheet assets calculated as of each day of the reporting quarter; and

(ii) The mean of the off-balance sheet exposures calculated as of the last day of each of the most recent three months, minus the applicable deductions under § 3.22(a), (c), and (d).

(2) For purposes of this part, *total leverage exposure* means the sum of the items described in paragraphs (c)(2)(i) through (viii) of this section, as adjusted pursuant to paragraph (c)(2)(ix) of this section for a clearing member national bank and Federal savings association and paragraph (c)(2)(x) of this section for a custody bank:

(i) The balance sheet carrying value of all of the national bank or Federal savings association's on-balance sheet assets, *plus* the value of securities sold under a repurchase transaction or a securities lending transaction that qualifies for sales treatment under GAAP, *less* amounts deducted from tier 1 capital under § 3.22(a), (c), and (d), and *less* the value of securities received in security-for-security repo-style transactions, where the national bank or Federal savings association acts as a securities lender and includes the securities received in its on-balance sheet assets but has not sold or re-hypothecated the securities received, and, for a national bank or Federal savings association that uses the standardized approach for counterparty credit risk under § 3.132(c) for its standardized risk-weighted assets, *less* the fair value of any derivative contracts;

(ii)(A) For a national bank or Federal savings association that uses the current exposure methodology under § 3.34(b) for its standardized risk-weighted assets, the potential future credit exposure (PFE) for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the national bank or Federal savings association, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), to which the national bank or Federal savings association is a counterparty as determined under § 3.34, but without regard to § 3.34(c), provided that:

(*1*) A national bank or Federal savings association may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 3.34, but

without regard to § 3.34(c), provided that it does not adjust the net-to-gross ratio (NGR); and

(*2*) A national bank or Federal savings association that chooses to exclude the PFE of credit derivatives or other similar instruments through which it provides credit protection pursuant to this paragraph (c)(2)(ii)(A) must do so consistently over time for the calculation of the PFE for all such instruments; or

(B)(*1*) For a national bank or Federal savings association that uses the standardized approach for counterparty credit risk under section § 3.132(c) for its standardized risk-weighted assets, the PFE for each netting set to which the national bank or Federal savings association is a counterparty (including cleared transactions except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the national bank or Federal savings association, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), as determined under § 3.132(c)(7), in which the term C in § 3.132(c)(7)(i) equals zero, and, for any counterparty that is not a commercial end-user, multiplied by 1.4. For purposes of this paragraph (c)(2)(ii)(B)(*1*), a national bank or Federal savings association may set the value of the term C in § 3.132(c)(7)(i) equal to the amount of collateral posted by a clearing member client of the national bank or Federal savings association in connection with the client-facing derivative transactions within the netting set; and

(*2*) A national bank or Federal savings association may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 3.132(c), provided that it does so consistently over time for the calculation of the PFE for all such instruments;

(iii)(A)(*1*) For a national bank or Federal savings association that uses the current exposure methodology under § 3.34(b) for its standardized risk-weighted assets, the amount of cash collateral that is received from a counterparty to a derivative contract and that has offset the mark-to-fair value of the derivative asset, or cash collateral that is posted to a counterparty to a derivative contract and that has reduced the national bank or Federal savings association's on-balance sheet assets, unless such cash collateral is all or part of variation margin that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*2*) The variation margin is used to reduce the current credit exposure of the derivative contract, calculated as described in § 3.34(b), and not the PFE; and

(*3*) For the purpose of the calculation of the NGR described in § 3.34(b)(2)(ii)(B), variation margin described in paragraph (c)(2)(iii)(A)(*2*) of this section may not reduce the net current credit exposure or the gross current credit exposure; or

(B)(*1*) For a national bank or Federal savings association that uses the standardized approach for counterparty credit risk under § 3.132(c) for its standardized risk-weighted assets, the replacement cost of each derivative contract or single product netting set of derivative contracts to which the national bank or Federal savings association is a counterparty, calculated according to the following formula, and, for any counterparty that is not a commercial end-user, multiplied by 1.4:

$$\textit{Replacement Cost} = \max\{V - CVM_r + CVM_p; 0\}$$

Where:

V equals the fair value for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the national bank or Federal savings association, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP);

CVM_r equals the amount of cash collateral received from a counterparty to a derivative contract and that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction, the amount of collateral received from the clearing member client; and

CVM_p equals the amount of cash collateral that is posted to a counterparty to a derivative contract and that has not offset the fair value of the derivative contract and that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction, the amount of collateral posted to the clearing member client;

(*2*) Notwithstanding paragraph (c)(2)(iii)(B)(*1*) of this section, where multiple netting sets are subject to a single variation margin agreement, a national bank or Federal savings association must apply the formula for replacement cost provided in § 3.132(c)(10)(i), in which the term C_{MA} may only include cash collateral that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*3*) For purposes of paragraph (c)(2)(iii)(B)(*1*), a national bank or Federal savings association must treat a derivative contract that references an index as if it were multiple derivative contracts each referencing one component of the index if the national bank or Federal savings association elected to treat the derivative contract as multiple derivative contracts under § 3.132(c)(5)(vi);

(C) For derivative contracts that are not cleared through a QCCP, the cash collateral received by the recipient counterparty is not segregated (by law, regulation, or an agreement with the counterparty);

(D) Variation margin is calculated and transferred on a daily basis based on the mark-to-fair value of the derivative contract;

(E) The variation margin transferred under the derivative contract or the governing rules of the CCP or QCCP for a cleared transaction is the full amount that is necessary to fully extinguish the net current credit exposure to the counterparty of the derivative contracts, subject to the threshold and minimum transfer amounts applicable to the counterparty under the terms of the derivative contract or the governing rules for a cleared transaction;

(F) The variation margin is in the form of cash in the same currency as the currency of settlement set forth in the derivative contract, provided that for the purposes of this paragraph (c)(2)(iii)(F), currency of settlement means any currency for settlement specified in the governing qualifying master netting agreement and the credit support annex to the qualifying master netting agreement, or in the governing rules for a cleared transaction; and

(G) The derivative contract and the variation margin are governed by a qualifying master netting agreement between the legal entities that are the counterparties to the derivative contract or by the governing rules for a cleared transaction, and the qualifying master netting agreement or the governing rules for a cleared transaction must explicitly stipulate that the counterparties agree to settle any payment obligations on a net basis, taking into account any variation margin received or provided under the contract if a credit event involving either counterparty occurs;

(iv) The effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the derivative contract) of a credit derivative, or other similar instrument, through which the national bank or Federal savings association provides credit protection, provided that:

(A) The national bank or Federal savings association may reduce the effective notional principal amount of the credit derivative by the amount of any reduction in the mark-to-fair value of the credit derivative if the reduction is recognized in common equity tier 1 capital;

(B) The national bank or Federal savings association may reduce the effective notional principal amount of the credit derivative by the effective notional principal amount of a purchased credit derivative or other similar instrument, provided that the remaining maturity of the purchased credit derivative is equal to or greater than the remaining maturity of the credit derivative through which the national bank or Federal savings

association provides credit protection and that:

(*1*) With respect to a credit derivative that references a single exposure, the reference exposure of the purchased credit derivative is to the same legal entity and ranks *pari passu* with, or is junior to, the reference exposure of the credit derivative through which the national bank or Federal savings association provides credit protection; or

(*2*) With respect to a credit derivative that references multiple exposures, the reference exposures of the purchased credit derivative are to the same legal entities and rank *pari passu* with the reference exposures of the credit derivative through which the national bank or Federal savings association provides credit protection, and the level of seniority of the purchased credit derivative ranks *pari passu* to the level of seniority of the credit derivative through which the national bank or Federal savings association provides credit protection;

(*3*) Where a national bank or Federal savings association has reduced the effective notional amount of a credit derivative through which the national bank or Federal savings association provides credit protection in accordance with paragraph (c)(2)(iv)(A) of this section, the national bank or Federal savings association must also reduce the effective notional principal amount of a purchased credit derivative used to offset the credit derivative through which the national bank or Federal savings association provides credit protection, by the amount of any increase in the mark-to-fair value of the purchased credit derivative that is recognized in common equity tier 1 capital; and

(*4*) Where the national bank or Federal savings association purchases credit protection through a total return swap and records the net payments received on a credit derivative through which the national bank or Federal savings association provides credit protection in net income, but does not record offsetting deterioration in the mark-to-fair value of the credit derivative through which the national bank or Federal savings association provides credit protection in net income (either through reductions in fair value or by additions to reserves), the national bank or Federal savings association may not use the purchased credit protection to offset the effective notional principal amount of the related credit derivative through which the national bank or Federal savings association provides credit protection;

(v) Where a national bank or Federal savings association acting as a principal has more than one repo-style transaction with the same counterparty and has offset the gross value of receivables due from a counterparty under reverse repurchase transactions by the gross value of payables under repurchase transactions due to the same counterparty, the gross value of receivables associated with the repo-style transactions *less* any on-balance sheet receivables amount associated with these repo-style transactions included under paragraph (c)(2)(i) of this section, unless the following criteria are met:

(A) The offsetting transactions have the same explicit final settlement date under their governing agreements;

(B) The right to offset the amount owed to the counterparty with the amount owed by the counterparty is legally enforceable in the normal course of business and in the event of receivership, insolvency, liquidation, or similar proceeding; and

(C) Under the governing agreements, the counterparties intend to settle net, settle simultaneously, or settle according to a process that is the functional equivalent of net settlement, (that is, the cash flows of the transactions are equivalent, in effect, to a single net amount on the settlement date), where both transactions are settled through the same settlement system, the settlement arrangements are supported by cash or intraday credit facilities intended to ensure that settlement of both transactions will occur by the end of the business day, and the settlement of the underlying securities does not interfere with the net cash settlement;

(vi) The counterparty credit risk of a repo-style transaction, including where the national bank or Federal savings association acts as an agent for a repo-style transaction and indemnifies the customer with respect to the performance of the customer's counterparty in an amount limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, calculated as follows:

(A) If the transaction is not subject to a qualifying master netting agreement, the counterparty credit risk (E*) for transactions with a counterparty must be calculated on a transaction by transaction basis, such that each transaction *i* is treated as its own netting set, in accordance with the following formula, where E_i is the fair value of the instruments, gold, or cash that the national bank or Federal savings association has lent, sold subject to repurchase, or provided as collateral to the counterparty, and C_i is the fair value of the instruments, gold, or cash that the national bank or Federal savings association has borrowed, purchased subject to resale, or received as collateral from the counterparty:

$E_i^* = \max \{0, [E_i - C_i]\}$; and

(B) If the transaction is subject to a qualifying master netting agreement, the counterparty credit risk (E*) must be calculated as the greater of zero and the total fair value of the instruments, gold, or cash that the national bank or Federal savings association has lent, sold subject to repurchase or provided as collateral to a counterparty for all transactions included in the qualifying master netting agreement (ΣE_i), *less* the total fair value of the instruments, gold, or cash that the national bank or Federal savings association borrowed, purchased subject to resale or received as collateral from the counterparty for those transactions (ΣC_i), in accordance with the following formula:

$E^* = \max \{0, [\Sigma E_i - \Sigma C_i]\}$

(vii) If a national bank or Federal savings association acting as an agent for a repo-style transaction provides a guarantee to a customer of the security or cash its customer has lent or borrowed with respect to the performance of the customer's counterparty and the guarantee is not limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, the amount of the guarantee that is greater than the difference between the fair value of the security or cash its customer has lent and the value of the collateral the borrower has provided;

(viii) The credit equivalent amount of all off-balance sheet exposures of the national bank or Federal savings association, excluding repo-style transactions, repurchase or reverse repurchase or securities borrowing or lending transactions that qualify for sales treatment under GAAP, and derivative transactions, determined using the applicable credit conversion factor under § 3.33(b), provided, however, that the minimum credit conversion factor that may be assigned to an off-balance sheet exposure under this paragraph is 10 percent; and

(ix) For a national bank or Federal savings association that is a clearing member:

(A) A clearing member national bank or Federal savings association that guarantees the performance of a clearing member client with respect to a cleared transaction must treat its exposure to the clearing member client as a derivative contract for purposes of determining its total leverage exposure;

(B) A clearing member national bank or Federal savings association that guarantees the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client must treat its exposure to the CCP as a derivative contract for purposes of determining its total leverage exposure;

(C) A clearing member national bank or Federal savings association that does not guarantee the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client may exclude its exposure to the CCP for purposes of determining its total leverage exposure;

(D) A national bank or Federal savings association that is a clearing member may exclude from its total leverage exposure the effective notional principal amount of credit protection sold through a credit derivative contract, or other similar instrument, that it clears on behalf of a clearing member client through a CCP as calculated in accordance with paragraph (c)(2)(iv) of this section; and

(E) Notwithstanding paragraphs (c)(2)(ix)(A) through (C) of this section, a national bank or Federal savings association may exclude from its total leverage exposure a clearing member's exposure to a clearing member client for a derivative contract, if the clearing member client and the clearing member are affiliates and consolidated for financial reporting purposes on the national bank's or Federal savings association's balance sheet.

(x) A custodial bank shall exclude from its total leverage exposure the lesser of:

(A) The amount of funds that the custody bank has on deposit at a qualifying central bank; and

(B) The amount of funds that the custody bank's clients have on deposit at the custody bank that are linked to fiduciary or custodial and safekeeping accounts. For purposes of this paragraph (c)(2)(x), a deposit account is linked to a fiduciary or custodial and safekeeping account if the deposit account is provided to a client that maintains a

fiduciary or custodial and safekeeping account with the custody bank, and the deposit account is used to facilitate the administration of the fiduciary or custody and safekeeping account.

(d) *Advanced approaches capital ratio calculations.* An advanced approaches national bank or Federal savings association that has completed the parallel run process and received notification from the OCC pursuant to § 3.121(d) must determine its regulatory capital ratios as described in paragraphs (d)(1) through (3) of this section.

(1) *Common equity tier 1 capital ratio.* The national bank's or Federal savings association's common equity tier 1 capital ratio is the lower of:

(i) The ratio of the national bank's or Federal savings association's common equity tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the national bank's or Federal savings association's common equity tier 1 capital to advanced approaches total risk-weighted assets.

(2) *Tier 1 capital ratio.* The national bank's or Federal savings association's tier 1 capital ratio is the lower of:

(i) The ratio of the national bank's or Federal savings association's tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the national bank's or Federal savings association's tier 1 capital to advanced approaches total risk-weighted assets.

(3) *Total capital ratio.* The national bank's or Federal savings association's total capital ratio is the lower of:

(i) The ratio of the national bank's or Federal savings association's total capital to standardized total risk-weighted assets; and

(ii) The ratio of the national bank's or Federal savings association's advanced-approaches-adjusted total capital to advanced approaches total risk-weighted assets. A national bank's or Federal savings association's advanced-approaches-adjusted total capital is the national bank's or Federal savings association's total capital after being adjusted as follows:

(A) An advanced approaches national bank or Federal savings association must deduct from its total capital any allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, included in its tier 2 capital in accordance with § 3.20(d)(3); and

(B) An advanced approaches national bank or Federal savings association must add to its total capital any eligible credit reserves that exceed the national bank's or Federal savings association's total expected credit losses to the extent that the excess reserve amount does not exceed 0.6 percent of the national bank's or Federal savings association's credit risk-weighted assets.

(4) *Federal savings association tangible capital ratio.* A Federal savings association's tangible capital ratio is the ratio of the Federal savings association's core capital (tier 1 capital) to average total assets as calculated under this subpart B. For purposes of this paragraph (d)(4), the term ''total assets'' means ''total assets'' as defined in part 6, subpart A of this chapter, subject to subpart G of this part.

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■ 4. In § 3.22, revise paragraphs (c), (f), and (h) to read as follows:

§ 3.22 Regulatory capital adjustments and deductions.

* * * * *

(c) *Deductions from regulatory capital related to investments in capital instruments or covered debt instruments* [23]—(1) *Investment in the national bank's or Federal savings association's own capital instruments.* A national bank or Federal savings association must deduct an investment in the national bank's or Federal savings association's own capital instruments, as follows:

(i) A national bank or Federal savings association must deduct an investment in the national bank's or Federal savings association's own common stock instruments from its common equity tier 1 capital elements to the extent such instruments are not excluded from regulatory capital under § 3.20(b)(1);

(ii) A national bank or Federal savings association must deduct an investment in the national bank's or Federal savings association's own additional tier 1 capital instruments from its additional tier 1 capital elements; and

(iii) A national bank or Federal savings association must deduct an investment in the national bank's or Federal savings association's own tier 2 capital instruments from its tier 2 capital elements.

(2) *Corresponding deduction approach.* For purposes of subpart C of this part, the corresponding deduction approach is the methodology used for the deductions from regulatory capital related to reciprocal cross holdings (as described in paragraph (c)(3) of this section), investments in the capital of unconsolidated financial institutions for a national bank or Federal savings association that is not an advanced approaches national bank or Federal savings association (as described in paragraph (c)(4) of this section), non-significant investments in the capital of unconsolidated financial institutions for an advanced approaches national bank or Federal savings association (as described in paragraph (c)(5) of this section), and non-common stock significant investments in the capital of unconsolidated financial institutions for an advanced approaches national bank or Federal savings association (as described in paragraph (c)(6) of this section). Under the corresponding deduction approach, a national bank or Federal savings association must make deductions from the component of capital for which the underlying instrument would qualify if it were issued by the national bank or Federal savings association itself, as described in paragraphs (c)(2)(i) through (iii) of this section. If the national bank or Federal savings association does not have a sufficient amount of a specific component of capital to effect the required deduction, the shortfall must be deducted according to paragraph (f) of this section.

(i) If an investment is in the form of an instrument issued by a financial institution that is not a regulated financial institution, the national bank or Federal savings association must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock or represents the most subordinated claim in a liquidation of the financial institution; and

(B) An additional tier 1 capital instrument if it is subordinated to all creditors of the financial institution and is senior in liquidation only to common shareholders.

(ii) If an investment is in the form of an instrument issued by a regulated financial institution and the instrument does not meet the criteria for common equity tier 1, additional tier 1 or tier 2 capital instruments under § 3.20, the national bank or Federal savings association must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock included in GAAP equity or represents the most subordinated claim in liquidation of the financial institution;

(B) An additional tier 1 capital instrument if it is included in GAAP equity, subordinated to all creditors of the financial institution, and senior in a receivership, insolvency, liquidation, or similar proceeding only to common shareholders;

(C) A tier 2 capital instrument if it is not included in GAAP equity but considered regulatory capital by the primary supervisor of the financial institution; and

(D) For an advanced approaches national bank or Federal savings association, a tier 2 capital instrument if it is a covered debt instrument.

(iii) If an investment is in the form of a non-qualifying capital instrument (as defined in § 3.300(c)), the national bank or Federal savings association must treat the instrument as:

(A) An additional tier 1 capital instrument if such instrument was included in the issuer's tier 1 capital prior to May 19, 2010; or

[23] The national bank or Federal savings association must calculate amounts deducted under paragraphs (c) through (f) of this section after it calculates the amount of ALLL or AACL, as applicable, includable in tier 2 capital under § 3.20(d)(3).

(B) A tier 2 capital instrument if such instrument was included in the issuer's tier 2 capital (but not includable in tier 1 capital) prior to May 19, 2010.

(3) *Reciprocal cross holdings in the capital of financial institutions.* (i) A national bank or Federal savings association must deduct an investment in the capital of other financial institutions that it holds reciprocally with another financial institution, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(ii) An advanced approaches national bank or Federal savings association must deduct an investment in any covered debt instrument that the institution holds reciprocally with another financial institution, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital or covered debt instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(4) *Investments in the capital of unconsolidated financial institutions.* A national bank or Federal savings association that is not an advanced approaches national bank or Federal savings association must deduct its investments in the capital of unconsolidated financial institutions (as defined in § 3.2) that exceed 25 percent of the sum of the national bank or Federal savings association's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section by applying the corresponding deduction approach in paragraph (c)(2) of this section.[24] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the OCC, a national bank or Federal savings association that underwrites a failed underwriting, for the period of time stipulated by the OCC, is not required to deduct an investment in the capital of an unconsolidated financial institution pursuant to this paragraph (c) to the extent the investment is related to the failed underwriting.[25]

(5) *Non-significant investments in the capital of unconsolidated financial institutions.* (i) An advanced approaches national bank or Federal savings association must deduct its non-significant investments in the capital of unconsolidated financial institutions (as defined in § 3.2) that, in the aggregate and together with any investment in a covered debt instrument (as defined in § 3.2) issued by a financial institution in which the national bank or Federal savings association does not have a significant investment in the capital of the unconsolidated financial institution (as defined in § 3.2), exceeds 10 percent of the sum of the advanced approaches national bank's or Federal savings association's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section (the 10 percent threshold for non-significant investments) by applying the corresponding deduction approach in paragraph (c)(2) of this section.[26] The deductions described in this paragraph are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the OCC, an advanced approaches national bank or Federal savings association that underwrites a failed underwriting, for the period of time stipulated by the OCC, is not required to deduct from capital a non-significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(5) to the extent the investment is related to the failed underwriting.[27] For any calculation under this paragraph (c)(5)(i), an advanced approaches national bank or Federal savings association may exclude the amount of an investment in a covered debt instrument under paragraph (c)(5)(iii) or (iv) of this section, as applicable.

(ii) For an advanced approaches national bank or Federal savings association, the amount to be deducted under this paragraph (c)(5) from a specific capital component is equal to:

(A) The advanced approaches national bank's or Federal savings association's aggregate non-significant investments in the capital of an unconsolidated financial institution and, if applicable, any investments in a covered debt instrument subject to deduction under this paragraph (c)(5), exceeding the 10 percent threshold for non-significant investments, multiplied by

(B) The ratio of the advanced approaches national bank's or Federal savings association's aggregate non-significant investments in the capital of an unconsolidated financial institution (in the form of such capital component) to the national bank's or Federal savings association's total non-significant investments in unconsolidated financial institutions, with an investment in a covered debt instrument being treated as tier 2 capital for this purpose.

(iii) For purposes of applying the deduction under paragraph (c)(5)(i) of this section, an advanced approaches national bank or Federal savings association that is not a subsidiary of a global systemically important banking organization, as defined in 12 CFR 252.2, may exclude from the deduction the amount of the national bank's or Federal savings association's gross long position, in accordance with § 3.22(h)(2), in investments in covered debt instruments issued by financial institutions in which the national bank or Federal savings association does not have a significant investment in the capital of the unconsolidated financial institutions up to an amount equal to 5 percent of the sum of the national bank's or Federal savings association's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(iv) Prior to applying the deduction under paragraph (c)(5)(i) of this section:

(A) A national bank or Federal savings association that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, may designate

[24] With the prior written approval of the OCC, for the period of time stipulated by the OCC, a national bank or Federal savings association is not required to deduct a non-significant investment in the capital instrument of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the OCC.

[25] Any non-significant investments in the capital of an unconsolidated financial institution that is not required to be deducted under this paragraph (c)(4) or otherwise under this section must be assigned the appropriate risk weight under subparts D, E, or F of this part, as applicable.

[26] With the prior written approval of the OCC, for the period of time stipulated by the OCC, an advanced approaches a national bank or Federal savings association is not required to deduct a non-significant investment in the capital instrument of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the OCC.

[27] Any non-significant investment in the capital of an unconsolidated financial institution or any investment in a covered debt instrument that is not required to be deducted under this paragraph (c)(4) or otherwise under this section must be assigned the appropriate risk weight under subpart D, E, or F of this part, as applicable.

any investment in a covered debt instrument as an excluded covered debt instrument, as defined in § 3.2.

(B) A national bank or Federal savings association that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section, its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, but no longer qualifies as an excluded covered debt instrument.

(C) A national bank or Federal savings association that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section the amount of its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a direct or indirect investment in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, and has been held for more than thirty business days.

(D) A national bank or Federal savings association that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section its gross long position, calculated in accordance with paragraph (h)(2) of this section, of its aggregate investment in excluded covered debt instruments that exceeds 5 percent of the sum of the national bank's or Federal savings association's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(6) *Significant investments in the capital of unconsolidated financial institutions that are not in the form of common stock.* If an advanced approaches national bank or Federal savings association has a significant investment in the capital of an unconsolidated financial institution, the advanced approaches national bank or Federal savings association must deduct from capital any such investment issued by the unconsolidated financial institution that is held by the national bank or Federal savings association other than an investment in the form of common stock, as well as any investment in a covered debt instrument issued by the unconsolidated financial institution, by applying the corresponding deduction approach in paragraph (c)(2) of this section.[28] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the OCC, for the period of time stipulated by the OCC, an advanced approaches national bank or Federal savings association that underwrites a failed underwriting is not required to deduct the significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(6) if such investment is related to such failed underwriting.

* * * * *

(f) *Insufficient amounts of a specific regulatory capital component to effect deductions.* Under the corresponding deduction approach, if a national bank or Federal savings association does not have a sufficient amount of a specific component of capital to effect the full amount of any deduction from capital required under paragraph (d) of this section, the national bank or Federal savings association must deduct the shortfall amount from the next higher (that is, more subordinated) component of regulatory capital. Any investment by an advanced approaches national bank or Federal savings association in a covered debt instrument must be treated as an investment in the tier 2 capital for purposes of this paragraph. Notwithstanding any other provision of this section, a qualifying community banking organization (as defined in § 3.12) that has elected to use the community bank leverage ratio framework pursuant to § 3.12 is not required to deduct any shortfall of tier 2 capital from its additional tier 1 capital or common equity tier 1 capital.

* * * * *

(h) *Net long position*—(1) *In general.* For purposes of calculating the amount of a national bank's or Federal savings association's investment in the national bank's or Federal savings association's own capital instrument, investment in the capital of an unconsolidated financial institution, and investment in a covered debt instrument under this section, the institution's net long position is the gross long position in the underlying instrument determined in accordance with paragraph (h)(2) of this section, as adjusted to recognize any short position by the national bank or Federal savings association in the same instrument subject to paragraph (h)(3) of this section.

(2) *Gross long position.* A gross long position is determined as follows:

(i) For an equity exposure that is held directly by the national bank or Federal savings association, the adjusted carrying value of the exposure as that term is defined in § 3.51(b);

(ii) For an exposure that is held directly and that is not an equity exposure or a securitization exposure, the exposure amount as that term is defined in § 3.2;

(iii) For each indirect exposure, the national bank's or Federal savings association's carrying value of its investment in an investment fund or, alternatively:

(A) A national bank or Federal savings association may, with the prior approval of the OCC, use a conservative estimate of the amount of its indirect investment in the national bank's or Federal savings association's own capital instruments, its indirect investment in the capital of an unconsolidated financial institution, or its indirect investment in a covered debt instrument held through a position in an index, as applicable; or

(B) A national bank or Federal savings association may calculate the gross long position for an indirect exposure to the national bank's or Federal savings association's own capital the capital in an unconsolidated financial institution, or a covered debt instrument by multiplying the national bank's or Federal savings association's carrying value of its investment in the investment fund by either:

(*1*) The highest stated investment limit (in percent) for an investment in the national bank's or Federal savings association's own capital instruments, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument, as applicable, as stated in the prospectus, partnership agreement, or similar contract defining permissible investments of the investment fund; or

(*2*) The investment fund's actual holdings (in percent) of the investment in the national bank's or Federal savings association's own capital instruments, investment in the capital of an unconsolidated financial institution, or investment in a covered debt instrument, as applicable; and

[28] With prior written approval of the OCC, for the period of time stipulated by the OCC, an advanced approaches national bank or Federal savings association is not required to deduct an investment in a covered debt instrument under this paragraph (c)(5) or otherwise under this section if such investment is made for the purpose of providing financial support to the financial institution as determined by the OCC.

(iv) For a synthetic exposure, the amount of the national bank's or Federal savings association's loss on the exposure if the reference capital instrument or covered debt instrument were to have a value of zero.

(3) *Adjustments to reflect a short position.* In order to adjust the gross long position to recognize a short position in the same instrument under paragraph (h)(1) of this section, the following criteria must be met:

(i) The maturity of the short position must match the maturity of the long position, or the short position must have a residual maturity of at least one year (maturity requirement); or

(ii) For a position that is a trading asset or trading liability (whether on- or off-balance sheet) as reported on the national bank's or Federal savings association's Call Report, if the national bank or Federal savings association has a contractual right or obligation to sell the long position at a specific point in time and the counterparty to the contract has an obligation to purchase the long position if the national bank or Federal savings association exercises its right to sell, this point in time may be treated as the maturity of the long position such that the maturity of the long position and short position are deemed to match for purposes of the maturity requirement, even if the maturity of the short position is less than one year; and

(iii) For an investment in a national bank's or Federal savings association's own capital instrument under paragraph (c)(1) of this section, an investment in the capital of an unconsolidated financial institution under paragraphs (c)(4) through (6) and (d) of this section (as applicable), and an investment in a covered debt instrument under paragraphs (c)(1), (5), and (6) of this section:

(A) The national bank or Federal savings association may only net a short position against a long position in an investment in the national bank's or Federal savings association's own capital instrument under paragraph (c)(1) of this section if the short position involves no counterparty credit risk;

(B) A gross long position in an investment in the national bank's or Federal savings association's own capital instrument, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument due to a position in an index may be netted against a short position in the same index;

(C) Long and short positions in the same index without maturity dates are considered to have matching maturities; and

(D) A short position in an index that is hedging a long cash or synthetic position in an investment in the national bank's or Federal savings association's own capital instrument, an investment in the capital instrument of an unconsolidated financial institution, or an investment in a covered debt instrument can be decomposed to provide recognition of the hedge. More specifically, the portion of the index that is composed of the same underlying instrument that is being hedged may be used to offset the long position if both the long position being hedged and the short position in the index are reported as a trading asset or trading liability (whether on- or off-balance sheet) on the national bank's or Federal savings association's Call Report, and the hedge is deemed effective by the national bank's or Federal savings association's internal control processes, which have not been found to be inadequate by the OCC.

§ 3.121 [Amended]

■ 5. Section 3.121 is amended by removing ''§ 3.10(c)(1) through (3)'' and adding ''§ 3.10(d)(1) through (3)'' in its place in paragraph (c).

§ 3.132 [Amended]

■ 6. Section 3.132 is amended by removing ''§ 3.10(c)(4)(ii)(B)'' and adding ''§ 3.10(c)(2)(ii)(B)'' in paragraphs (c)(7)(iii) and (iv).

§ 3.304 [Amended]

■ 7. Section 3.304 is amended by:

■ a. Removing ''§ 3.10(c)(4)'' and adding in its place ''§ 3.10(d)'' in paragraph (a) introductory text; and

■ b. Removing ''§ 3.10(c)(4)(ii)(J)(*1*)'' and adding in its place ''§ 3.10(c)(2)(x)(A)'' in paragraph (e).

Board of Governors of the Federal Reserve System

For the reasons set forth in the joint preamble, the Board amends part 217 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 217—CAPITAL ADEQUACY OF BANK HOLDING COMPANIES, SAVINGS AND LOAN HOLDING COMPANIES, AND STATE MEMBER BANKS (REGULATION Q).

■ 8. The authority citation for part 217 continues to read as follows:

Authority: 12 U.S.C. 248(a), 321–338a, 481–486, 1462a, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1851, 3904, 3906–3909, 4808, 5365, 5368, 5371, and 5371 note; Pub. L. 116–136, 134 Stat. 281.

■ 9. In § 217.2:

■ a. Add definitions in alphabetical order for ''Covered debt instrument'' and ''Excluded covered debt instrument'';

■ b. In the definition of ''Fiduciary or custodial and safekeeping accounts'', remove ''§ 217.10(c)(4)(ii)(J)'' and add ''§ 217.10(c)(2)(x)'' in its place;

■ c. Revise the definition of ''Indirect exposure'';

■ d. Add a definition in alphabetical order for ''Investment in a covered debt instrument'';

■ e. Revise the definition of ''Synthetic exposure''; and

■ f. In the definition of ''Total leverage exposure'', remove ''§ 217.10(c)(4)(ii)'' and add ''§ 217.10(c)(2)'' in its place.

The additions and revisions read as follows:

§ 217.2 Definitions.

* * * * *

Covered debt instrument means an unsecured debt instrument that is:

(1) Issued by a global systemically important BHC and that is an eligible debt security, as defined in 12 CFR 252.61, or that is *pari passu* or subordinated to any eligible debt security issued by the global systemically important BHC; or

(2) Issued by a Covered IHC, as defined in 12 CFR 252.161, and that is an eligible Covered IHC debt security, as defined in 12 CFR 252.161, or that is *pari passu* or subordinated to any eligible Covered IHC debt security issued by the Covered IHC; or

(3) Issued by a global systemically important banking organization, as defined in 12 CFR 252.2 other than a global systemically important BHC; or issued by a subsidiary of a global systemically important banking organization that is not a global systemically important BHC, other than a Covered IHC, as defined in 12 CFR 252.161; and where,

(i) The instrument is eligible for use to comply with an applicable law or regulation requiring the issuance of a minimum amount of instruments to absorb losses or recapitalize the issuer or any of its subsidiaries in connection with a resolution, receivership, insolvency, or similar proceeding of the issuer or any of its subsidiaries; or

(ii) The instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition; for purposes of this paragraph (3)(ii) of this definition, if the issuer may be subject to a special resolution regime, in its jurisdiction of incorporation or organization, that addresses the failure or potential failure of a financial company and any

instrument described in paragraph (3)(i) of this definition is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument, then an instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition if that instrument is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument ahead of or proportionally with any instrument described in paragraph (3)(i) of this definition; and

(4) Provided that, for purposes of this definition, *covered debt instrument* does not include a debt instrument that qualifies as tier 2 capital pursuant to 12 CFR 217.20(d) or that is otherwise treated as regulatory capital by the primary supervisor of the issuer.

* * * * *

Excluded covered debt instrument means an investment in a covered debt instrument held by a global systemically important BHC or a Board-regulated institution that is a subsidiary of a global systemically important BHC that:

(1) Is held in connection with market making-related activities permitted under 12 CFR 248.4, provided that a direct exposure or an indirect exposure to a covered debt instrument is held for 30 business days or less; and

(2) Has been designated as an excluded covered debt instrument by the global systemically important BHC or the subsidiary of a global systemically important BHC pursuant to 12 CFR 217.22(c)(5)(iv)(A).

* * * * *

Indirect exposure means an exposure that arises from the Board-regulated institution's investment in an investment fund which holds an investment in the Board-regulated institution's own capital instrument or an investment in the capital of an unconsolidated financial institution. For an advanced approaches Board-regulated institution, indirect exposure also includes an investment in an investment fund that holds a covered debt instrument.

* * * * *

Investment in a covered debt instrument means a Board-regulated institution's net long position calculated in accordance with § 217.22(h) in a covered debt instrument, including direct, indirect, and synthetic exposures to the debt instrument, excluding any underwriting positions held by the Board-regulated institution for five or fewer business days.

* * * * *

Synthetic exposure means an exposure whose value is linked to the value of an investment in the Board-regulated institution's own capital instrument or to the value of an investment in the capital of an unconsolidated financial institution. For an advanced approaches Board-regulated institution, synthetic exposure includes an exposure whose value is linked to the value of an investment in a covered debt instrument.

* * * * *

■ 10. Section 217.10 is amended by:

■ a. Revising paragraph (c);

■ b. Redesignating paragraph (d) as (e); and

■ c. Adding new paragraph (d).

The revision and addition read as follows:

§ 217.10 Minimum capital requirements.

* * * * *

(c) *Supplementary leverage ratio.* (1) A Category III Board-regulated institution or advanced approaches Board-regulated institution must determine its supplementary leverage ratio in accordance with this paragraph, beginning with the calendar quarter immediately following the quarter in which the Board-regulated institution is identified as a Category III Board-regulated institution. An advanced approaches Board-regulated institution's or a Category III Board-regulated institution's supplementary leverage ratio is the ratio of its tier 1 capital to total leverage exposure, the latter of which is calculated as the sum of:

(i) The mean of the on-balance sheet assets calculated as of each day of the reporting quarter; and

(ii) The mean of the off-balance sheet exposures calculated as of the last day of each of the most recent three months, minus the applicable deductions under § 217.22(a), (c), and (d).

(2) For purposes of this part, *total leverage exposure* means the sum of the items described in paragraphs (c)(2)(i) through (viii) of this section, as adjusted pursuant to paragraph (c)(2)(ix) of this section for a clearing member Board-regulated institution and paragraph (c)(2)(x) of this section for a custodial banking organization:

(i) The balance sheet carrying value of all of the Board-regulated institution's on-balance sheet assets, *plus* the value of securities sold under a repurchase transaction or a securities lending transaction that qualifies for sales treatment under GAAP, *less* amounts deducted from tier 1 capital under § 217.22(a), (c), and (d), and *less* the value of securities received in security-for-security repo-style transactions, where the Board-regulated institution acts as a securities lender and includes the securities received in its on-balance sheet assets but has not sold or re-hypothecated the securities received, and, for a Board-regulated institution that uses the standardized approach for counterparty credit risk under § 217.132(c) for its standardized risk-weighted assets, *less* the fair value of any derivative contracts;

(ii)(A) For a Board-regulated institution that uses the current exposure methodology under § 217.34(b) for its standardized risk-weighted assets, the potential future credit exposure (PFE) for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the Board-regulated institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), to which the Board-regulated institution is a counterparty as determined under § 217.34, but without regard to § 217.34(c), provided that:

(*1*) A Board-regulated institution may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 217.34, but without regard to § 217.34(c), provided that it does not adjust the net-to-gross ratio (NGR); and

(*2*) A Board-regulated institution that chooses to exclude the PFE of credit derivatives or other similar instruments through which it provides credit protection pursuant to paragraph (c)(2)(ii)(A) of this section must do so consistently over time for the calculation of the PFE for all such instruments; or

(B)(*1*) For a Board-regulated institution that uses the standardized approach for counterparty credit risk under section § 217.132(c) for its standardized risk-weighted assets, the PFE for each netting set to which the Board-regulated institution is a counterparty (including cleared transactions except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the Board-regulated institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), as determined under § 217.132(c)(7), in which the term C in

§ 217.132(c)(7)(i) equals zero, and, for any counterparty that is not a commercial end-user, multiplied by 1.4. For purposes of this paragraph (c)(2)(ii)(B)(*1*), a Board-regulated institution may set the value of the term C in § 217.132(c)(7)(i) equal to the amount of collateral posted by a clearing member client of the Board-regulated institution in connection with the client-facing derivative transactions within the netting set; and

(*2*) A Board-regulated institution may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 217.132(c), provided that it does so consistently over time for the calculation of the PFE for all such instruments;

(iii)(A)(*1*) For a Board-regulated institution that uses the current exposure methodology under § 217.34(b) for its standardized risk-weighted assets, the amount of cash collateral that is received from a counterparty to a derivative contract and that has offset the mark-to-fair value of the derivative asset, or cash collateral that is posted to a counterparty to a derivative contract and that has reduced the Board-regulated institution's on-balance sheet assets, unless such cash collateral is all or part of variation margin that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*2*) The variation margin is used to reduce the current credit exposure of the derivative contract, calculated as described in § 217.34(b), and not the PFE; and

(*3*) For the purpose of the calculation of the NGR described in § 217.34(b)(2)(ii)(B), variation margin described in paragraph (c)(2)(iii)(A)(*2*) of this section may not reduce the net current credit exposure or the gross current credit exposure; or

(B)(*1*) For a Board-regulated institution that uses the standardized approach for counterparty credit risk under § 217.132(c) for its standardized risk-weighted assets, the replacement cost of each derivative contract or single product netting set of derivative contracts to which the Board-regulated institution is a counterparty, calculated according to the following formula, and, for any counterparty that is not a commercial end-user, multiplied by 1.4:

$$\textit{Replacement Cost} = \max\{V - CVM_r + CVM_p; 0\}$$

Where:

V equals the fair value for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the Board-regulated institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP);

CVM_r equals the amount of cash collateral received from a counterparty to a derivative contract and that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction, the amount of collateral received from the clearing member client; and

CVM_p equals the amount of cash collateral that is posted to a counterparty to a derivative contract and that has not offset the fair value of the derivative contract and that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction, the amount of collateral posted to the clearing member client;

(*2*) Notwithstanding paragraph (c)(2)(iii)(B)(*1*) of this section, where multiple netting sets are subject to a single variation margin agreement, a Board-regulated institution must apply the formula for replacement cost provided in § 217.132(c)(10)(i), in which the term C_{MA} may only include cash collateral that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*3*) For purposes of paragraph (c)(2)(iii)(B)(*1*), a Board-regulated institution must treat a derivative contract that references an index as if it were multiple derivative contracts each referencing one component of the index if the Board-regulated institution elected to treat the derivative contract as multiple derivative contracts under § 217.132(c)(5)(vi);

(C) For derivative contracts that are not cleared through a QCCP, the cash collateral received by the recipient counterparty is not segregated (by law, regulation, or an agreement with the counterparty);

(D) Variation margin is calculated and transferred on a daily basis based on the mark-to-fair value of the derivative contract;

(E) The variation margin transferred under the derivative contract or the governing rules of the CCP or QCCP for a cleared transaction is the full amount that is necessary to fully extinguish the net current credit exposure to the counterparty of the derivative contracts, subject to the threshold and minimum transfer amounts applicable to the counterparty under the terms of the derivative contract or the governing rules for a cleared transaction;

(F) The variation margin is in the form of cash in the same currency as the currency of settlement set forth in the derivative contract, provided that for the purposes of this paragraph (c)(2)(iii)(F), currency of settlement means any currency for settlement specified in the governing qualifying master netting agreement and the credit support annex to the qualifying master netting agreement, or in the governing rules for a cleared transaction; and

(G) The derivative contract and the variation margin are governed by a qualifying master netting agreement between the legal entities that are the counterparties to the derivative contract or by the governing rules for a cleared transaction, and the qualifying master netting agreement or the governing rules for a cleared transaction must explicitly stipulate that the counterparties agree to settle any payment obligations on a net basis, taking into account any variation margin received or provided under the contract if a credit event involving either counterparty occurs;

(iv) The effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the derivative contract) of a credit derivative, or other similar instrument, through which the Board-regulated institution provides credit protection, provided that:

(A) The Board-regulated institution may reduce the effective notional principal amount of the credit derivative by the amount of any reduction in the mark-to-fair value of the credit derivative if the reduction is recognized in common equity tier 1 capital;

(B) The Board-regulated institution may reduce the effective notional principal amount of the credit derivative by the effective notional principal amount of a purchased credit derivative or other similar instrument, provided that the remaining maturity of the purchased credit derivative is equal to or greater than the remaining maturity of the credit derivative through which the Board-regulated institution provides credit protection and that:

(*1*) With respect to a credit derivative that references a single exposure, the reference exposure of the purchased credit derivative is to the same legal entity and ranks *pari passu* with, or is junior to, the reference exposure of the credit derivative through which the Board-regulated institution provides credit protection; or

(*2*) With respect to a credit derivative that references multiple exposures, the reference exposures of the purchased credit derivative are to the same legal entities and rank *pari passu* with the reference exposures of the credit derivative through which the Board-regulated institution provides credit protection, and the level of seniority of the purchased credit derivative ranks *pari passu* to the level of seniority of the credit derivative through which the Board-regulated institution provides credit protection;

(*3*) Where a Board-regulated institution has reduced the effective notional amount of a credit derivative through which the Board-regulated institution provides credit protection in accordance with paragraph (c)(2)(iv)(A) of this section, the Board-regulated institution must also reduce the effective notional principal amount of a purchased credit derivative used to offset the credit derivative through which the Board-regulated institution provides credit protection, by the amount of any increase in the mark-to-fair value of the purchased credit derivative that is recognized in common equity tier 1 capital; and

(*4*) Where the Board-regulated institution purchases credit protection through a total return swap and records the net payments

received on a credit derivative through which the Board-regulated institution provides credit protection in net income, but does not record offsetting deterioration in the mark-to-fair value of the credit derivative through which the Board-regulated institution provides credit protection in net income (either through reductions in fair value or by additions to reserves), the Board-regulated institution may not use the purchased credit protection to offset the effective notional principal amount of the related credit derivative through which the Board-regulated institution provides credit protection;

(v) Where a Board-regulated institution acting as a principal has more than one repo-style transaction with the same counterparty and has offset the gross value of receivables due from a counterparty under reverse repurchase transactions by the gross value of payables under repurchase transactions due to the same counterparty, the gross value of receivables associated with the repo-style transactions *less* any on-balance sheet receivables amount associated with these repo-style transactions included under paragraph (c)(2)(i) of this section, unless the following criteria are met:

(A) The offsetting transactions have the same explicit final settlement date under their governing agreements;

(B) The right to offset the amount owed to the counterparty with the amount owed by the counterparty is legally enforceable in the normal course of business and in the event of receivership, insolvency, liquidation, or similar proceeding; and

(C) Under the governing agreements, the counterparties intend to settle net, settle simultaneously, or settle according to a process that is the functional equivalent of net settlement, (that is, the cash flows of the transactions are equivalent, in effect, to a single net amount on the settlement date), where both transactions are settled through the same settlement system, the settlement arrangements are supported by cash or intraday credit facilities intended to ensure that settlement of both transactions will occur by the end of the business day, and the settlement of the underlying securities does not interfere with the net cash settlement;

(vi) The counterparty credit risk of a repo-style transaction, including where the Board-regulated institution acts as an agent for a repo-style transaction and indemnifies the customer with respect to the performance of the customer's counterparty in an amount limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, calculated as follows:

(A) If the transaction is not subject to a qualifying master netting agreement, the counterparty credit risk (E*) for transactions with a counterparty must be calculated on a transaction by transaction basis, such that each transaction *i* is treated as its own netting set, in accordance with the following formula, where E_i is the fair value of the instruments, gold, or cash that the Board-regulated institution has lent, sold subject to repurchase, or provided as collateral to the counterparty, and C_i is the fair value of the instruments, gold, or cash that the Board-regulated institution has borrowed, purchased subject to resale, or received as collateral from the counterparty:

$E_i^* = \max \{0, [E_i - C_i]\}$; and

(B) If the transaction is subject to a qualifying master netting agreement, the counterparty credit risk (E*) must be calculated as the greater of zero and the total fair value of the instruments, gold, or cash that the Board-regulated institution has lent, sold subject to repurchase or provided as collateral to a counterparty for all transactions included in the qualifying master netting agreement (ΣE_i), *less* the total fair value of the instruments, gold, or cash that the Board-regulated institution borrowed, purchased subject to resale or received as collateral from the counterparty for those transactions (ΣC_i), in accordance with the following formula:

$E^* = \max \{0, [\Sigma E_i - \Sigma C_i]\}$

(vii) If a Board-regulated institution acting as an agent for a repo-style transaction provides a guarantee to a customer of the security or cash its customer has lent or borrowed with respect to the performance of the customer's counterparty and the guarantee is not limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, the amount of the guarantee that is greater than the difference between the fair value of the security or cash its customer has lent and the value of the collateral the borrower has provided;

(viii) The credit equivalent amount of all off-balance sheet exposures of the Board-regulated institution, excluding repo-style transactions, repurchase or reverse repurchase or securities borrowing or lending transactions that qualify for sales treatment under GAAP, and derivative transactions, determined using the applicable credit conversion factor under § 217.33(b), provided, however, that the minimum credit conversion factor that may be assigned to an off-balance sheet exposure under this paragraph is 10 percent; and

(ix) For a Board-regulated institution that is a clearing member:

(A) A clearing member Board-regulated institution that guarantees the performance of a clearing member client with respect to a cleared transaction must treat its exposure to the clearing member client as a derivative contract for purposes of determining its total leverage exposure;

(B) A clearing member Board-regulated institution that guarantees the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client must treat its exposure to the CCP as a derivative contract for purposes of determining its total leverage exposure;

(C) A clearing member Board-regulated institution that does not guarantee the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client may exclude its exposure to the CCP for purposes of determining its total leverage exposure;

(D) A Board-regulated institution that is a clearing member may exclude from its total leverage exposure the effective notional principal amount of credit protection sold through a credit derivative contract, or other similar instrument, that it clears on behalf of a clearing member client through a CCP as calculated in accordance with paragraph (c)(2)(iv) of this section; and

(E) Notwithstanding paragraphs (c)(2)(ix)(A) through (C) of this section, a Board-regulated institution may exclude from its total leverage exposure a clearing member's exposure to a clearing member client for a derivative contract, if the clearing member client and the clearing member are affiliates and consolidated for financial reporting purposes on the Board-regulated institution's balance sheet.

(x) A custodial banking organization shall exclude from its total leverage exposure the lesser of:

(A) The amount of funds that the custodial banking organization has on deposit at a qualifying central bank; and

(B) The amount of funds in deposit accounts at the custodial banking organization that are linked to fiduciary or custodial and safekeeping accounts at the custodial banking organization. For purposes of this paragraph (c)(2)(x), a deposit account is linked to a fiduciary or custodial and safekeeping account if the deposit account is provided to a client that maintains a fiduciary or custodial and safekeeping account with the custodial banking organization, and the deposit account is used to facilitate the administration of the fiduciary or custodial and safekeeping account.

(d) *Advanced approaches capital ratio calculations.* An advanced approaches Board-regulated institution that has completed the parallel run process and received notification from the Board pursuant to § 217.121(d) must determine its regulatory capital ratios as described in paragraphs (d)(1) through (3) of this section.

(1) *Common equity tier 1 capital ratio.* The Board-regulated institution's common equity tier 1 capital ratio is the lower of:

(i) The ratio of the Board-regulated institution's common equity tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the Board-regulated institution's common equity tier 1 capital to advanced approaches total risk-weighted assets.

(2) *Tier 1 capital ratio.* The Board-regulated institution's tier 1 capital ratio is the lower of:

(i) The ratio of the Board-regulated institution's tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the Board-regulated institution's tier 1 capital to advanced approaches total risk-weighted assets.

(3) *Total capital ratio.* The Board-regulated institution's total capital ratio is the lower of:

(i) The ratio of the Board-regulated institution's total capital to standardized total risk-weighted assets; and

(ii) The ratio of the Board-regulated institution's advanced-approaches-adjusted total capital to advanced approaches total risk-weighted assets. A Board-regulated institution's advanced-approaches-adjusted total capital is the Board-regulated institution's total capital after being adjusted as follows:

(A) An advanced approaches Board-regulated institution must deduct from its total capital any allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, included in its tier 2 capital in accordance with § 217.20(d)(3); and

(B) An advanced approaches Board-regulated institution must add to its total capital any eligible credit reserves that exceed the Board-regulated institution's total expected credit losses to the extent that the excess reserve amount does not exceed 0.6 percent of the Board-regulated institution's credit risk-weighted assets.

* * * * *

■ 11. In § 217.22, revise paragraphs (c), (f) and (h) to read as follows:

§ 217.22 Regulatory capital adjustments and deductions.

* * * * *

(c) *Deductions from regulatory capital related to investments in capital instruments or covered debt instruments* [23]—(1) *Investment in the Board-regulated institution's own capital or covered debt instruments.* A Board-regulated institution must deduct an investment in the Board-regulated institution's own capital instruments, and an advanced approaches Board-regulated institution also must deduct an investment in the Board-regulated institution's own covered debt instruments, as follows:

[23] The Board-regulated institution must calculate amounts deducted under paragraphs (c) through (f) of this section after it calculates the amount of ALLL or AACL, as applicable, includable in tier 2 capital under § 217.20(d)(3).

(i) A Board-regulated institution must deduct an investment in the Board-regulated institution's own common stock instruments from its common equity tier 1 capital elements to the extent such instruments are not excluded from regulatory capital under § 217.20(b)(1);

(ii) A Board-regulated institution must deduct an investment in the Board-regulated institution's own additional tier 1 capital instruments from its additional tier 1 capital elements;

(iii) A Board-regulated institution must deduct an investment in the Board-regulated institution's own tier 2 capital instruments from its tier 2 capital elements; and

(iv) An advanced approaches Board-regulated institution must deduct an investment in the institution's own covered debt instruments from its tier 2 capital elements, as applicable. If the advanced approaches Board-regulated institution does not have a sufficient amount of tier 2 capital to effect this deduction, the institution must deduct the shortfall amount from the next higher (that is, more subordinated) component of regulatory capital.

(2) *Corresponding deduction approach.* For purposes of subpart C of this part, the corresponding deduction approach is the methodology used for the deductions from regulatory capital related to reciprocal cross holdings (as described in paragraph (c)(3) of this section), investments in the capital of unconsolidated financial institutions for a Board-regulated institution that is not an advanced approaches Board-regulated institution (as described in paragraph (c)(4) of this section), non-significant investments in the capital of unconsolidated financial institutions for an advanced approaches Board-regulated institution (as described in paragraph (c)(5) of this section), and non-common stock significant investments in the capital of unconsolidated financial institutions for an advanced approaches Board-regulated institution (as described in paragraph (c)(6) of this section). Under the corresponding deduction approach, a Board-regulated institution must make deductions from the component of capital for which the underlying instrument would qualify if it were issued by the Board-regulated institution itself, as described in paragraphs (c)(2)(i) through (iii) of this section. If the Board-regulated institution does not have a sufficient amount of a specific component of capital to effect the required deduction, the shortfall must be deducted according to paragraph (f) of this section.

(i) If an investment is in the form of an instrument issued by a financial institution that is not a regulated financial institution, the Board-regulated institution must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock or represents the most subordinated claim in a liquidation of the financial institution; and

(B) An additional tier 1 capital instrument if it is subordinated to all creditors of the financial institution and is senior in liquidation only to common shareholders.

(ii) If an investment is in the form of an instrument issued by a regulated financial institution and the instrument does not meet the criteria for common equity tier 1, additional tier 1 or tier 2 capital instruments under § 217.20, the Board-regulated institution must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock included in GAAP equity or represents the most subordinated claim in liquidation of the financial institution;

(B) An additional tier 1 capital instrument if it is included in GAAP equity, subordinated to all creditors of the financial institution, and senior in a receivership, insolvency, liquidation, or similar proceeding only to common shareholders;

(C) A tier 2 capital instrument if it is not included in GAAP equity but considered regulatory capital by the primary supervisor of the financial institution; and

(D) For an advanced approaches Board-regulated institution, a tier 2 capital instrument if it is a covered debt instrument.

(iii) If an investment is in the form of a non-qualifying capital instrument (as defined in § 217.300(c)), the Board-regulated institution must treat the instrument as:

(A) An additional tier 1 capital instrument if such instrument was included in the issuer's tier 1 capital prior to May 19, 2010; or

(B) A tier 2 capital instrument if such instrument was included in the issuer's tier 2 capital (but not includable in tier 1 capital) prior to May 19, 2010.

(3) *Reciprocal cross holdings in the capital of financial institutions.* (i) A Board-regulated institution must deduct an investment in the capital of other financial institutions that it holds reciprocally, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(ii) An advanced approaches Board-regulated institution must deduct an investment in any covered debt instrument that the institution holds reciprocally with another financial institution, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital or covered debt instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(4) *Investments in the capital of unconsolidated financial institutions.* A Board-regulated institution that is not an advanced approaches Board-regulated institution must deduct its investments in the capital of unconsolidated financial institutions (as defined in § 217.2) that exceed 25 percent of the sum of the Board-regulated institution's common equity tier 1 capital elements minus all deductions from and adjustments to

common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section by applying the corresponding deduction approach in paragraph (c)(2) of this section.[24] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the Board, a Board-regulated institution that underwrites a failed underwriting, for the period of time stipulated by the Board, is not required to deduct an investment in the capital of an unconsolidated financial institution pursuant to this paragraph (c) to the extent the investment is related to the failed underwriting.[25]

[24] With the prior written approval of the Board, for the period of time stipulated by the Board, a Board-regulated institution that is not an advanced approaches Board-regulated institution is not required to deduct an investment in the capital of an unconsolidated financial institution pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the Board.

[25] Any investments in the capital of unconsolidated financial institutions that do not exceed the 25 percent threshold for investments in the capital of unconsolidated financial institutions under this section must be assigned the appropriate risk weight under subparts D or F of this part, as applicable.

(5) *Non-significant investments in the capital of unconsolidated financial institutions.* (i) An advanced approaches Board-regulated institution must deduct its non-significant investments in the capital of unconsolidated financial institutions (as defined in § 217.2) that, in the aggregate and together with any investment in a covered debt instrument (as defined in § 217.2) issued by a financial institution in which the Board-regulated institution does not have a significant investment in the capital of the unconsolidated financial institution (as defined in § 217.2), exceeds 10 percent of the sum of the advanced approaches Board-regulated institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section (the 10 percent threshold for non-significant investments) by applying the corresponding deduction approach in paragraph (c)(2) of this section.[26] The deductions described in this paragraph are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the Board, an advanced approaches Board-regulated institution that underwrites a failed underwriting, for the period of time stipulated by the Board, is not required to deduct from capital a non-significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(5) to the extent the investment is related to the failed underwriting.[27] For any calculation under this paragraph (c)(5)(i), an advanced approaches Board-regulated institution may exclude the amount of an investment in a covered debt instrument under paragraph (c)(5)(iii) or (iv) of this section, as applicable.

[26] With the prior written approval of the Board, for the period of time stipulated by the Board, an advanced approaches Board-regulated institution is not required to deduct a non-significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the Board.

[27] Any non-significant investment in the capital of an unconsolidated financial institution or any investment in a covered debt instrument that is not required to be deducted under this paragraph (c)(5) or otherwise under this section must be assigned the appropriate risk weight under subparts D, E, or F of this part, as applicable.

(ii) For an advanced approaches Board-regulated institution, the amount to be deducted under this paragraph (c)(5) from a specific capital component is equal to:

(A) The advanced approaches Board-regulated institution's aggregate non-significant investments in the capital of an unconsolidated financial institution and, if applicable, any investments in a covered debt instrument subject to deduction under this paragraph (c)(5), exceeding the 10 percent threshold for non-significant investments, multiplied by

(B) The ratio of the advanced approaches Board-regulated institution's aggregate non-significant investments in the capital of an unconsolidated financial institution (in the form of such capital component) to the advanced approaches Board-regulated institution's total non-significant investments in unconsolidated financial institutions, with an investment in a covered debt instrument being treated as tier 2 capital for this purpose.

(iii) For purposes of applying the deduction under paragraph (c)(5)(i) of this section, an advanced approaches Board-regulated institution that is not a global systemically important BHC or a subsidiary of a global systemically important banking organization, as defined in 12 CFR 252.2, may exclude from the deduction the amount of the Board-regulated institution's gross long position, in accordance with § 217.22(h)(2), in investments in covered debt instruments issued by financial institutions in which the Board-regulated institution does not have a significant investment in the capital of the unconsolidated financial institutions up to an amount equal to 5 percent of the sum of the Board-regulated institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(iv) Prior to applying the deduction under paragraph (c)(5)(i) of this section:

(A) A global systemically important BHC or a Board-regulated institution that is a subsidiary of a global systemically important BHC may designate any investment in a covered debt instrument as an excluded covered debt instrument, as defined in § 217.2.

(B) A global systemically important BHC or a Board-regulated institution that is a subsidiary of a global systemically important BHC must deduct, according to the corresponding deduction approach in paragraph (c)(2) of this section, its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, but no longer qualifies as an excluded covered debt instrument.

(C) A global systemically important BHC or a Board-regulated institution that is a subsidiary of a global systemically important BHC must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section the amount of its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a direct or indirect investment in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, and has been held for more than thirty business days.

(D) A global systemically important BHC or a Board-regulated institution that is a subsidiary of a global systemically important BHC must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section its gross long position, calculated in accordance with paragraph (h)(2) of this section, of its aggregate

position in excluded covered debt instruments that exceeds 5 percent of the sum of the Board-regulated institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(6) *Significant investments in the capital of unconsolidated financial institutions that are not in the form of common stock.* If an advanced approaches Board-regulated institution has a significant investment in the capital of an unconsolidated financial institution, the advanced approaches Board-regulated institution must deduct from capital any such investment issued by the unconsolidated financial institution that is held by the Board-regulated institution other than an investment in the form of common stock, as well as any investment in a covered debt instrument issued by the unconsolidated financial institution, by applying the corresponding deduction approach in paragraph (c)(2) of this section.[28] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the Board, for the period of time stipulated by the Board, an advanced approaches Board-regulated institution that underwrites a failed underwriting is not required to deduct the significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(6) if such investment is related to such failed underwriting.

[28] With prior written approval of the Board, for the period of time stipulated by the Board, an advanced approaches Board-regulated institution is not required to deduct a significant investment in the capital of an unconsolidated financial institution, including an investment in a covered debt instrument, under this paragraph (c)(6) or otherwise under this section if such investment is made for the purpose of providing financial support to the financial institution as determined by the Board.

* * * * *

(f) *Insufficient amounts of a specific regulatory capital component to effect deductions.* Under the corresponding deduction approach, if a Board-regulated institution does not have a sufficient amount of a specific component of capital to effect the full amount of any deduction from capital required under paragraph (d) of this section, the Board-regulated institution must deduct the shortfall amount from the next higher (that is, more subordinated) component of regulatory capital. Any investment by an advanced approaches Board-regulated institution in a covered debt instrument must be treated as an investment in the tier 2 capital for purposes of this paragraph (f). Notwithstanding any other provision of this section, a qualifying community banking organization (as defined in § 217.12) that has elected to use the community bank leverage ratio framework pursuant to § 217.12 is not required to deduct any shortfall of tier 2 capital from its additional tier 1 capital or common equity tier 1 capital.

* * * * *

(h) *Net long position*—(1) *In general.* For purposes of calculating the amount of a Board-regulated institution's investment in the Board regulated institution's own capital instrument, investment in the capital of an unconsolidated financial institution, and investment in a covered debt instrument under this section, the institution's net long position is the gross long position in the underlying instrument determined in accordance with paragraph (h)(2) of this section, as adjusted to recognize any short position by the Board-regulated institution in the same instrument subject to paragraph (h)(3) of this section.

(2) *Gross long position.* A gross long position is determined as follows:

(i) For an equity exposure that is held directly by the Board-regulated institution, the adjusted carrying value of the exposure as that term is defined in § 217.51(b);

(ii) For an exposure that is held directly and that is not an equity exposure or a securitization exposure, the exposure amount as that term is defined in § 217.2;

(iii) For each indirect exposure, the Board-regulated institution's carrying value of its investment in an investment fund or, alternatively:

(A) A Board-regulated institution may, with the prior approval of the Board, use a conservative estimate of the amount of its indirect investment in the Board-regulated institution's own capital instruments, its indirect investment in the capital of an unconsolidated financial institution, or its indirect investment in a covered debt instrument held through a position in an index, as applicable; or

(B) A Board-regulated institution may calculate the gross long position for an indirect exposure to the Board-regulated institution's own capital instruments, the capital of an unconsolidated financial institution, or a covered debt instrument by multiplying the Board-regulated institution's carrying value of its investment in the investment fund by either:

(*1*) The highest stated investment limit (in percent) for an investment in the Board-regulated institution's own capital instruments, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument, as applicable, as stated in the prospectus, partnership agreement, or similar contract defining permissible investments of the investment fund; or

(*2*) The investment fund's actual holdings (in percent) of the investment in the Board-regulated institution's own capital instruments, investment in the capital of an unconsolidated financial institution, or investment in a covered debt instrument, as applicable; and

(iv) For a synthetic exposure, the amount of the Board-regulated institution's loss on the exposure if the reference capital or covered debt instrument were to have a value of zero.

(3) *Adjustments to reflect a short position.* In order to adjust the gross long position to recognize a short position in the same instrument under paragraph (h)(1) of this section, the following criteria must be met:

(i) The maturity of the short position must match the maturity of the long position, or the short position must have a residual maturity of at least one year (maturity requirement); or

(ii) For a position that is a trading asset or trading liability (whether on- or off-balance sheet) as reported on the Board-regulated institution's Call Report, for a state member bank, or FR Y–9C, for a bank holding company, savings and loan holding company, or intermediate holding company, as applicable, if the Board-regulated institution has a contractual right or obligation to sell the long position at a specific point in time and the counterparty to the contract has an obligation to purchase the long position if the Board-regulated institution exercises its right to sell, this point in time may be treated as the maturity of the long position such that the maturity of the long position and short position are deemed to match for purposes of the maturity requirement, even if the maturity of the short position is less than one year; and

(iii) For an investment in a Board-regulated institution's own capital instrument under paragraph (c)(1) of this section, an investment in the capital of an unconsolidated financial institution under paragraphs (c)(4) through (6) and (d) of this section (as applicable), and an investment in a covered debt instrument under

paragraphs (c)(1), (5), and (6) of this section:

(A) The Board-regulated institution may only net a short position against a long position in an investment in the Board-regulated institution's own capital instrument or own covered debt instrument under paragraph (c)(1) of this section if the short position involves no counterparty credit risk;

(B) A gross long position in an investment in the Board-regulated institution's own capital instrument, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument due to a position in an index may be netted against a short position in the same index;

(C) Long and short positions in the same index without maturity dates are considered to have matching maturities; and

(D) A short position in an index that is hedging a long cash or synthetic position in an investment in the Board-regulated institution's own capital instrument, an investment in the capital instrument of an unconsolidated financial institution, or an investment in a covered debt instrument can be decomposed to provide recognition of the hedge. More specifically, the portion of the index that is composed of the same underlying instrument that is being hedged may be used to offset the long position if both the long position being hedged and the short position in the index are reported as a trading asset or trading liability (whether on- or off-balance sheet) on the Board-regulated institution's Call Report, for a state member bank, or FR Y–9C, for a bank holding company, savings and loan holding company, or intermediate holding company, as applicable, and the hedge is deemed effective by the Board-regulated institution's internal control processes, which have not been found to be inadequate by the Board.

§ 217.121 [Amended]

■ 12. Section 217.121 is amended by removing ''§ 217.10(c)(1) through (3)'' and adding ''§ 217.10(d)(1) through (3)'' in paragraph (c).

§ 217.132 [Amended]

■ 13. Section 217.132 is amended by removing ''§ 217.10(c)(4)(ii)(B)(*2*)'' and adding ''§ 217.10(c)(2)(ii)(B)'' in paragraphs (c)(7)(iii) and (iv).

§ 217.303 [Amended]

■ 14. Section 217.303 is amended by:

■ a. Removing ''§ 217.10(c)(4)'' and adding in its place ''§ 217.10(c)'' in paragraph (a); and

■ b. Removing ''§ 217.10(c)(4)(ii)(J)(*1*)'' and adding in its place ''§ 217.10(c)(2)(x)(A)'' in paragraph (e).

PART 252—ENHANCED PRUDENTIAL STANDARDS (REGULATION YY)

■ 15. The authority citation for part 252 continues to read as follows:

Authority: 12 U.S.C. 321–338a, 481–486, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l, 1831w, 1835, 1844(b), 1844(c), 3101 *et seq.,* 3101 note, 3904, 3906–3909, 4808, 5361, 5362, 5365, 5366, 5367, 5368, 5371.

Subpart G—External Long-Term Debt Requirement, External Total Loss-Absorbing Capacity Requirement and Buffer, and Restrictions on Corporate Practices for U.S. Global Systemically Important Banking Organizations

■ 16. In § 252.61, remove the definition of ''External TLAC buffer'' and add a definition for ''External TLAC risk-weighted buffer'' in alphabetical order.

The addition reads as follows:

§ 252.61 Definitions.

* * * * *

External TLAC risk-weighted buffer means, with respect to a global systemically important BHC, the sum of 2.5 percent, any applicable countercyclical capital buffer under 12 CFR 217.11(b) (expressed as a percentage), and the global systemically important BHC's method 1 capital surcharge.

* * * * *

■ 17. In § 252.63, revise paragraphs (c)(3)(i)(C) and (c)(5)(iii)(A)(*2*) to read as follows:

§ 252.63 External total loss-absorbing capacity requirement and buffer.

* * * * *

(c) * * *

(3) * * *

(i) * * *

(C) The ratio (expressed as a percentage) of the global systemically important BHC's outstanding eligible external long-term debt amount plus 50 percent of the amount of unpaid principal of outstanding eligible debt securities issued by the global systemically important BHC due to be paid in, as calculated in § 252.62(b)(2), greater than or equal to 365 days (one year) but less than 730 days (two years) to total risk-weighted assets.

* * * * *

(5) * * *

(iii) * * *

(A) * * *

(*2*) The ratio (expressed as a percentage) of the global systemically important BHC's outstanding eligible external long-term debt amount plus 50 percent of the amount of unpaid principal of outstanding eligible debt securities issued by the global systemically important BHC due to be paid in in, as calculated in § 252.62(b)(2), greater than or equal to 365 days (one year) but less than 730 days (two years) to total leverage exposure.

* * * * *

Subpart P—Covered IHC Long-Term Debt Requirement, Covered IHC Total Loss-Absorbing Capacity Requirement and Buffer, and Restrictions on Corporate Practices for Intermediate Holding Companies of Global Systemically Important Foreign Banking Organizations

■ 18. In § 252.160, revise paragraph (b)(2) to read as follows:

§ 252.160 Applicability.

* * * * *

(b) * * *

(2) 1095 days (three years) after the later of the date on which:

(i) The U.S. non-branch assets of the global systemically important foreign banking organization that controls the Covered IHC equaled or exceeded $50 billion; and

(ii) The foreign banking organization that controls the Covered IHC became a global systemically important foreign banking organization.

* * * * *

■ 19. In § 252.162, revise paragraph (b)(1) to read as follows:

§ 252.162 Covered IHC long-term debt requirement.

* * * * *

(b) * * *

(1) A Covered IHC's outstanding eligible Covered IHC long-term debt amount is the sum of:

(i) One hundred (100) percent of the amount due to be paid of unpaid principal of the outstanding eligible Covered IHC debt securities issued by the Covered IHC in greater than or equal to 730 days (two years); and

(ii) Fifty (50) percent of the amount due to be paid of unpaid principal of the outstanding eligible Covered IHC debt securities issued by the Covered IHC in greater than or equal to 365 days (one year) and less than 730 days (two years); and

(iii) Zero (0) percent of the amount due to be paid of unpaid principal of the outstanding eligible Covered IHC debt securities issued by the Covered IHC in less than 365 days (one year).

* * * * *

■ 20. In § 252.165, revise paragraph (d)(3)(i)(C) to read as follows:

§ 252.165 Covered IHC total loss-absorbing capacity requirement and buffer.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(C) The ratio (expressed as a percentage) of the Covered IHC's outstanding eligible Covered IHC long-term debt amount plus 50 percent of the amount of unpaid principal of outstanding eligible Covered IHC debt securities issued by the Covered IHC due to be paid in, as calculated in § 252.162(b)(2), greater than or equal to 365 days (one year) but less than 730 days (two years) to total risk-weighted assets.

* * * * *

12 CFR Part 324

FEDERAL DEPOSIT INSURANCE CORPORATION

For the reasons set out in the joint preamble, the FDIC amends 12 CFR part 324 as follows.

PART 324—CAPITAL ADEQUACY OF FDIC–SUPERVISED INSTITUTIONS

■ 21. The authority citation for part 324 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note), Pub. L. 115–174; section 4014, Pub. L. 116–136, 134 Stat. 281 (15 U.S.C. 9052).

■ 22. In § 324.2:

■ a. Add in alphabetical order definitions for ''Covered debt instrument'' and ''Excluded covered debt instrument'';

■ b. Revise the definitions of ''Fiduciary or custodial and safekeeping account'' and ''Indirect exposure'';

■ c. Add in alphabetical order and definition for ''Investment in a covered debt instrument''; and

■ d. Revise the definitions of ''Synthetic exposure'' and ''Total leverage exposure''.

The additions and revisions read as follows:

§ 324.2 Definitions.

* * * * *

Covered debt instrument means an unsecured debt instrument that is:

(1) Issued by a global systemically important BHC, as defined in 12 CFR 217.2, and that is an eligible debt security, as defined in 12 CFR 252.61, or that is *pari passu* or subordinated to any eligible debt security issued by the global systemically important BHC; or

(2) Issued by a Covered IHC, as defined in 12 CFR 252.161, and that is an eligible Covered IHC debt security, as defined in 12 CFR 252.161, or that is *pari passu* or subordinated to any eligible Covered IHC debt security issued by the Covered IHC; or

(3) Issued by a global systemically important banking organization, as defined in 12 CFR 252.2 other than a global systemically important BHC, as defined in 12 CFR 217.2; or issued by a subsidiary of a global systemically important banking organization that is not a global systemically important BHC, other than a Covered IHC, as defined in 12 CFR 252.161; and where,

(i) The instrument is eligible for use to comply with an applicable law or regulation requiring the issuance of a minimum amount of instruments to absorb losses or recapitalize the issuer or any of its subsidiaries in connection with a resolution, receivership, insolvency, or similar proceeding of the issuer or any of its subsidiaries; or

(ii) The instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition; for purposes of this paragraph (3)(ii) of this definition, if the issuer may be subject to a special resolution regime, in its jurisdiction of incorporation or organization, that addresses the failure or potential failure of a financial company and any instrument described in paragraph (3)(i) of this definition is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument, then an instrument is *pari passu* or subordinated to any instrument described in paragraph (3)(i) of this definition if that instrument is eligible under that special resolution regime to be written down or converted into equity or any other capital instrument ahead of or proportionally with any instrument described in paragraph (3)(i) of this definition; and

(4) Provided that, for purposes of this definition, *covered debt instrument* does not include a debt instrument that qualifies as tier 2 capital pursuant to 12 CFR 324.20(d) or that is otherwise treated as regulatory capital by the primary supervisor of the issuer.

* * * * *

Excluded covered debt instrument means an investment in a covered debt instrument held by an FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, that:

(1) Is held in connection with market making-related activities permitted under 12 CFR 351.4, provided that a direct exposure or an indirect exposure to a covered debt instrument is held for 30 business days or less; and

(2) Has been designated as an excluded covered debt instrument by the FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, pursuant to 12 CFR 324.22(c)(5)(iv)(A).

* * * * *

Fiduciary or custodial and safekeeping account means, for purposes of § 324.10(c)(2)(x), an account administered by a custody bank for which the custody bank provides fiduciary or custodial and safekeeping services, as authorized by applicable Federal or state law.

* * * * *

Indirect exposure means an exposure that arises from the FDIC-supervised institution's investment in an investment fund which holds an investment in the FDIC-supervised institution's own capital instrument or an investment in the capital of an unconsolidated financial institution. For an advanced approaches FDIC-supervised institution, indirect exposure also includes an investment in an investment fund that holds a covered debt instrument.

* * * * *

Investment in a covered debt instrument means an FDIC-supervised institution's net long position calculated in accordance with § 324.22(h) in a covered debt instrument, including direct, indirect, and synthetic exposures to the debt instrument, excluding any underwriting positions held by the FDIC-supervised institution for five or fewer business days.

* * * * *

Synthetic exposure means an exposure whose value is linked to the value of an investment in the FDIC-supervised institution's own capital instrument or to the value of an investment in the capital of an unconsolidated financial institution. For an advanced approaches FDIC-supervised institution, synthetic exposure includes an exposure whose value is linked to the value of an investment in a covered debt instrument.

* * * * *

Total leverage exposure is defined in § 324.10(c)(2).

* * * * *

■ 23. Section 324.10 is amended by:

■ a. Revising paragraph (c);

■ b. Redesignating paragraph (d) as (e); and

■ c. Adding new paragraph (d).

The revision and addition read as follows:

§ 324.10 Minimum capital requirements.

* * * * *

(c) *Supplementary leverage ratio.* (1) A Category III FDIC-supervised institution or advanced approaches FDIC-supervised institution must determine its supplementary leverage ratio in accordance with this paragraph, beginning with the calendar quarter immediately following the quarter in which the FDIC-supervised institution is identified as a Category III FDIC-supervised institution. An advanced approaches FDIC-supervised institution's or a Category III FDIC-supervised institution's supplementary leverage ratio is the ratio of its tier 1 capital to total leverage exposure, the latter of which is calculated as the sum of:

(i) The mean of the on-balance sheet assets calculated as of each day of the reporting quarter; and

(ii) The mean of the off-balance sheet exposures calculated as of the last day of each of the most recent three months, minus the applicable deductions under § 324.22(a), (c), and (d).

(2) For purposes of this part, *total leverage exposure* means the sum of the items described in paragraphs (c)(2)(i) through (viii) of this section, as adjusted pursuant to paragraph (c)(2)(ix) of this section for a clearing member FDIC-supervised institution and paragraph (c)(2)(x) of this section for a custody bank:

(i) The balance sheet carrying value of all of the FDIC-supervised institution's on-balance sheet assets, *plus* the value of securities sold under a repurchase transaction or a securities lending transaction that qualifies for sales treatment under GAAP, *less* amounts deducted from tier 1 capital under § 324.22(a), (c), and (d), and *less* the value of securities received in security-for-security repo-style transactions, where the FDIC-supervised institution acts as a securities lender and includes the securities received in its on-balance sheet assets but has not sold or re-hypothecated the securities received, and, for an FDIC-supervised institution that uses the standardized approach for counterparty credit risk under § 324.132(c) for its standardized risk-weighted assets, *less* the fair value of any derivative contracts;

(ii)(A) For an FDIC-supervised institution that uses the current exposure methodology under § 324.34(b) for its standardized risk-weighted assets, the potential future credit exposure (PFE) for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the FDIC-supervised institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), to which the FDIC-supervised institution is a counterparty as determined under § 324.34, but without regard to § 324.34(c), provided that:

(*1*) An FDIC-supervised institution may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 324.34, but without regard to § 324.34(c), provided that it does not adjust the net-to-gross ratio (NGR); and

(*2*) An FDIC-supervised institution that chooses to exclude the PFE of credit derivatives or other similar instruments through which it provides credit protection pursuant to this paragraph (c)(2)(ii)(A) must do so consistently over time for the calculation of the PFE for all such instruments; or

(B)(*1*) For an FDIC-supervised institution that uses the standardized approach for counterparty credit risk under section § 324.132(c) for its standardized risk-weighted assets, the PFE for each netting set to which the FDIC-supervised institution is a counterparty (including cleared transactions except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the FDIC-supervised institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP), as determined under § 324.132(c)(7), in which the term C in § 324.132(c)(7)(i) equals zero, and, for any counterparty that is not a commercial end-user, multiplied by 1.4. For purposes of this paragraph (c)(2)(ii)(B)(*1*), an FDIC-supervised institution may set the value of the term C in § 324.132(c)(7)(i) equal to the amount of collateral posted by a clearing member client of the FDIC-supervised institution in connection with the client-facing derivative transactions within the netting set; and

(*2*) An FDIC-supervised institution may choose to exclude the PFE of all credit derivatives or other similar instruments through which it provides credit protection when calculating the PFE under § 324.132(c), provided that it does so consistently over time for the calculation of the PFE for all such instruments;

(iii)(A)(*1*) For an FDIC-supervised institution that uses the current exposure methodology under § 324.34(b) for its standardized risk-weighted assets, the amount of cash collateral that is received from a counterparty to a derivative contract and that has offset the mark-to-fair value of the derivative asset, or cash collateral that is posted to a counterparty to a derivative contract and that has reduced the FDIC-supervised institution's on-balance sheet assets, unless such cash collateral is all or part of variation margin that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*2*) The variation margin is used to reduce the current credit exposure of the derivative contract, calculated as described in § 324.34(b), and not the PFE; and

(*3*) For the purpose of the calculation of the NGR described in § 324.34(b)(2)(ii)(B), variation margin described in paragraph (c)(2)(iii)(A)(*2*) of this section may not reduce the net current credit exposure or the gross current credit exposure; or

(B)(*1*) For an FDIC-supervised institution that uses the standardized approach for counterparty credit risk under § 324.132(c) for its standardized risk-weighted assets, the replacement cost of each derivative contract or single product netting set of derivative contracts to which the FDIC-supervised institution is a counterparty, calculated according to the following formula, and, for any counterparty that is not a commercial end-user, multiplied by 1.4:

$$\textit{Replacement Cost} = \max\{V - CVM_r + CVM_p; 0\}$$

Where:

V equals the fair value for each derivative contract or each single-product netting set of derivative contracts (including a cleared transaction except as provided in paragraph (c)(2)(ix) of this section and, at the discretion of the FDIC-supervised institution, excluding a forward agreement treated as a derivative contract that is part of a repurchase or reverse repurchase or a securities borrowing or lending transaction that qualifies for sales treatment under GAAP);

CVM_r equals the amount of cash collateral received from a counterparty to a derivative contract and that satisfies the conditions in

paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction on behalf of a clearing member client, the amount of collateral received from the clearing member client; and

CVM_p equals the amount of cash collateral that is posted to a counterparty to a derivative contract and that has not offset the fair value of the derivative contract and that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section, or, in the case of a client-facing derivative transaction on behalf of a clearing member client, the amount of collateral posted to the clearing member client;

(*2*) Notwithstanding paragraph (c)(2)(iii)(B)(*1*) of this section, where multiple netting sets are subject to a single variation margin agreement, an FDIC-supervised institution must apply the formula for replacement cost provided in § 324.132(c)(10)(i), in which the term C_{MA} may only include cash collateral that satisfies the conditions in paragraphs (c)(2)(iii)(C) through (G) of this section; and

(*3*) For purposes of paragraph (c)(2)(iii)(B)(*1*), an FDIC-supervised institution must treat a derivative contract that references an index as if it were multiple derivative contracts each referencing one component of the index if the FDIC-supervised institution elected to treat the derivative contract as multiple derivative contracts under § 324.132(c)(5)(vi);

(C) For derivative contracts that are not cleared through a QCCP, the cash collateral received by the recipient counterparty is not segregated (by law, regulation, or an agreement with the counterparty);

(D) Variation margin is calculated and transferred on a daily basis based on the mark-to-fair value of the derivative contract;

(E) The variation margin transferred under the derivative contract or the governing rules of the CCP or QCCP for a cleared transaction is the full amount that is necessary to fully extinguish the net current credit exposure to the counterparty of the derivative contracts, subject to the threshold and minimum transfer amounts applicable to the counterparty under the terms of the derivative contract or the governing rules for a cleared transaction;

(F) The variation margin is in the form of cash in the same currency as the currency of settlement set forth in the derivative contract, provided that for the purposes of this paragraph (c)(2)(iii)(F), currency of settlement means any currency for settlement specified in the governing qualifying master netting agreement and the credit support annex to the qualifying master netting agreement, or in the governing rules for a cleared transaction; and

(G) The derivative contract and the variation margin are governed by a qualifying master netting agreement between the legal entities that are the counterparties to the derivative contract or by the governing rules for a cleared transaction, and the qualifying master netting agreement or the governing rules for a cleared transaction must explicitly stipulate that the counterparties agree to settle any payment obligations on a net basis, taking into account any variation margin received or provided under the contract if a credit event involving either counterparty occurs;

(iv) The effective notional principal amount (that is, the apparent or stated notional principal amount multiplied by any multiplier in the derivative contract) of a credit derivative, or other similar instrument, through which the FDIC-supervised institution provides credit protection, provided that:

(A) The FDIC-supervised institution may reduce the effective notional principal amount of the credit derivative by the amount of any reduction in the mark-to-fair value of the credit derivative if the reduction is recognized in common equity tier 1 capital;

(B) The FDIC-supervised institution may reduce the effective notional principal amount of the credit derivative by the effective notional principal amount of a purchased credit derivative or other similar instrument, provided that the remaining maturity of the purchased credit derivative is equal to or greater than the remaining maturity of the credit derivative through which the FDIC-supervised institution provides credit protection and that:

(*1*) With respect to a credit derivative that references a single exposure, the reference exposure of the purchased credit derivative is to the same legal entity and ranks *pari passu* with, or is junior to, the reference exposure of the credit derivative through which the FDIC-supervised institution provides credit protection; or

(*2*) With respect to a credit derivative that references multiple exposures, the reference exposures of the purchased credit derivative are to the same legal entities and rank *pari passu* with the reference exposures of the credit derivative through which the FDIC-supervised institution provides credit protection, and the level of seniority of the purchased credit derivative ranks *pari passu* to the level of seniority of the credit derivative through which the FDIC-supervised institution provides credit protection;

(*3*) Where an FDIC-supervised institution has reduced the effective notional amount of a credit derivative through which the FDIC-supervised institution provides credit protection in accordance with paragraph (c)(2)(iv)(A) of this section, the FDIC-supervised institution must also reduce the effective notional principal amount of a purchased credit derivative used to offset the credit derivative through which the FDIC-supervised institution provides credit protection, by the amount of any increase in the mark-to-fair value of the purchased credit derivative that is recognized in common equity tier 1 capital; and

(*4*) Where the FDIC-supervised institution purchases credit protection through a total return swap and records the net payments received on a credit derivative through which the FDIC-supervised institution provides credit protection in net income, but does not record offsetting deterioration in the mark-to-fair value of the credit derivative through which the FDIC-supervised institution provides credit protection in net income (either through reductions in fair value or by additions to reserves), the FDIC-supervised institution may not use the purchased credit protection to offset the effective notional principal amount of the related credit derivative through which the FDIC-supervised institution provides credit protection;

(v) Where an FDIC-supervised institution acting as a principal has more than one repo-style transaction with the same counterparty and has offset the gross value of receivables due from a counterparty under reverse repurchase transactions by the gross value of payables under repurchase transactions due to the same counterparty, the gross value of receivables associated with the repo-style transactions *less* any on-balance sheet receivables amount associated with these repo-style transactions included under paragraph (c)(2)(i) of this section, unless the following criteria are met:

(A) The offsetting transactions have the same explicit final settlement date under their governing agreements;

(B) The right to offset the amount owed to the counterparty with the amount owed by the counterparty is legally enforceable in the normal course of business and in the event of receivership, insolvency, liquidation, or similar proceeding; and

(C) Under the governing agreements, the counterparties intend to settle net, settle simultaneously, or settle according to a process that is the functional equivalent of net settlement, (that is, the cash flows of the transactions are equivalent, in effect, to a single net amount on the settlement date), where both transactions are settled through the same settlement system, the settlement arrangements are supported by cash or intraday credit facilities intended to ensure that settlement of both transactions will occur by the end of the business day, and the settlement of the underlying securities does not interfere with the net cash settlement;

(vi) The counterparty credit risk of a repo-style transaction, including where the FDIC-supervised institution acts as an agent for a repo-style transaction and indemnifies the customer with respect to the performance of the customer's counterparty in an amount limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, calculated as follows:

(A) If the transaction is not subject to a qualifying master netting agreement, the counterparty credit risk (E*) for transactions with a counterparty must be calculated on a transaction by transaction basis, such that each transaction *i* is treated as its own netting set, in accordance with the following formula, where E_i is the fair value of the instruments, gold, or cash that the FDIC-supervised institution has lent, sold subject to repurchase, or provided as collateral to the counterparty, and C_i is the fair value of the instruments, gold, or cash that the FDIC-supervised institution has borrowed, purchased subject to resale, or received as collateral from the counterparty:

$E_i^* = \max\{0, [E_i - C_i]\}$; and

(B) If the transaction is subject to a qualifying master netting agreement, the counterparty credit risk (E*) must be calculated as the greater of zero and the total

fair value of the instruments, gold, or cash that the FDIC-supervised institution has lent, sold subject to repurchase or provided as collateral to a counterparty for all transactions included in the qualifying master netting agreement (ΣE_i), *less* the total fair value of the instruments, gold, or cash that the FDIC-supervised institution borrowed, purchased subject to resale or received as collateral from the counterparty for those transactions (ΣC_i), in accordance with the following formula:

$$E^* = \max \{0, [\Sigma E_i - \Sigma C_i]\}$$

(vii) If an FDIC-supervised institution acting as an agent for a repo-style transaction provides a guarantee to a customer of the security or cash its customer has lent or borrowed with respect to the performance of the customer's counterparty and the guarantee is not limited to the difference between the fair value of the security or cash its customer has lent and the fair value of the collateral the borrower has provided, the amount of the guarantee that is greater than the difference between the fair value of the security or cash its customer has lent and the value of the collateral the borrower has provided;

(viii) The credit equivalent amount of all off-balance sheet exposures of the FDIC-supervised institution, excluding repo-style transactions, repurchase or reverse repurchase or securities borrowing or lending transactions that qualify for sales treatment under GAAP, and derivative transactions, determined using the applicable credit conversion factor under § 324.33(b), provided, however, that the minimum credit conversion factor that may be assigned to an off-balance sheet exposure under this paragraph is 10 percent; and

(ix) For an FDIC-supervised institution that is a clearing member:

(A) A clearing member FDIC-supervised institution that guarantees the performance of a clearing member client with respect to a cleared transaction must treat its exposure to the clearing member client as a derivative contract for purposes of determining its total leverage exposure;

(B) A clearing member FDIC-supervised institution that guarantees the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client must treat its exposure to the CCP as a derivative contract for purposes of determining its total leverage exposure;

(C) A clearing member FDIC-supervised institution that does not guarantee the performance of a CCP with respect to a transaction cleared on behalf of a clearing member client may exclude its exposure to the CCP for purposes of determining its total leverage exposure;

(D) An FDIC-supervised institution that is a clearing member may exclude from its total leverage exposure the effective notional principal amount of credit protection sold through a credit derivative contract, or other similar instrument, that it clears on behalf of a clearing member client through a CCP as calculated in accordance with paragraph (c)(2)(iv) of this section; and

(E) Notwithstanding paragraphs (c)(2)(ix)(A) through (C) of this section, an FDIC-supervised institution may exclude from its total leverage exposure a clearing member's exposure to a clearing member client for a derivative contract, if the clearing member client and the clearing member are affiliates and consolidated for financial reporting purposes on the FDIC-supervised institution's balance sheet.

(x) A custody bank shall exclude from its total leverage exposure the lesser of:

(A) The amount of funds that the custody bank has on deposit at a qualifying central bank; and

(B) The amount of funds in deposit accounts at the custody bank that are linked to fiduciary or custodial and safekeeping accounts at the custody bank. For purposes of this paragraph (c)(2)(x), a deposit account is linked to a fiduciary or custodial and safekeeping account if the deposit account is provided to a client that maintains a fiduciary or custodial and safekeeping account with the custody bank, and the deposit account is used to facilitate the administration of the fiduciary or custodial and safekeeping account.

(d) *Advanced approaches capital ratio calculations.* An advanced approaches FDIC-supervised institution that has completed the parallel run process and received notification from the FDIC pursuant to § 324.121(d) must determine its regulatory capital ratios as described in paragraphs (d)(1) through (3) of this section.

(1) *Common equity tier 1 capital ratio.* The FDIC-supervised institution's common equity tier 1 capital ratio is the lower of:

(i) The ratio of the FDIC-supervised institution's common equity tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the FDIC-supervised institution's common equity tier 1 capital to advanced approaches total risk-weighted assets.

(2) *Tier 1 capital ratio.* The FDIC-supervised institution's tier 1 capital ratio is the lower of:

(i) The ratio of the FDIC-supervised institution's tier 1 capital to standardized total risk-weighted assets; and

(ii) The ratio of the FDIC-supervised institution's tier 1 capital to advanced approaches total risk-weighted assets.

(3) *Total capital ratio.* The FDIC-supervised institution's total capital ratio is the lower of:

(i) The ratio of the FDIC-supervised institution's total capital to standardized total risk-weighted assets; and

(ii) The ratio of the FDIC-supervised institution's advanced-approaches-adjusted total capital to advanced approaches total risk-weighted assets. An FDIC-supervised institution's advanced-approaches-adjusted total capital is the FDIC-supervised institution's total capital after being adjusted as follows:

(A) An advanced approaches FDIC-supervised institution must deduct from its total capital any allowance for loan and lease losses or adjusted allowance for credit losses, as applicable, included in its tier 2 capital in accordance with § 324.20(d)(3); and

(B) An advanced approaches FDIC-supervised institution must add to its total capital any eligible credit reserves that exceed the FDIC-supervised institution's total expected credit losses to the extent that the excess reserve amount does not exceed 0.6 percent of the FDIC-supervised institution's credit risk-weighted assets.

(4) *State savings association tangible capital ratio.* (i) Until January 1, 2014, a state savings association shall determine its tangible capital ratio in accordance with 12 CFR 390.468.

(ii) As of January 1, 2014, a state savings association's tangible capital ratio is the ratio of the state savings association's core capital (tier 1 capital) to total assets. For purposes of this paragraph, the term total assets shall have the meaning provided in 12 CFR 324.401(g).

* * * * *

■ 24. In § 324.22, revise paragraphs (c), (f), and (h) to read as follows:

§ 324.22 Regulatory capital adjustments and deductions.

* * * * *

(c) *Deductions from regulatory capital related to investments in capital instruments or covered debt instruments*[23]—(1) *Investment in the FDIC-supervised institution's own capital instruments.* An FDIC-supervised institution must deduct an investment in its own capital instruments, as follows:

(i) An FDIC-supervised institution must deduct an investment in the FDIC-supervised institution's own common stock instruments from its common equity tier 1 capital elements to the extent such instruments are not excluded from regulatory capital under § 324.20(b)(1);

(ii) An FDIC-supervised institution must deduct an investment in the FDIC-supervised institution's own additional tier 1 capital instruments from its additional tier 1 capital elements; and

(iii) An FDIC-supervised institution must deduct an investment in the FDIC-supervised institution's own tier 2 capital instruments from its tier 2 capital elements.

(2) *Corresponding deduction approach.* For purposes of subpart C of this part, the corresponding deduction approach is the methodology used for the deductions from regulatory capital related to reciprocal cross holdings (as described in paragraph (c)(3) of this section), investments in the capital of unconsolidated financial institutions for an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution (as described in paragraph (c)(4) of this section), non-significant investments in the capital of unconsolidated financial institutions for

[23] The FDIC-supervised institution must calculate amounts deducted under paragraphs (c) through (f) of this section after it calculates the amount of ALLL or AACL, as applicable, includable in tier 2 capital under § 324.20(d)(3).

an advanced approaches FDIC-supervised institution (as described in paragraph (c)(5) of this section), and non-common stock significant investments in the capital of unconsolidated financial institutions for an advanced approaches FDIC-supervised institution (as described in paragraph (c)(6) of this section). Under the corresponding deduction approach, an FDIC-supervised institution must make deductions from the component of capital for which the underlying instrument would qualify if it were issued by the FDIC-supervised institution itself, as described in paragraphs (c)(2)(i) through (iii) of this section. If the FDIC-supervised institution does not have a sufficient amount of a specific component of capital to effect the required deduction, the shortfall must be deducted according to paragraph (f) of this section.

(i) If an investment is in the form of an instrument issued by a financial institution that is not a regulated financial institution, the FDIC-supervised institution must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock or represents the most subordinated claim in a liquidation of the financial institution; and

(B) An additional tier 1 capital instrument if it is subordinated to all creditors of the financial institution and is senior in liquidation only to common shareholders.

(ii) If an investment is in the form of an instrument issued by a regulated financial institution and the instrument does not meet the criteria for common equity tier 1, additional tier 1 or tier 2 capital instruments under § 324.20, the FDIC-supervised institution must treat the instrument as:

(A) A common equity tier 1 capital instrument if it is common stock included in GAAP equity or represents the most subordinated claim in liquidation of the financial institution;

(B) An additional tier 1 capital instrument if it is included in GAAP equity, subordinated to all creditors of the financial institution, and senior in a receivership, insolvency, liquidation, or similar proceeding only to common shareholders;

(C) A tier 2 capital instrument if it is not included in GAAP equity but considered regulatory capital by the primary supervisor of the financial institution; and

(D) For an advanced approaches FDIC-supervised institution, a tier 2 capital instrument if it is a covered debt instrument.

(iii) If an investment is in the form of a non-qualifying capital instrument (as defined in § 324.300(c)), the FDIC-supervised institution must treat the instrument as:

(A) An additional tier 1 capital instrument if such instrument was included in the issuer's tier 1 capital prior to May 19, 2010; or

(B) A tier 2 capital instrument if such instrument was included in the issuer's tier 2 capital (but not includable in tier 1 capital) prior to May 19, 2010.

(3) *Reciprocal cross holdings in the capital of financial institutions.* (i) An FDIC-supervised institution must deduct an investment in the capital of other financial institutions that it holds reciprocally, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(ii) An advanced approaches FDIC-supervised institution must deduct an investment in any covered debt instrument that the institution holds reciprocally with another financial institution, where such reciprocal cross holdings result from a formal or informal arrangement to swap, exchange, or otherwise intend to hold each other's capital or covered debt instruments, by applying the corresponding deduction approach in paragraph (c)(2) of this section.

(4) *Investments in the capital of unconsolidated financial institutions.* An FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution must deduct its investments in the capital of unconsolidated financial institutions (as defined in § 324.2) that exceed 25 percent of the sum of the FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section by applying the corresponding deduction approach in paragraph (c)(2) of this section.[24] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the FDIC, an FDIC-supervised institution that underwrites a failed underwriting, for the period of time stipulated by the FDIC, is not required to deduct an investment in the capital of an unconsolidated financial institution pursuant to this paragraph (c) to the extent the investment is related to the failed underwriting.[25]

(5) *Non-significant investments in the capital of unconsolidated financial institutions.* (i) An advanced approaches FDIC-supervised institution must deduct its non-significant investments in the capital of unconsolidated financial institutions (as defined in § 324.2) that, in the aggregate and together with any investment in a covered debt instrument (as defined in § 324.2) issued by a financial institution in which the FDIC-supervised institution does not have a significant investment in the capital of the unconsolidated financial institution (as defined in § 324.2), exceeds 10 percent of the sum of the advanced approaches FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section (the 10 percent threshold for non-significant investments) by applying the corresponding deduction approach in paragraph (c)(2) of this section.[26] The deductions described in this paragraph are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the FDIC, an advanced approaches FDIC-supervised institution that underwrites a failed underwriting, for the period of time stipulated by the FDIC, is not required to deduct from capital a non-significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(5) to the extent the investment is related to the failed

[24] With the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an FDIC-supervised institution that is not an advanced approaches FDIC-supervised institution, is not required to deduct an investment in the capital of an unconsolidated financial institution pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the FDIC.

[25] Any investments in the capital of an unconsolidated financial institution that do not exceed the 25 percent threshold for investments in the capital of unconsolidated financial institutions under this section must be assigned the appropriate risk weight under subparts D or F of this part, as applicable.

[26] With the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution is not required to deduct a non-significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph if the financial institution is in distress and if such investment is made for the purpose of providing financial support to the financial institution, as determined by the FDIC.

underwriting.[27] For any calculation under this paragraph (c)(5)(i), an advanced approaches FDIC-supervised institution may exclude the amount of an investment in a covered debt instrument under paragraph (c)(5)(iii) or (iv) of this section, as applicable.

(ii) For an advanced approaches FDIC-supervised institution, the amount to be deducted under this paragraph (c)(5) from a specific capital component is equal to:

(A) The advanced approaches FDIC-supervised institution's aggregate non-significant investments in the capital of an unconsolidated financial institution and, if applicable, any investments in a covered debt instrument subject to deduction under this paragraph (c)(5), exceeding the 10 percent threshold for non-significant investments, multiplied by

(B) The ratio of the advanced approaches FDIC-supervised institution's aggregate non-significant investments in the capital of an unconsolidated financial institution (in the form of such capital component) to the advanced approaches FDIC-supervised institution's total non-significant investments in unconsolidated financial institutions, with an investment in a covered debt instrument being treated as tier 2 capital for this purpose.

(iii) For purposes of applying the deduction under paragraph (c)(5)(i) of this section, an advanced approaches FDIC-supervised institution that is not a subsidiary of a global systemically important banking organization, as defined in 12 CFR 252.2, may exclude from the deduction the amount of the FDIC-supervised institution's gross long position, in accordance with § 324.22(h)(2), in investments in covered debt instruments issued by financial institutions in which the FDIC-supervised institution does not have a significant investment in the capital of the unconsolidated financial institutions up to an amount equal to 5 percent of the sum of the FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(iv) Prior to applying the deduction under paragraph (c)(5)(i) of this section:

(A) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, may designate any investment in a covered debt instrument as an excluded covered debt instrument, as defined in § 324.2.

(B) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct, according to the corresponding deduction approach in paragraph (c)(2) of this section, its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, but no longer qualifies as an excluded covered debt instrument.

(C) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section the amount of its gross long position, calculated in accordance with paragraph (h)(2) of this section, in a direct or indirect investment in a covered debt instrument that was originally designated as an excluded covered debt instrument, in accordance with paragraph (c)(5)(iv)(A) of this section, and has been held for more than thirty business days.

(D) An FDIC-supervised institution that is a subsidiary of a global systemically important BHC, as defined in 12 CFR 252.2, must deduct according to the corresponding deduction approach in paragraph (c)(2) of this section its gross long position, calculated in accordance with paragraph (h)(2) of this section, of its aggregate position in excluded covered debt instruments that exceeds 5 percent of the sum of the FDIC-supervised institution's common equity tier 1 capital elements minus all deductions from and adjustments to common equity tier 1 capital elements required under paragraphs (a) through (c)(3) of this section, net of associated DTLs in accordance with paragraph (e) of this section.

(6) *Significant investments in the capital of unconsolidated financial institutions that are not in the form of common stock.* If an advanced approaches FDIC-supervised institution has a significant investment in the capital of an unconsolidated financial institution, the advanced approaches FDIC-supervised institution must deduct from capital any such investment issued by the unconsolidated financial institution that is held by the FDIC-supervised institution other than an investment in the form of common stock, as well as any investment in a covered debt instrument issued by the unconsolidated financial institution, by applying the corresponding deduction approach in paragraph (c)(2) of this section.[28] The deductions described in this section are net of associated DTLs in accordance with paragraph (e) of this section. In addition, with the prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution that underwrites a failed underwriting is not required to deduct the significant investment in the capital of an unconsolidated financial institution or an investment in a covered debt instrument pursuant to this paragraph (c)(6) if such investment is related to such failed underwriting.

* * * * *

(f) *Insufficient amounts of a specific regulatory capital component to effect deductions.* Under the corresponding deduction approach, if an FDIC-supervised institution does not have a sufficient amount of a specific component of capital to effect the full amount of any deduction from capital required under paragraph (d) of this section, the FDIC-supervised institution must deduct the shortfall amount from the next higher (that is, more subordinated) component of regulatory capital. Any investment by an advanced approaches FDIC-supervised institution in a covered debt instrument must be treated as an investment in the tier 2 capital for purposes of this paragraph (f). Notwithstanding any other provision of this section, a qualifying community banking organization (as defined in § 324.12) that has elected to use the community bank leverage ratio framework pursuant to § 324.12 is not required to deduct any shortfall of tier 2 capital from its additional tier 1 capital or common equity tier 1 capital.

* * * * *

(h) *Net long position*—(1) *In general.* For purposes of calculating the amount of an FDIC-supervised institution's investment in the FDIC-supervised

[27] Any non-significant investment in the capital of an unconsolidated financial institution or any investment in a covered debt instrument that is not required to be deducted under this paragraph (c)(5) or otherwise under this section must be assigned the appropriate risk weight under subparts D, E, or F of this part, as applicable.

[28] With prior written approval of the FDIC, for the period of time stipulated by the FDIC, an advanced approaches FDIC-supervised institution is not required to deduct a significant investment in the capital of an unconsolidated financial institution, including an investment in a covered debt instrument, under this paragraph (c)(6) or otherwise under this section if such investment is made for the purpose of providing financial support to the financial institution as determined by the FDIC.

institution's own capital instrument, investment in the capital of an unconsolidated financial institution, and investment in a covered debt instrument under this section, the institution's net long position is the gross long position in the underlying instrument determined in accordance with paragraph (h)(2) of this section, as adjusted to recognize any short position by the FDIC-supervised institution in the same instrument subject to paragraph (h)(3) of this section.

(2) *Gross long position.* A gross long position is determined as follows:

(i) For an equity exposure that is held directly by the FDIC-supervised institution, the adjusted carrying value of the exposure as that term is defined in § 324.51(b);

(ii) For an exposure that is held directly and that is not an equity exposure or a securitization exposure, the exposure amount as that term is defined in § 324.2;

(iii) For each indirect exposure, the FDIC-supervised institution's carrying value of its investment in an investment fund or, alternatively:

(A) An FDIC-supervised institution may, with the prior approval of the FDIC, use a conservative estimate of the amount of its indirect investment in the FDIC-supervised institution's own capital instruments, its indirect investment in the capital of an unconsolidated financial institution, or its indirect investment in a covered debt instrument held through a position in an index, as applicable; or

(B) An FDIC-supervised institution may calculate the gross long position for an indirect exposure to the FDIC-supervised institution's own capital instruments, the capital of an unconsolidated financial institution, or a covered debt instrument by multiplying the FDIC-supervised institution's carrying value of its investment in the investment fund by either:

(*1*) The highest stated investment limit (in percent) for an investment in the FDIC-supervised institution's own capital instruments, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument, as applicable, as stated in the prospectus, partnership agreement, or similar contract defining permissible investments of the investment fund; or

(*2*) The investment fund's actual holdings (in percent) of the investment in the FDIC-supervised institution's own capital instruments, investment in the capital of an unconsolidated financial institution, or investment in a covered debt instrument, as applicable; and

(iv) For a synthetic exposure, the amount of the FDIC-supervised institution's loss on the exposure if the reference capital or covered debt instrument were to have a value of zero.

(3) *Adjustments to reflect a short position.* In order to adjust the gross long position to recognize a short position in the same instrument under paragraph (h)(1) of this section, the following criteria must be met:

(i) The maturity of the short position must match the maturity of the long position, or the short position must have a residual maturity of at least one year (maturity requirement); or

(ii) For a position that is a trading asset or trading liability (whether on- or off-balance sheet) as reported on the FDIC-supervised institution's Call Report, if the FDIC-supervised institution has a contractual right or obligation to sell the long position at a specific point in time and the counterparty to the contract has an obligation to purchase the long position if the FDIC-supervised institution exercises its right to sell, this point in time may be treated as the maturity of the long position such that the maturity of the long position and short position are deemed to match for purposes of the maturity requirement, even if the maturity of the short position is less than one year; and

(iii) For an investment in an FDIC-supervised institution's own capital instrument under paragraph (c)(1) of this section, an investment in the capital of an unconsolidated financial institution under paragraphs (c)(4) through (6) and (d) of this section (as applicable), and an investment in a covered debt instrument under paragraphs (c)(1), (5), and (6) of this section:

(A) The FDIC-supervised institution may only net a short position against a long position in an investment in the FDIC-supervised institution's own capital instrument under paragraph (c)(1) of this section if the short position involves no counterparty credit risk;

(B) A gross long position in an investment in the FDIC-supervised institution's own capital instrument, an investment in the capital of an unconsolidated financial institution, or an investment in a covered debt instrument due to a position in an index may be netted against a short position in the same index;

(C) Long and short positions in the same index without maturity dates are considered to have matching maturities; and

(D) A short position in an index that is hedging a long cash or synthetic position in an investment in the FDIC-supervised institution's own capital instrument, an investment in the capital instrument of an unconsolidated financial institution, or an investment in a covered debt instrument can be decomposed to provide recognition of the hedge. More specifically, the portion of the index that is composed of the same underlying instrument that is being hedged may be used to offset the long position if both the long position being hedged and the short position in the index are reported as a trading asset or trading liability (whether on- or off-balance sheet) on the FDIC-supervised institution's Call Report, and the hedge is deemed effective by the FDIC-supervised institution's internal control processes, which have not been found to be inadequate by the FDIC.

§ 324.121 [Amended]

■ 25. Section 324.121 is amended by removing ''§ 324.10(c)(1) through (3)'' and adding ''§ 324.10(d)(1) through (3)'' in paragraph (c).

§ 324.132 [Amended]

■ 6. Section 324.132 is amended by removing ''§ 324.10(c)(4)(ii)(B)'' and adding ''§ 324.10(c)(2)(ii)(B)'' in paragraph (c)(7)(iii) and (iv).

§ 324.304 [Amended]

■ 27. Section 324.304 is amended by:

■ a. Removing ''§ 324.10(c)(4)'' and adding in its place ''§ 324.10(c)'' in paragraph (a) introductory text; and

■ b. Removing ''§ 324.10(c)(4)(ii)(J)(*1*)'' and adding in its place ''§ 324.10(c)(2)(x)(A)'' in paragraph (e).

Brian P. Brooks,

Acting Comptroller of the Currency.

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

Ann E. Misback,

Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on or about October 20, 2020.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2020–27046 Filed 1–5–21; 8:45 am]

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Part III

Securities and Exchange Commission

17 CFR Parts 210 and 270

Good Faith Determinations of Fair Value; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 210 and 270

[Release No. IC–34128; File No. S7–07–20]

RIN 3235–AM71

Good Faith Determinations of Fair Value

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting a new rule under the Investment Company Act of 1940 (''Investment Company Act'' or the ''Act'') that will address valuation practices and the role of the board of directors with respect to the fair value of the investments of a registered investment company or business development company (''fund''). The rule will provide requirements for determining fair value in good faith for purposes of the Act. This determination will involve assessing and managing material risks associated with fair value determinations; selecting, applying, and testing fair value methodologies; and overseeing and evaluating any pricing services used. The rule will permit a fund's board of directors to designate certain parties to perform the fair value determinations, who will then carry out these functions for some or all of the fund's investments. This designation will be subject to board oversight and certain reporting and other requirements designed to facilitate the board's ability effectively to oversee this party's fair value determinations. The rule will include a specific provision related to the determination of the fair value of investments held by unit investment trusts, which do not have boards of directors. The rule will also define when market quotations are readily available under the Act. The Commission is also adopting a separate rule providing the recordkeeping requirements that will be associated with fair value determinations and is rescinding previously issued guidance on the role of the board of directors in determining fair value and the accounting and auditing of fund investments.

DATES: *Effective date:* This rule is effective March 8, 2021. *Compliance dates:* The applicable compliance dates are discussed in section II.G of this rule.

FOR FURTHER INFORMATION CONTACT: Zeena Abdul-Rahman, Senior Counsel; Joel Cavanaugh, Senior Counsel; Bradley Gude, Senior Counsel; Thoreau A. Bartmann, Senior Special Counsel; or Brian McLaughlin Johnson, Assistant Director, at (202) 551–6792, Investment Company Regulation Office, Division of Investment Management; Kieran G. Brown, Senior Counsel, or David J. Marcinkus, Branch Chief, at (202) 551–6825 or *IMOCC@sec.gov,* Chief Counsel's Office, Division of Investment Management; Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–8549. Regarding accounting and auditing matters: Jenson Wayne or Alexis Cunningham, Assistant Chief Accountants at (202) 551–6918 or *IM-CAO@sec.gov,* Chief Accountant's Office, Division of Investment Management, Securities and Exchange Commission; or Jeffrey Nick or Natalie Martin, Professional Accounting Fellows, at (202) 551–5300 or *OCA@sec.gov,* Office of the Chief Accountant, Securities and Exchange Commission.

SUPPLEMENTARY INFORMATION: The Commission is adopting 17 CFR 270.2a–5 (new rule 2a–5) and 17 CFR 270.31a–4 (new rule 31a–4) under the Investment Company Act.

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I. Introduction

The Investment Company Act requires funds to value their portfolio investments using the market value of their portfolio securities when market quotations are ''readily available,'' and, when a market quotation for a portfolio security is not readily available or if the investment is not a security, by using the investment's fair value, as determined in good faith by the fund's board.[1] Proper valuation, among other things, promotes the purchase and sale

[1] Section 2(a)(41) of the Investment Company Act. *See also* 17 CFR 270.2a–4 (''rule 2a–4''). We generally use the term ''fair value'' in this release as that term is used in the definition of ''value'' in the Investment Company Act, that is, the value of securities for which no readily available market quotations exist. See section 2(a)(41) of the Investment Company Act. In contrast to the Investment Company Act, FASB Accounting Standard Codification Topic 820: Fair Value Measurement (''ASC Topic 820'') uses the term ''fair value'' to refer generally to the value of an asset or liability, regardless of whether that value is based on readily available market quotations or on other inputs. Accordingly, when we use the term fair value in this release, we are using it to mean fair value as defined under the Investment Company Act, unless we specifically note that we mean fair value under ASC Topic 820, such as in the sections below that discuss rescission of the accounting guidance.

of fund shares at fair prices, and helps to avoid dilution of shareholder interests.[2] Improper valuation can cause investors to pay fees that are too high or to base their investment decisions on inaccurate information.[3] We are adopting new 17 CFR 270.2a–5 (''rule 2a–5'' or ''final rule'') in response to the developments in markets and fund investment practices since the Commission last comprehensively addressed valuation 50 years ago. These include developments in the accounting and auditing literature,[4] the growing complexity of valuation, and intervening regulatory developments such as the development of ASC Topic 820 and the interplay of 17 CFR 270.38a–1 (''rule 38a–1'' or ''the compliance rule'') in facilitating board oversight of funds and the valuation process.[5] In addition, funds now invest in a greater variety of securities and other instruments, some of which did not exist in 1970 and may present different and more significant valuation challenges.[6] For example, funds that invest primarily in fixed income instruments (which may require fair value determinations for some or all of the portfolio assets) have expanded from around $800 billion in assets to over $4.5 trillion in just the last 20 years.[7]

We proposed rule 2a–5 in April 2020 and received more than 60 comment letters on the proposal.[8] Most commenters supported the Commission's goal of modernizing the regulatory framework for fund valuations.[9] Commenters generally agreed that the proposed framework for making a fair value determination was reasonable and consistent with current practice, but several requested additional flexibility regarding certain proposed requirements.[10]

We are adopting rule 2a–5 and companion 17 CFR 270.31a–4 (''rule 31a–4'' and, together with rule 2a–5, the ''rules'') with certain modifications from the proposal to address the comments we received, including targeted revisions to address issues noted with respect to certain of the more prescriptive elements of the proposed rule. We are also rescinding the Commission's previously issued guidance on the role of the board of directors in determining fair value and the accounting and auditing of fund investments as proposed and, in a change from the proposal, are superseding certain of the guidance on thinly traded securities and the use of pricing services the Commission issued in 2014.[11]

II. Discussion

The final rule provides requirements for determining fair value in good faith with respect to a fund for purposes of section 2(a)(41) of the Act and rule 2a–4 thereunder.[12] We believe that, in light of the developments discussed above and in the Proposing Release, to determine the fair value of fund investments in good faith requires a certain minimum, consistent framework for fair value and standard of baseline practices across funds, which the final rule establishes.[13]

Under the final rule, fair value as determined in good faith will require assessing and managing material risks associated with fair value determinations; selecting, applying, and testing fair value methodologies; and overseeing and evaluating any pricing services used. These required functions generally reflect our understanding of current practices used by funds to fair value their investments, and we discuss each in detail below.

The final rule also permits a fund's board[14] to designate a ''valuation designee'' to perform fair value determinations.[15] The valuation

[2] *See* Good Faith Determinations of Fair Value, Investment Company Act Release No. 33845 (Apr. 21, 2020) [85 FR 28734 (May 13, 2020)] (''Proposing Release''), at n.2.

[3] *See Id.* at nn.1–11 and accompanying text.

[4] *See* Securities and Exchange Commission Codification of Financial Reporting Policies, Statement Regarding ''Restricted Securities,'' Investment Company Act Release No. 5847 (Oct. 21, 1969) [35 FR 19989 (Dec. 31, 1970)], Financial Reporting Codification (CCH) section 404.04 (Apr. 15, 1982) (''ASR 113''); Investment Companies, Investment Company Act Release No. 6295 (Dec. 23, 1970) [35 FR 19986 (Dec. 31, 1970)], Financial Reporting Codification (CCH) section 404.03 (Apr. 15, 1982) (''ASR 118''). ASR 113 and ASR 118 continue to be included in the list of interpretive releases relating to the Investment Company Act found in 17 CFR part 271 as Investment Company Act Release Nos. 5847 and 6295, respectively. We refer to the releases herein as ASR 113 and ASR 118.

[5] *See* Proposing Release, *supra* footnote 2, at nn.17–31 and accompanying text.

[6] *See* Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles, Investment Company Act Release No. 33704 (Nov. 25, 2019) [85 FR 4446 (Jan. 24, 2020)] (noting the dramatic growth in the volume and complexity of the derivatives markets over the past two decades, and the increased use of derivatives by certain funds); Use of Derivatives by Investment Companies under the Investment Company Act of 1940, Investment Company Act Release No. 29776 (Aug. 31, 2011) [76 FR 55237 (Sept. 7, 2011)], at 69 (noting that ''[v]aluation of some derivatives may present special challenges for funds''); *see also* Use of Derivatives by Registered Investment Companies and Business Development Companies, Investment Company Act Release No. 34084 (Nov. 2, 2020) [85 FR 83162 (Dec. 21, 2020)] (''Derivatives Adopting Release'') at n.1 and accompanying text. The fund industry has grown tremendously in the intervening years. For example, in December 1969, open-end funds had net assets of over $53 billion. *See* H.R. Rep. No. 1382, 91st Cong., 2d Sess. 2 (1970). As of September 11, 2020, there were 12,680 open-end funds registered with the Commission with total net assets of over $27 trillion. *See infra* footnotes 496 through 497 and accompanying text. Moreover, as of September 2020, there were 97 business development companies (''BDCs'') with $62 billion in total net assets. *See infra* footnote 497 and accompanying text. BDCs, which did not exist in 1970, must invest at least 70% of their assets in certain investments, which may be difficult to value. *See* section 55(a) of the Act.

[7] *See* 2020 Investment Company Institute Fact Book at data table 3 *available at https://www.icifactbook.org/data/20_fb_data. See also* Proposing Release, *supra* footnote 2 (discussing the fund industry changes since the issuance of ASR 113 and 118).

[8] *See* Proposing Release, *supra* footnote 2. The comment letters on the Proposing Release (File No. S7–07–20) are available at *https://www.sec.gov/comments/s7-07-20/s70720.htm.*

[9] *See, e.g.,* Comment Letter of Fidelity Investments (July 21, 2020) (''Fidelity Comment Letter''); Comment Letter of the American Bar Association (July 20, 2020) (''ABA Comment Letter''); Comment Letter of Franklin Resources, Inc. (July 21, 2020) (''Franklin Comment Letter''); Comment Letter of Charles E. Andrews, James G. Ellis, Pablo R. González Guajardo, Vanessa C.L. Chang, John G. Freund, and Christopher E. Stone (July 21, 2020) (''American Fund Trustees Comment Letter''); Comment Letter of the New York City Bar Association (July 21, 2020) (''NYC Bar Comment Letter''). However, some commenters objected to the proposal. *See* Comment Letter of Douglas Scheidt (May 29, 2020) (''Scheidt Comment Letter 1'') and (June 29, 2020) (''Scheidt Comment Letter 2''); Comment Letter of Michael Cohan, David Jessup, Jr., and Shenghang Jiang (July 21, 2020) (''University of Miami Comment Letter'').

[10] *See, e.g.,* Comment Letter of J.P. Morgan Asset Management (July 15, 2020) (''JPMAM Comment Letter''); Comment Letter of the Vanguard Group (July 21, 2020) (''Vanguard Comment Letter''); Comment Letter of the Investment Company Institute (July 16, 2020) (''ICI Comment Letter''); Comment Letter of the Asset Management Group of the Securities Industry and Financial Markets Association (July 21, 2020) (''SIFMA AMG Comment Letter''); Comment Letter of Capital Research and Management Company (July 21, 2020) (''Capital Group Comment Letter'').

[11] Money Market Fund Reform; Amendments to Form PF, Investment Company Act Release No. 31166 (July 23, 2014) [79 FR 47736 (Aug. 14, 2014)] (''2014 Money Market Fund Release'').

[12] The final rule defines a ''fund'' as a registered investment company or a business development company. Rule 2a–5(e)(1).

[13] One commenter stated that rule 2a–5 does not require the Commission to exercise its exemptive authority under section 6(c). Comment Letter of Jack Murphy (July 20, 2020) (''Murphy Comment Letter''). We agree and are relying on our authority under other provisions of the Investment Company Act, including our authority under section 38(a) of the Act, to adopt rule 2a–5. In any event, we believe the final rule's provisions are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the Act. Accordingly, we believe section 6(c) also provides additional authority for the final rule.

[14] For purpose of the final rule, ''board'' means either the fund's entire board of directors or a designated committee of such board composed of a majority of directors who are not interested persons of the fund. Rule 2a–5(e)(3).

[15] *See infra* footnotes 138–140 and accompanying text (discussing the change from the proposed ''assign'' to the term ''designate'' in the final rule).

designee can be the adviser of the fund or, in a change from the proposal, an officer of an internally managed fund.[16] When a board designates the performance of determinations of fair value to a valuation designee for some or all of the fund's investments under the final rule, the final rule requires the board to oversee the valuation designee's performance of fair value determinations. To facilitate such oversight, the final rule also includes certain reporting and other requirements.[17] The final rule acknowledges that, consistent with longstanding practice, these valuation designees often play an important and valuable role in carrying out the day-to-day work of determining fair values. Under the final rule, the board remains responsible for the fair value determinations required by the statute. Where the board designates a valuation designee to perform fair value determinations under the final rule, the board will fulfill its continuing statutory obligations through active oversight of the valuation designee's performance of fair value determinations and compliance with the other requirements of the final rule.[18]

Also, as proposed, the final rule applies to all registered investment companies and BDCs, regardless of their classification or sub-classification (*e.g.,* open-end funds and closed-end funds),[19] or their investment objectives or strategies (*e.g.,* equity or fixed income; actively managed or tracking an index).[20] In the case of a unit investment trust (''UIT''), because a UIT does not have a board of directors or adviser, a UIT's trustee, or, in a change from the proposal, the UIT's depositor must conduct fair value determinations under the final rule.[21]

While many commenters thought that the proposal's general approach of balancing between prescriptive requirements and principles-based guidelines was reasonable, others requested modifications.[22] A number of commenters recommended that the Commission recast the proposed rule as a non-exclusive safe harbor or provide additional flexibility.[23] Some stated that they believed that fair value in good faith is a flexible concept, and thus they believed that fair value determinations are not amenable to a single approach, which they believed was consistent with the flexible approach taken in ASR 118.[24]

In light of the developments since the Commission last comprehensively addressed fair value determinations for funds, we believe that it is important to establish a minimum and consistent framework for fair value practices across funds. This framework also allows the Commission to articulate appropriate oversight measures, as outlined in section II.B below,[25] that are designed to help address valuation risks, including those arising from conflicts of interest.[26] The final rule establishes minimum and baseline standards that we believe are inherent in any good faith fair value determination, as informed by current industry practice. If we were to establish a safe harbor, in contrast, it may give the misleading impression that an approach to making fair value determinations that does not meet this minimum baseline would satisfy the board's statutory obligations.[27] The final rule does not establish a single approach to making such determinations. Instead, it establishes a principles-based framework for boards to use in creating their own specific process for making fair value determinations, including through designating and appropriately overseeing a valuation designee to perform certain valuation tasks.[28] It reflects an appropriate balance between providing a board or valuation designee with the flexibility to exercise judgment in the valuation process consistent with its good faith, paired with an appropriate set of baseline standards. Accordingly, we do not think that it is appropriate to recast rule 2a–5 as a safe harbor. However, we do agree with commenters that additional flexibility is appropriate in certain areas and have made a number of changes from the proposal in this regard, as discussed below.[29]

In support of a safe-harbor approach, some commenters raised concerns that violations of the proposed rule that may not directly impact the value given to an asset, for example a failure to keep records for the prescribed period, could

[16] Rule 2a–5(e)(4).

[17] Rule 2a–5(b).

[18] One commenter stated his belief that the Commission would need to use exemptive authority to ''shift[ ] the statutory fair valuation responsibilities'' away from fund directors. Scheidt Comment Letter 2. *But see* Murphy Comment Letter. As discussed above, we emphasize that the final rule does not in fact shift the statutory fair valuation responsibilities away from directors. Rather, the final rule establishes the requirements the board must meet to fulfill its continuing statutory obligations.

[19] An open-end fund is a management investment company that offers for sale or has outstanding redeemable securities of which it is the issuer. *See* section 5(a)(1) of the Investment Company Act. A closed-end fund is a management investment company other than an open-end fund. *See* section 5(a)(2) of the Investment Company Act. Section 2(a)(48) of the Investment Company Act defines a ''business development company'' as any closed-end investment company that operates for the purpose of making investments in securities described in section 55(a)(1) through 55(a)(3) of the Investment Company Act and that makes available significant managerial assistance with respect to the issuers of such securities.

[20] *See* rule 2a–5(e)(1) (defining ''fund'' to mean a registered investment company or business development company).

[21] Rule 2a–5(d). Section 4(2) of the Investment Company Act defines a UIT as an investment company that (1) is organized under a trust indenture or similar instrument; (2) does not have a board of directors; and (3) issues only redeemable securities, each of which represents an undivided interest in a unit of specified securities. *But see* Form N–7 for Registration of Unit Investment Trusts under the Securities Act of 1933 and the Investment Company Act of 1940, Investment Company Act Release No. 15612, Appendix B, Guide 2 (Mar. 9, 1987) [52 FR 8268, 8295–96 (Mar. 17, 1987)] (Staff Guidelines stating that the board's fair value role under section 2(a)(41) is to be performed by the UIT's trustee or the trustee's appointed person). *See infra* section II.E (rescission of staff guidance).

[22] *See, e.g.,* JPMAM Comment Letter; Vanguard Comment Letter; Comment Letter of State Street Global Advisors (July 21, 2020) (''SSGA Comment Letter''); Comment Letter of Baillie Gifford Funds (July 21, 2020) (''Baillie Gifford Comment Letter'').

[23] *See, e.g.,* Comment Letter of Arthur E. Johnson, Chairman of Independent Trustees, Fidelity Fixed Income and Asset Allocation Funds and David M. Thomas, Co-Lead Independent Trustee, Fidelity Equity and High Income Funds (June 26, 2020) (''Fidelity Trustees Comment Letter''); ICI Comment Letter; Comment Letter of Ronald E. Toupin, Board Chair, Guggenheim Funds (July 20, 2020) (''Guggenheim Trustees Comment Letter''); Catherine L. Newell, General Counsel and Executive Vice President, Dimensional Fund Advisers (July 27, 2020) (''Dimensional Comment Letter''); Comment Letter of Dechert LLP (July 21, 2020) (''Dechert Comment Letter''); Comment Letter of David B. Smith, General Counsel, Mutual Fund Directors Forum (July 21, 2020) (''MFDF Comment Letter'').

[24] *See* ICI Comment Letter; Fidelity Trustees Comment Letter; Guggenheim Trustees Comment Letter; Dimensional Comment Letter; Dechert Comment Letter. *See also* ASR 118 and Letter to Craig S. Tyle, General Counsel, Investment Company Institute (Dec. 8, 1999) and *infra* footnote 386 and accompanying text.

[25] Throughout this release, when we refer to ''appropriate'' oversight, we mean oversight consistent with the guidance set out *infra* in section II.B.1.

[26] As stated in the Proposing Release, we believe that, in light of the developments discussed above, to determine the fair value of fund investments in good faith requires a certain minimum, consistent framework for fair value and standard of baseline practices across funds, which would be established by the final rule. *See* Proposing Release, *supra* footnote 2, at 14–15.

[27] We do not believe that establishing a baseline for making fair value determinations detracts from, or is at odds with, the board's fiduciary duty. Nothing in this rulemaking should be construed as abrogating or limiting any of the fiduciary duties that boards owe to funds. *See, e.g.,* section 36(a) of the Act; *Burks* v. *Lasker,* 441 U.S. 471, 484–85 (1970).

[28] *See also* Fidelity Comment Letter (approving of the proposed approach of describing the process that must be followed rather than the describing with specificity the substantive elements of a proper fair value determination); ICI Comment Letter (appreciating that the Commission has not prescribed detailed methodological or investment-specific valuation guidance and instead emphasized process, reporting, and oversight).

[29] *See, e.g., infra* section II.B.2.

raise doubts about whether a valuation was made consistent with the requirements of the Act. These commenters stated that this would be true even where the end result of the actual valuation was appropriate.[30] In response to these concerns, as discussed below, we are tailoring certain of the proposed reporting requirements and moving the proposed recordkeeping requirements out of rule 2a–5 and into a separate rule under the Act.[31] While a board or adviser's failure to comply with the final rule's requirements may call into question the effectiveness of the fund's fair value process and its compliance program, the Commission underscores that the objective of the final rule is to ensure that a fund's assets are properly valued. A violation of the final rule does not necessarily mean that the actual values ascribed to particular fund investments were in fact inappropriate, or, for example, that the fund has violated rule 22c–1.

A. Fair Value as Determined in Good Faith Under Section 2(a)(41) of the Act

Rule 2a–5 sets forth certain required functions that must be performed to determine the fair value of the fund's investments in good faith.[32] As discussed below, we are adopting these required functions substantially as proposed, with several changes from the proposal based on the comments the Commission received.

1. Periodically Assess and Manage Valuation Risks

We are adopting, as proposed, the requirement to assess periodically any material risks associated with the determination of the fair value of the fund's investments, including material conflicts of interest, and to manage those identified valuation risks.[33] Also as proposed, the final rule does not identify other specific valuation risks that may need to be addressed under this requirement or establish a specific re-assessment frequency.

Several commenters expressed general support for the valuation risk requirement,[34] with others suggesting certain modifications, particularly regarding whether the final rule should prescribe a frequency for the proposed periodic re-assessment of the fund's material valuation risks.[35] One commenter opposed the proposed requirement entirely, and suggested that the Commission remove references to valuation risk from the proposed rule, on the basis that identified valuation risks should have no impact on the actual fair valuing of particular fund investments, and that this requirement thus would unnecessarily complicate the final rule while providing no investor protection benefit.[36]

After considering these comments, we continue to believe that requiring the assessment and management of material valuation risks in the final rule will help promote an effective overall process for fair valuing fund investments in good faith.[37] With respect to the frequency of the required periodic re-assessment of valuation risks, we continue to believe that different frequencies for the re-assessment of valuation risks may be appropriate for different funds or risks, and have determined not to modify the proposed rule to include a required minimum frequency. We also continue to believe, as stated in the Proposing Release, that the periodic re-assessment of valuation risk generally should take into account changes in fund investments, significant changes in a fund's investment strategy or policies, market events, and other relevant factors.[38]

The Proposing Release also included a non-exhaustive list of examples of sources or types of valuation risk.[39] As discussed below, we are reiterating this non-exhaustive list here, with several modifications to broaden the examples to include additional sources and types of risk raised by commenters.

We received a number of comments on the list of sources and types of valuation risk. One commenter expressed general support for the inclusion of this list, including its level of generality in describing sources and types of risk.[40] One commenter, on the other hand, stated that this list would cause confusion because funds cannot anticipate how the identified sources and types of valuation risk will affect the valuation of particular investments.[41] One commenter stated that the text of the final rule should identify specific valuation risks (similar to the non-exhaustive list discussed in the Proposing Release) that a board or adviser, as applicable, must assess and manage.[42] Other commenters recommended that the Commission identify additional sources and types of valuation risks.[43]

One commenter recommended we clarify that the assessment and management of valuation risks other than those identified in the Proposing Release can satisfy this requirement.[44] Similarly, one commenter suggested we clarify that some sources or types of valuation risk may be considered more or less important than others based on a particular fund's investments, the markets in which its investments trade, reliance on third-party service providers, and other relevant circumstances.[45]

After considering these comments, we continue to believe that a fund's specific

[30] *See, e.g.,* Comment Letter of Stradley Ronon Stevens Young, LLP (July 21, 2020) (''Stradley Comment Letter''); Comment Letter of Guggenheim Investments (July 21, 2020) (''Guggenheim Comment Letter''); Dechert Comment Letter.

[31] *See infra* section II.C.

[32] As proposed, these requirements will apply to a fund's board that is determining fair value or, if the board designates a valuation designee to perform any fair value determinations as discussed below, to that party.

[33] Rule 2a–5(a)(1). Valuation risk includes the risks associated with the process of determining whether an investment must be fair valued in the first place.

[34] *See* Comment Letter of Valuation Research Corporation (July 21, 2020) (''VRC Comment Letter''); Murphy Comment Letter.

[35] *See, e.g.,* Comment Letter of Sullivan & Worcester LLP (June 8, 2020) (''Sullivan Comment Letter'') (suggesting requirement of annual re-assessment of valuation risks); Comment Letter of the International Valuation Standard Council (July 14, 2020) (''IVSC Comment Letter'') (same); *but see* ABA Comment Letter (stating that valuation policies and procedures, including procedures for re-assessment of valuation risks, would be subject to annual review under rule 38a–1, and recommending no minimum frequency in final rule).

[36] *See* Franklin Comment Letter. For the same reasons, this commenter also suggested that we remove the proposed requirement that the adviser periodically report to the board on material changes to the assessment and management of valuation risks, including conflicts of interest. As discussed in section II.B.2.a below, the final rule includes periodic reporting on material changes in the assessment and management of valuation risks.

[37] The final rule will require, among other things, that the board or valuation designee, as applicable, take into account the fund's valuation risks in establishing and applying fair value methodologies and, where the board has designated the valuation designee to perform fair value determinations, periodic reporting on material changes in the management and assessment of valuation risks, as discussed in section II.B.2.a) below. *See* rule 2a–5(a)(2).

[38] *See* Proposing Release, *supra* footnote 2, at section II.A.1.

[39] *See id.*

[40] *See, e.g.,* Murphy Comment Letter.

[41] *See* Franklin Comment Letter (questioning whether funds should be expected to anticipate ''potential market shocks or dislocations'' in fair valuing their investments). *See also* ABA Comment Letter (stating that a board or adviser's assessment of valuation risks cannot account for potential future events, such as potential market shocks or dislocations that could change the assessment or management of valuation risk).

[42] *See* University of Miami Comment Letter.

[43] *See, e.g.,* Comment Letter of IHS Markit (July 21, 2020) (''IHS Markit Comment Letter'') (stating that additional risks include the market structure for the asset); Murphy Comment Letter (stating that additional risks include the possibility that an adviser or third-party service provider will be unable to operate).

[44] *See* Stradley Comment Letter.

[45] *See* ABA Comment Letter.

valuation risks depend on the facts and circumstances of the particular fund's investments. As such, we believe that the non-exhaustive list of examples of sources and types of valuation risk, set forth below, is appropriate. As we stated in the Proposing Release, the risks identified are not intended to be a comprehensive list of all possible sources of valuation risk, but a set of examples that may help inform fund boards and valuation designees. We agree that the additional risks identified by commenters may also be relevant for certain funds, and have broadened the list provided below in several respects to include those risks. The final rule, like the proposal, is designed to provide a board or valuation designee, as applicable, with the flexibility to determine which of the identified sources and types of valuation risk are relevant to the fund's investments, as well as to identify other risks not listed here. The final rule also provides flexibility to determine whether certain sources and types of valuation risk should be weighed more heavily than others.

As such, the following is a non-exhaustive list of sources or types of valuation risk:

- The types of investments held or intended to be held by the fund [46] and the characteristics of those investments; [47]
- Potential market or sector shocks or dislocations and other types of disruptions that may affect a valuation designee's or a third-party's ability to operate; [48]
- The extent to which each fair value methodology uses unobservable inputs, particularly if such inputs are provided by the valuation designee; [49]
- The proportion of the fund's investments that are fair valued as determined in good faith, and their contribution to the fund's returns;
- Reliance on service providers that have more limited expertise in relevant asset classes; the use of fair value methodologies that rely on inputs from third-party service providers; and the extent to which third-party service providers rely on their own service providers (so-called ''fourth-party'' risks); and
- The risk that the methods for determining and calculating fair value are inappropriate or that such methods are not being applied consistently or correctly.

2. Establish and Apply Fair Value Methodologies

As proposed, the final rule will provide that fair value as determined in good faith requires the board or valuation designee, as applicable, to establish and apply fair value methodologies. To satisfy this requirement, a board or valuation designee, as applicable, must:

(1) Select and apply appropriate fair value methodologies;

(2) Periodically review the appropriateness and accuracy of the methodologies selected and make any necessary changes or adjustments thereto; and

(3) Monitor for circumstances that may necessitate the use of fair value.

As discussed below, we are adopting these functions substantially as proposed, with certain modifications to respond to commenters' concerns and suggestions.

(a) Select and Apply Appropriate Fair Value Methodologies

The final rule will require the board or valuation designee, as applicable, to select and apply in a consistent manner an appropriate methodology or methodologies [50] for determining (which includes calculating) the fair value of fund investments.[51] As proposed, to satisfy this requirement, the board or valuation designee, as applicable, will have to specify the key inputs and assumptions specific to each asset class or portfolio holding.[52] We are, however, modifying the requirement to select and apply appropriate methodologies in the final rule in two ways to address commenter concerns and suggestions. First, the final rule will provide that the selected methodologies for fund investments may be changed if different methodologies are equally or more representative of the fair value of the investments. Second, the final rule will not require the specification of methodologies that will apply to new types of investments in which the fund intends to invest.

We received numerous comments on the proposed requirement that the board or adviser, as applicable, select and apply in a consistent manner an appropriate methodology or methodologies for determining (which includes calculating) the fair value of fund investments. These commenters generally requested clarification relating to the proposed requirement that a board or adviser, as applicable, select and apply fair value methodologies ''in a consistent manner.'' Several commenters stated that this proposed requirement suggested that a board or adviser, as applicable, generally may select only one methodology per asset class, and requested we clarify that this requirement does not preclude a board or adviser, as applicable, from selecting different methodologies for different securities within the same asset class or sub-class.[53] The final rule clarifies that this requirement is not meant to limit a board or valuation designee, as applicable, from using an appropriate methodology to fair value an investment, even if other investments within the same ''asset class'' are fair valued using a different appropriate methodology.

Similarly, commenters requested we clarify that the requirement to select and apply fair value methodologies in a consistent manner does not restrict a board's or adviser's ability to change the selected methodology for an investment or asset class under appropriate circumstances.[54] We recognize that

[46] We recognize that in assessing and managing this potential source of valuation risk, a board or valuation designee, as applicable, may not be able to identify all of the types of investments the fund will hold or the specific valuation risks related to such investments. This risk assessment and management generally should take into account those investments that the fund reasonably expects to purchase in the reasonably near term.

[47] Investment characteristics would include among other things, the size of the investment relative to measures of market demand, such as daily trading volume.

[48] Indicators of potential market or sector shocks or dislocations could include a significant change in short-term volatility or market liquidity, significant changes in trading volume, or a sudden increase in trading suspensions. Additional types of disruptions that may affect a valuation designee's or a third-party's ability to operate include, for example, a system failure or cyberattack.

[49] *See infra* footnotes 354–355 and accompanying text.

[50] As the Commission stated in the Proposing Release, ASC Topic 820 refers to valuation approaches and valuation techniques. In practice, many valuation techniques are referred to as *methods* (*e.g.,* discounted cash flow method). As a result, this Adopting Release uses the terms ''technique'' and ''method'' interchangeably to refer to a specific way of determining fair value and likewise uses the terms ''methods'' and ''methodologies'' interchangeably.

[51] Proposing Release, *supra* footnote 2, at n.45 and accompanying text. As stated in the Proposing Release, regarding the key inputs and assumptions specific to each asset class or portfolio holding, it would not be sufficient, for example, to simply state that private equity investments are valued using a discounted cash flow model, or that options are valued using a Black-Scholes model, without providing any additional detail on the specific qualitative and quantitative factors to be considered, the sources of the methodology's inputs and assumptions, and a description of how the calculation is to be performed (which may, but need not necessarily, take the form of a formula).

[52] *See* rule 2a–5(a)(2)(i).

[53] *See, e.g.,* ICI Comment Letter; Sullivan Comment Letter; Murphy Comment Letter; Comment Letter of MFS Investment Management (July 21, 2020) (''MFS Comment Letter''); Comment Letter of John Hancock Investment Management LLC (July 21, 2020) (''John Hancock Comment Letter'').

[54] *See, e.g.,* Sullivan Comment Letter; IVSC Comment Letter; JPMAM Comment Letter;

there may be circumstances where it is appropriate to change a methodology if it would result in a measurement that is equally or more representative of fair value.[55] Accordingly, we have modified the final rule to clarify that the requirement to apply fair value methodologies in a consistent manner does not preclude the board or valuation designee, as applicable, from changing the methodology for an investment in such circumstances.[56] Applying a methodology consistently is not meant to lock in place a rigid pre-established methodology, but instead to address the risks associated with switching methodologies in order to achieve a specific outcome. Accordingly, the consistent application of appropriate methodologies allows for a board or valuation designee, as applicable, to select and apply a different methodology or methodologies for investments in the same asset class, or to change the methodology selected for one or more particular investments, based on changes to the facts and circumstances related to the particular investment if different methodologies are equally or more representative of the fair value of the investments.[57] Any change in methodology must be documented under the applicable recordkeeping requirements.[58]

Commenters questioned our statement in the Proposing Release that to be appropriate under rule 2a–5, a methodology used for purposes of determining fair value must be consistent with ASC Topic 820,[59] and thus must be derived from one of the principles-based approaches described therein.[60] Some of these commenters suggested that ASC Topic 820 is not appropriately tailored to address all of the specific circumstances that may arise for a fund that values its assets daily, and stated that we should either provide more specific guidance for certain funds or investments,[61] or not limit appropriate methodologies to those addressed in ASC Topic 820.[62]

We believe that an appropriate methodology must be consistent with those used to prepare the fund's financial statements and thus be consistent with the principles of the valuation approaches laid out in ASC Topic 820. Therefore, if a valuation methodology was used that is not consistent with the principles of the valuation approaches laid out in ASC Topic 820, we would presume that use of such a methodology would be misleading or inaccurate. While the valuation approaches laid out in ASC Topic 820 may not directly address every situation that a fund may face because the accounting standards are principles-based, we believe that taking a valuation approach that is inconsistent with the principles outlined in ASC Topic 820 may result in a fund having a misleading or inaccurate fair value process because such an approach may not be consistent with U.S. GAAP and the fund's financial reporting process. Supplemental methodologies for situations not explicitly outlined in ASC Topic 820 may be appropriately applied by boards or valuation designees provided that the methodologies are not inconsistent with the principles outlined in ASC Topic 820. We recognize that there is no single methodology for determining the fair value of an investment because fair value depends on the facts and circumstance of each investment, including the relevant market and market participants.[63] We continue to believe that for any particular investment, there may be a range of appropriate values that could reasonably be considered to be fair value, and whether a specific value should be considered fair value will depend on the facts and circumstances of the particular investment. A consistent application of the selected methodology or methodologies, with changes to the methodology or methodologies where appropriate, together with the other provisions of the rules, would promote unbiased determinations of fair value within the range.

Commenters suggested we clarify that certain guidance provided in the 2014 Money Market Funds Adopting Release relating to the valuation of thinly traded securities is being superseded by final rule 2a–5 and the related guidance provided herein.[64] We believe that the guidance contained in this section addresses the same concerns discussed in the guidance contained in the last paragraph of the section on valuing thinly traded securities in the 2014 Money Market Funds Adopting Release.[65] Accordingly, that paragraph is superseded. As a general principle, determining fair value requires taking into account market conditions existing at the time of the determination. Accordingly, appropriate methodologies for funds holding debt securities generally should not fair value these securities at par or amortized cost based on the expectation that the funds will hold those securities until maturity, if the funds could not reasonably expect to receive approximately that value upon the measurement date under current market conditions. We continue to believe that fair value cannot be based on what a buyer might pay at some later time, such as when the market ultimately recognizes the security's true value as currently perceived by the portfolio manager.[66] Funds also may not fair value portfolio securities at prices not achievable on a current basis on the belief that the fund would not currently need to sell those securities. We believe the principles established in ASC Topic 820, which provide that an investment is valued based on an exit price at the measurement date from the perspective of a market participant under current market conditions, are consistent with the statements in this paragraph.[67]

Comment Letter of Seward & Kissel LLP (July 20, 2020) (''Seward & Kissel Comment Letter''). For this reason, two commenters also suggested that we remove this term from the final rule. *See* Franklin Comment Letter; Comment Letter of Federated Hermes, Inc. (July 21, 2020) (''Federated Hermes Comment Letter'').

[55] *See* ASC Topic 820–10–35–25 (requiring consistent application of valuation techniques, but providing that a change in a valuation technique or its application is appropriate if the change results in a measurement that is equally or more representative of fair value in the circumstances).

[56] *See* rule 2a–5(a)(2)(i).

[57] A change includes using a new methodology or making a material adjustment to an existing methodology. *See* JPMAM Comment Letter.

[58] *See* rule 31a–4(a). Furthermore, where the board has designated the valuation designee to perform fair value determinations, the final rule will require that the valuation designee periodically report to the board on material changes to, or material deviations from, the fair value methodologies established under this requirement. *See* rule 2a–5(b)(1)(i)(A)(*2*)(*ii*).

[59] Currently, ASC Topic 820 refers to valuation approaches, including the market approach, income approach, and cost approach, as well as valuation techniques and methods as ways in which to measure fair value. *See supra* footnote 50.

[60] *See, e.g.,* NYC Bar Comment Letter; Scheidt Comment Letter 2.

[61] *See* Scheidt Comment Letter 2.

[62] *See* ABA Comment Letter.

[63] This is consistent with what the Commission previously said in ASR 118 (''Methods which are in accord with this principle may, for example, be based on a multiple of earnings, or a discount from market of a similar freely traded security, or yield to maturity with respect to debt issues, or a combination of these and other methods.''). Consistent with the principles in ASC Topic 820, the methodologies selected should maximize the use of relevant observable inputs and minimize the use of unobservable inputs.

[64] *See, e.g.,* Vanguard Comment Letter.

[65] *See* 2014 Money Market Funds Release, *supra* footnote 11, at last paragraph of section III.D.2.a.

[66] *See* 2014 Money Market Funds Release, *supra* footnote 11, at section III.D.2.a.

[67] *See* ASC 820–10–35–3 and ASC 820–10–20 (''A fair value measurement assumes that the asset or liability is exchanged in an orderly transaction between market participants to sell the asset or transfer the liability at the measurement date under current market conditions.''; Fair Value means ''the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement

Continued

The proposed rule also would have required the board or adviser, as applicable, to consider the applicability of the selected fair value methodologies to types of fund investments that a fund does not currently hold but in which it intends to invest in the future.[68] This requirement was designed to facilitate the effective determination of the fair value of these new investments by the board or adviser, as applicable. While one commenter suggested that this requirement was appropriate as proposed,[69] other commenters generally opposed this requirement as being potentially overly burdensome by requiring boards and advisers to establish a predetermined list of methodologies to account for *all* types of new investments in which the fund may invest.[70]

We are persuaded that specifically requiring a predetermination of the methodologies that must be applied to hypothetical future investments could cause undue burdens to the extent it caused a fund to establish methodologies for assets in which a fund ultimately does not invest. Moreover, a fund will be required to value all of its investments, regardless of whether the fund had pre-determined a methodology. We believe that the general requirement under the final rule to select and apply in a consistent manner an appropriate methodology or methodologies for determining (and calculating) the fair value of fund investments,[71] will require a board or a valuation designee, where applicable, to determine which methodology is appropriate for a new investment type that a fund has actually purchased by the time the investments are valued. Accordingly, we have determined to remove from the final rule the proposed specific requirement that a board or adviser, as applicable, specify in advance the fair value methodologies that will apply to new types of investments in which the fund intends to invest.

(b) Periodically Review the Appropriateness and Accuracy of the Methodologies Selected

To establish and apply fair value methodologies appropriately, the final rule will require a board or valuation designee to review periodically the selected fair value methodologies for appropriateness and accuracy, and to make changes or adjustments to the methodologies where necessary.[72] We are adopting this requirement substantially as proposed, with one modification, discussed below, to respond to a comment we received. In addition, as stated in the Proposing Release, the results of back-testing or calibration (as discussed below) or a change in circumstances specific to an investment, for example, could necessitate adjustments to a fund's fair value methodologies.[73]

We received one comment on this requirement. The commenter generally supported it, but suggested we clarify that ''adjustments'' to the selected fair value methodologies under this requirement may include a change to new appropriate methodologies.[74] We agree, and have added the word ''change'' to the final rule to clarify that a necessary adjustment to the selected methodology under the final rule is not limited to modifying an existing methodology for a particular investment (for example, adjusting inputs), but also may include changing to a new methodology where appropriate.[75]

(c) Monitor for Circumstances That May Necessitate the Use of Fair Value

As proposed, the final rule will also require the board or valuation designee, as applicable, to monitor for circumstances that may necessitate the use of fair value as determined in good faith.[76] For example, if a fund invests in securities that trade in foreign markets, the board or valuation designee, as applicable, generally should identify and monitor for the kinds of significant events that, if they occurred after the market closes in the relevant jurisdiction but before the fund prices its shares, would materially affect the value of the security and therefore may suggest that market quotations are not reliable.[77]

One commenter generally requested we clarify that this requirement is not meant to require the board or valuation designee, where applicable, to identify in advance *all* of the circumstances that may require the use of fair value.[78] While we agree that the circumstances that may necessitate fair value depend on the facts and circumstances of the particular fund's investments and that certain of these circumstances cannot be established in advance, we also believe that monitoring for circumstances that may require the use of fair value is an important element of an effective overall process for determining fair value in good faith.

The proposed rule also would have required the establishment of criteria for determining when market quotations are no longer reliable and therefore not readily available.[79] One commenter viewed this proposed requirement as potentially being overly restrictive of boards' and advisers' discretion to question the reliability of market quotations, and suggested we remove it from the final rule.[80] Another commenter suggested that requiring a board or adviser to identify in advance all of the criteria indicating when a market quotation may not be reliable would be overly burdensome.[81]

Although this requirement derived from the Commission's positions under the compliance rule,[82] we have determined to remove it from the final rule. We agree with commenters that requiring, in advance, a list of specific *criteria* for determining when market quotations may no longer be reliable could limit the board's or valuation designee's flexibility to consider the full range of conditions that may affect the reliability of market quotations. In addition, we believe that to satisfy the requirement to monitor for circumstances that may necessitate the use of fair value, discussed above, boards and valuation designees would have to take into account the circumstances that may cause market quotations to be no longer reliable. The final rule, however, will not require

date''). *See also* ASC Topic 820, at par. 820–10–35–54H (''A reporting entity's intention to hold the asset or to settle or otherwise fulfill the liability is not relevant when measuring fair value because fair value is a market-based measurement, not an entity-specific measurement.'').

[68] Proposed rule 2a–5(a)(2)(i)(B).

[69] *See* IHS Markit Comment Letter (stating that funds currently have processes in place to ensure that a methodology and supporting pricing service provider are in place to cover new investments).

[70] *See, e.g.,* Sullivan Comment Letter; Seward & Kissel Comment Letter; ABA Comment Letter; VRC Comment Letter.

[71] *See* rule 2a–5(a)(1).

[72] *See* Proposing Release, *supra* footnote 2, at n.50 and accompanying text.

[73] *Cf.* ASC Topic 820–10–35–25, which provides a non-exhaustive list of events that may warrant a change or an adjustment to a valuation technique, including where (1) new markets develop, (2) new information becomes available, (3) information previously used is no longer available, (4) the valuation technique improves, and (5) market conditions change. Boards or valuation designees generally should seek to account for such occurrences and consider specifying alternative sources.

[74] *See* Murphy Comment Letter.

[75] *See supra* section II.A.2.a).

[76] Rule 2a–5(a)(2)(iii).

[77] *Cf.* ASC Topic 820–10–35–41C(b).

[78] *See* John Hancock Comment Letter.

[79] Proposed rule 2a–5(a)(2)(iv).

[80] *See* Sullivan Comment Letter.

[81] *See* John Hancock Comment Letter.

[82] *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 26299 (Dec. 17, 2003) [68 FR 74713 (Dec. 24, 2003)] (''Compliance Rules Adopting Release'').

those broader circumstances to be captured in specific criteria.

3. Test Fair Value Methodologies for Appropriateness and Accuracy

As proposed, the final rule will require the testing of the appropriateness and accuracy of the methodologies used to calculate fair value.[83] This requirement is designed to help ensure that the selected fair value methodologies are appropriate and that adjustments to the methodologies are made where necessary. The final rule, similar to the proposal, will require the board or valuation designee, as applicable, to identify the testing methods to be used and the minimum frequency with which such testing methods are used, but will not require particular testing methods or a specific minimum frequency for the testing.

While several commenters supported the proposed requirement,[84] other commenters recommended that we modify or clarify the requirement in the final rule. One commenter recommended that we remove from the final rule the proposed requirement that the adviser or board identify the testing methods to be used and the minimum frequency with which such testing methods are used, viewing it as overly prescriptive and too limiting of the discretion of the board or adviser, as applicable, to determine how testing should be conducted.[85] Several commenters recommended we clarify that parties other than the board or adviser, as applicable, such as pricing services, may perform the testing.[86] One commenter asked that we provide a de minimis exception to the proposed testing requirement for funds that have a limited amount of fair valued investments.[87] Finally, one commenter recommended that the final rule require that methodology testing be performed at least quarterly or whenever the fund provides financial statements to investors.[88]

After considering these comments, we continue to believe that the specific tests to be performed and the frequency with which such tests should be performed are matters that depend on the circumstances of each fund and thus should be determined by the board or the valuation designee, as applicable. We also continue to believe that requiring the identification of (1) the testing methods to be used, and (2) the minimum frequency of the testing, is appropriate and still provides boards and valuation designees with flexibility to perform methodology testing based on the particular circumstances of a particular fund.[89] We believe that funds that have even a limited amount of fair valued investments should test their methodologies, and therefore are not providing a de minimis exception.[90] Testing can often reveal important information about the continuing appropriateness of a methodology. We expect the frequency and nature of testing would vary depending on the type and amount of investments held by the fund. If a specific methodology consistently over-values or under-values one or more fund investments as compared to observed transactions, the board or valuation designee, as applicable, should investigate the reasons for this difference.

Calibration and back-testing are examples of particularly useful testing methods to identify trends in certain circumstances, and potentially to assist in identifying issues with methodologies applied by fund service providers, including poor performance or potential conflicts of interest.[91] Several commenters recommended we clarify that this statement is not meant to suggest that calibration and back-testing are required testing methods, or that the use of appropriate testing methods other than calibration and back-testing would not satisfy the testing requirement.[92] While we believe that calibration and back-testing are methods that should be used for testing the appropriateness and accuracy of funds' fair value methodologies in many circumstances, the final rule does not require calibration and back-testing, nor does it preclude boards or valuation designees, where applicable, from using other appropriate testing methods.[93] We expect that as testing methodologies are developed and change over time, new and different tools for testing may also become more prominent or useful. The final rule provides flexibility to allow funds to use new, appropriate testing methods.

4. Pricing Services

As proposed, the final rule will provide that determining fair value in good faith requires the oversight and evaluation of pricing services, where used.[94] For funds that use pricing services, the final rule will require that the board or valuation designee, as applicable, establish a process for approving, monitoring, and evaluating each pricing service provider. The final rule also will require that the board or valuation designee, as applicable, establish a process for initiating price challenges as appropriate. Commenters generally supported the proposal to require the board or adviser, as applicable, to oversee and evaluate pricing services.[95] One commenter, however, stated that this oversight provision is unnecessary in the case of pricing services that are not affiliated with the fund's adviser.[96] This commenter stated that pricing services should not be distinguished from other third-party fund service providers, which advisers oversee to meet their own fiduciary obligations. Another commenter questioned the significance

[83] Rule 2a–5(a)(3).

[84] *See, e.g.,* Baillie Gifford Comment Letter; Capital Group Comment Letter; Comment Letter of Invesco Advisers, Inc. (July 21, 2020) (''Invesco Comment Letter'').

[85] *See* Franklin Comment Letter.

[86] *See* ICI Comment Letter; IHS Markit Comment Letter; Comment Letter of New York State Society of Certified Public Accountants (Jul. 22, 2020) (''NYSSCPA Comment Letter''). We received several comments generally requesting that we clarify that the board or adviser, where applicable, may engage third parties to assist with fair value determinations. Those comments are addressed below in section II.B relating to guidance on assistance of others.

[87] *See* NYSSCPA Comment Letter.

[88] *See* Comment Letter of CFA Institute (July 21, 2020) (''CFA Institute Comment Letter'').

[89] Calibration can assist in assessing whether the fund's valuation technique reflects current market conditions, and whether any adjustments to the valuation technique are appropriate. ''Calibration'' for these purposes is the process for monitoring and evaluating whether there are material differences between the actual price the fund paid to acquire portfolio holdings that received a fair value under the Act and the prices calculated for those holdings by the fund's fair value methodology at the time of acquisition. *See* Proposing Release, *supra* footnote 2, at n.57.

[90] *See* NYSSCPA Comment Letter.

[91] As stated in the Proposing Release, back-testing involves a comparison of the fair value ascribed to the fund's investment against observed transactions or other market information, such as quotes from dealers or data from pricing services. One common form of back-testing is ''disposition analysis,'' which compares a fair value as determined using a fair value technique with the price obtained for the security upon its disposition by the fund. *See* Proposing Release, *supra* footnote 2, at n.58.

[92] *See, e.g.,* Comment Letter of T. Rowe Price Associates, Inc. (''July 21, 2020) (''TRC Comment Letter''); SIFMA Comment Letter; CFA Institute Comment Letter.

[93] We recognize, for example, that back-testing as a testing method may be less useful for portfolio holdings that trade infrequently. *See* Proposing Release, *supra* footnote 2, at n.59 and accompanying text.

[94] Rule 2a–5(a)(4).

[95] *See, e.g.* Comment Letter of Deloitte & Touche LLP (July 15, 2020) (''Deloitte Comment Letter''); Fidelity Trustees Comment Letter; John Hancock Comment Letter; ICI Comment Letter; Comment Letter of Council of Institutional Investors (July 20, 2020) (''Council of Institutional Investors Comment Letter''); Comment Letter of AIMA (July 21, 2020) (''AIMA Comment Letter); Vanguard Comment Letter; Invesco Comment Letter; MFS Comment Letter; VRC Comment Letter; Guggenheim Comment Letter; TRP Comment Letter; IVSC Comment Letter; Comment Letter of Harvest Investments, Ltd. (July 21, 2020) (''Harvest Comment Letter''); Murphy Comment Letter.

[96] Stradley Comment Letter.

of a pricing service's conflicts of interest, stating that pricing services maintain relationships with a wide variety of investment advisers, and generally are expected to provide the same valuation information with respect to a particular security to all funds.[97] As a result, this commenter asserted that it would be less likely for a pricing service to be unduly pressured to provide favorable information in a particular scenario or to a particular investment adviser. We believe, however, that the conflict is not necessarily one of responding to pressure from a particular investment adviser, but, rather, a pricing service might generally provide higher or more aggressive valuations to retain business.

We believe, and many commenters agreed, that pricing services play an important role in the fair value process by providing information on evaluated prices, matrix prices, price opinions, or similar pricing estimates or information that can assist in determining the fair value of fund investments.[98] Additionally, we believe that pricing services may have conflicts of interest such as maintaining continuing business relationships with the valuation designee. Therefore, given the widespread reliance on pricing services, the critical role they play in the valuation of fund investments, and their potential conflicts of interests, regardless of whether they are affiliated with the fund's adviser, the final rule will require that pricing services be subject to oversight so that the board or valuation designee, as applicable, has a reasonable basis to use the pricing information it receives as an input in determining fair value in good faith. To oversee pricing services effectively, the board or valuation designee, as applicable, should establish a process for the approval, monitoring, and evaluation of each pricing service provider used.

In a change from the proposal, we are modifying the final rule to require funds to establish a *process* for initiating price challenges as appropriate, instead of the proposed approach that would have required funds to establish *criteria* for the circumstances under which price challenges would be initiated.[99] Many commenters stated that requiring funds to establish specific criteria, such as objective thresholds, for price challenges was too rigid. Commenters were concerned that this would result in rote or mechanical price challenges that may be unnecessary, while not covering price challenges that may be appropriate based on facts and circumstances not readily susceptible to being distilled into criteria specified in advance.[100] Commenters stated that the circumstances under which a fund might initiate a price challenge are not always objective or based on set criteria given the myriad of different, and often fluid, data sources and inputs that could lead to challenges.[101]

After considering comments, we agree that there can be a range of circumstances under which a price challenge may be warranted, some of which cannot be distilled into specific criteria in advance.[102] For example, such an approach may lead the valuation designee to challenge pricing information that is reasonable given market conditions, solely because such pricing information meets the pre-established criteria. We believe, however, that appropriate oversight of pricing services includes a rigorous analysis of the pricing information provided by pricing services and any price challenges, where appropriate. Therefore, we are amending this requirement to require that funds establish a process for initiating price challenges, instead of pre-established criteria.[103] Such a process generally should outline the circumstances under which a price challenge should be initiated.[104]

Several commenters urged the Commission to provide additional guidance concerning who would qualify as a pricing service under the final rule.[105] Two commenters stated that the term ''pricing service'' as used in the Proposing Release is not entirely consistent with the definition in the Public Company Accounting Oversight Board (PCAOB) standards for auditing fair value measurements.[106] We are not adopting a specific list of criteria for who may qualify as a pricing service because we believe that it may become outdated over time and that the scope of the term ''pricing service'' is generally understood by boards and valuation designees. However, as we stated in the Proposing Release, we refer to pricing services as third parties that regularly provide funds with information on evaluated prices, matrix prices, price opinions, or similar pricing estimates or information to assist in determining the fair value of fund investments.[107] We believe that the types of entities that would be pricing services under the final rule would include pricing services as defined in the PCAOB standards.[108]

Some commenters suggested we also include a specific requirement for a fund's board or adviser, as applicable, to periodically review the selection of pricing services and to evaluate other pricing services.[109] Two commenters, in contrast, stated that such a requirement would be unnecessary because the compliance rule already requires periodic reviews of service providers, including fund pricing services.[110] We believe that a specific requirement to review the selection of pricing services is unnecessary in light of the reporting requirements of rule 2a–5, discussed

[97] John Hancock Comment Letter.

[98] *See, e.g.* Fidelity Trustees Comment Letter; Deloitte Comment Letter. *See also* Capital Group Comment Letter (noting that more than 50% of the fund portfolios with non-U.S. equity strategies may be subject to non-U.S. price adjustments due to significant U.S. market moves, which would require pricing services to provide a substantial amount of pricing information).

[99] *See* Proposing Release, *supra* footnote 2, at text following n.63 (stating that price challenges are typically initiated when pricing information from a pricing service differs materially from the board's or adviser's view of the fair value of an investment).

[100] *See e.g.,* ICI Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter; TRP Comment Letter; Guggenheim Comment Letter; Comment Letter of Jon Hunt and Joseph T. Grause, Trustee and Lead Non-Interested Trustee, Advisors' Inner Circle Funds Trusts (July 23, 2020) (''Advisor's Inner Circle Trustees Comment Letter''); Murphy Comment Letter.

[101] *See e.g.,* Capital Group Comment Letter; John Hancock Comment Letter.

[102] *See e.g.,* ICI Comment Letter; Guggenheim Comment Letter; TRP Comment Letter.

[103] *See e.g.* SIFMA AMG Comment Letter.

[104] If the board designates a valuation designee to perform fair value determinations, the process for initiating price challenges established by the valuation designee is required to be subject to appropriate board oversight under rule 2a–5. *See infra* text accompanying footnotes 214–218 (noting that a valuation designee may have an incentive to value fund assets improperly in order to increase fees and that, therefore, as part of the board's oversight responsibilities, the board should seek to identify such potential conflicts of interest, monitor such conflicts, and take reasonable steps to manage such conflicts).

[105] *See e.g.,* Comment Letter of Refinitiv Evaluated Pricing Service (July 21, 2020) (''Refinitiv Comment Letter''); Comment Letter of ICE Data Pricing & Reference Data, LLC (July 21, 2020) (''ICE Data Comment Letter''); Capital Group Comment Letter; AIMA Comment Letter; Comment Letter of KPMG (July 20, 2020) (''KPMG Comment Letter''); Comment Letter of Duffs and Phelps (July 21, 2020) (''Duff & Phelps Comment Letter''); Comment Letter of the American Society of Appraisers (July 21, 2020) (''ASA Comment Letter'').

[106] *See* KPMG Comment Letter; *see also* Duff & Phelps Comment Letter.

[107] *See* Proposing Release, *supra* footnote 2, at text accompanying n.60.

[108] *See* PCAOB AS 2501.

[109] *See* Council of Institutional Investors Comment Letter; VRC Comment Letter; IHS Markit Comment Letter.

[110] ICE Data Comment Letter; *see also* Refinitiv Comment Letter; Murphy Comment Letter. We disagree with these commenters. *See* Compliance Rules Adopting Release, *supra* footnote 82, at n.28 (stating that the term ''service provider'' as used in the Compliance Rules Adopting Release does not include pricing services).

below.[111] We think that the board or the valuation designee should, as part of their annual review of the adequacy and effectiveness of the fair value process, consider the adequacy and effectiveness of the pricing services used given the important role that information provided by pricing services can play in the fair value process.

In addition, several commenters stated that the oversight of pricing services requirements under rule 2a–5 may not be consistent with previous guidance regarding the use of pricing services in the 2014 Money Market Fund Release, particularly regarding the role of the board of directors.[112] Some of these commenters urged us to rescind that guidance and holistically address oversight of pricing services in this Adopting Release.[113]

We believe that the requirements of the final rule and the guidance provided in this section effectively address the concerns with oversight of pricing services discussed as part of the fair value guidance in the 2014 Money Market Fund Release. We state below our views on how oversight and selection of pricing services may be effectively conducted, which is largely consistent with our previous guidance from the 2014 Money Market Fund Release guidance but reflects the process established in rule 2a–5 allowing the board to designate the valuation designee to perform fair value determinations.[114] The guidance below also includes certain additional factors that were included in the Proposing Release.[115] Our views stated below supersede the guidance the Commission expressed in the 2014 Money Market Fund Release regarding the use of pricing services, and so we are rescinding that guidance.[116]

We believe that under the final rule, before deciding to use a pricing service, the fund's board or valuation designee, as applicable, generally should take into consideration factors such as: (i) The qualifications, experience, and history of the pricing service; (ii) the valuation methods or techniques, inputs, and assumptions[117] used by the pricing service for different classes of holdings, and how they are affected (if at all) as market conditions change;[118] (iii) the quality of the pricing information provided by the service and the extent to which the service determines its pricing information as close as possible to the time as of which the fund calculates its net asset value;[119] (iv) the pricing service's process for considering price challenges, including how the pricing service incorporates information received from price challenges into its pricing information; (v) the pricing service's actual and potential conflicts of interest and the steps the pricing service takes to mitigate such conflicts;[120] and (vi) the testing processes used by the pricing service.[121] In addition, the fund's board or valuation designee, as applicable, should generally consider the appropriateness of using pricing information provided by a pricing service in determining the fair values of the fund's investments where, for example, the fund's board or valuation designee, as applicable, does not have a good faith basis for believing that the pricing service's pricing methodologies produce prices that reflect fair value.[122]

5. Fair Value Policies and Procedures

The final rule does not include the provision in the proposal that would have separately required the fund to adopt written policies and procedures reasonably designed to achieve compliance with the requirements of rule 2a–5.[123] While commenters generally supported this requirement,[124] other commenters argued that policies and procedures required by the proposed rule are already required by the compliance rule and urged the Commission to clarify the interaction between fund obligations under the compliance rule and the policies and procedures required under the proposed rule.[125]

Rule 38a–1 requires a fund's board, including a majority of its independent directors, to approve the fund's policies and procedures, and those of each adviser and other specified service providers, based upon a finding by the board that the policies and procedures are reasonably designed to prevent violation of the Federal securities laws.[126] We agree that, after our adoption of rules 2a–5 and 31a–4, the compliance rule by its terms will require the adoption and implementation of written policies and procedures reasonably designed to prevent violations of the requirements of rules 2a–5 and 31a–4 (''fair value policies and procedures'').[127] Accordingly, final rule 2a–5 does not include a separate policies and procedures requirement.

While the adopting release for the compliance rule included a discussion

[111] *See infra* section II.B.2.

[112] *See* MFDF Comment Letter; Fidelity Trustees Comment Letter; Comment Letter of Independent Directors Council (July 16, 2020) (''IDC Comment Letter''); NYC Bar Comment Letter; ABA Comment Letter; American Funds Trustees Comment Letter.

[113] ABA Comment Letter; IDC Comment Letter; Fidelity Trustees Comment Letter. *See also* Advisor's Inner Circle Trustees Comment Letter (stating its belief that the list of factors set out in the Proposing Release exceeds what is reasonably necessary to oversee pricing services, and offering, as an example, that review of a pricing service's valuation methods or techniques, inputs and assumptions is inconsistent with the role of an overseer of pricing services). The specific factors with which the commenter had concerns were also included in the guidance in the 2014 Money Market Fund Release. We disagree with the commenter because we believe that a review of a pricing service's valuation methods or techniques, inputs, and assumptions is a necessary factor of effective oversight by the valuation designee or the board, as applicable.

[114] *See* Proposing Release, *supra* footnote 2, at text following n.154 (requesting comment on whether the Commission should rescind any other valuation guidance in light of the proposal).

[115] *See* Proposing Release, *supra* footnote 2, at text accompanying nn.62–63.

[116] This rescission is limited to section III.D.2.b of the 2014 Money Market Fund Release entitled ''Use of Pricing Services.'' The guidance in that release on the use of amortized cost valuation remains valid. *See also supra* footnotes 64–67 and accompanying text (discussing the rescission of certain guidance we provided in the 2014 Money Market Fund Release regarding thinly traded securities).

[117] In considering a pricing service's valuation methods or techniques, inputs, and assumptions, the fair value policies and procedures generally should address whether the pricing service is relying on inputs or assumptions provided by the valuation designee or its affiliates. *See* Proposing Release, *supra* footnote 2, at n.62. *See also infra* section II.B.3.

[118] Guidance in the 2014 Money Market Fund Release contained a similar position. *See, e.g.,* 2014 Money Market Fund Release, *supra* footnote 11, at text accompanying n.899.

[119] *Id.*

[120] *See supra* footnote 97 and accompanying text (discussing the conflicts of interests of pricing services).

[121] Factors (iv) through (vi) were included in the Proposing Release. *See* Proposing Release, *supra* footnote 2, at text accompanying nn.62–63.

[122] The 2014 Money Market Fund Release contained a similar position. *See, e.g.,* 2014 Money Market Fund Release, *supra* footnote 11, at text accompanying n.899.

[123] Proposed rule 2a–5(a)(5).

[124] *See, e.g.,* Comment Letter of IDC Comment Letter (July 21, 2020) (''IAA Comment Letter''); Murphy Comment Letter; ICI Comment Letter; Invesco Comment Letter; AIMA Comment Letter; IVSC Comment Letter; Comment Letter of the Small Business Investor Alliance (July 21, 2020) (''SBIA Comment Letter''); ICE Data Comment Letter; Fidelity Comment Letter; Comment Letter of Richard Cavanagh and Karen Robards, Independent Co-Chairs of the Boards of Directors/Trustees of the Funds in the BlackRock Fixed-Income Complex (July 17, 2020) (''BlackRock Trustees Comment Letter''); ABA Comment Letter; Vanguard Comment Letter.

[125] *See, e.g.,* Seward & Kissel Comment Letter; ABA Comment Letter; Fidelity Comment Letter; NYC Bar Comment Letter. *See also* Stradley Comment Letter and Advisor's Inner Circle Trustees Comment Letter (noting that the proposed policies and procedures required under rule 2a–5 were duplicative and would be unnecessarily burdensome to boards).

[126] 17 CFR 270.38a–1(a)(2). *See also* Compliance Rules Adopting Release, *supra* footnote 82.

[127] *See, e.g.,* Seward & Kissel Comment Letter; ABA Comment Letter; Fidelity Comment Letter; Advisor's Inner Circle Trustees Comment Letter; NYC Bar Comment Letter. *See* Compliance Rules Adopting Release, *supra* footnote 82, at nn.39–47.

of certain policies and procedures for determination of fair value that a fund should adopt, this discussion occurred prior to our adoption of rule 2a–5.[128] Rule 2a–5 creates a new framework for fair value determinations. As we stated in the Proposing Release, the requirements of rule 2a–5 and guidance in this release will supersede the Compliance Rules Adopting Release's discussion of policies and procedures for the pricing of portfolio securities and fund shares.[129] Accordingly, to comply with the compliance rule, each fund must adopt and implement fair value policies and procedures that are reasonably designed to prevent violations of new rules 2a–5 and 31a–4's requirements. Because rules 2a–5 and 31a–4 are new rules under the Act with new fair value determination requirements, and given the intrinsic relationship of the rules to the board's own statutory functions relating to valuation, the fair value policies and procedures must be approved by the board pursuant to rule 38a–1 and may not be considered material amendments to existing fair value policies and procedures.[130]

Where the board determines the fair value of investments, the fund will adopt and implement the fair value policies and procedures under the compliance rule.[131] Similarly, where the board designates the adviser as valuation designee to perform fair value determinations under rule 2a–5(b), as discussed in section II.B, the adviser will adopt and implement the fair value policies and procedures under the compliance rule. As with a fund adopting fair value policies and procedures, the adviser's fair value policies and procedures must be approved by the board pursuant to rule 38a–1 and may not be considered material amendments to existing fair value policies and procedures. This approach clarifies, as some commenters requested, that the board can fulfill its responsibilities under the compliance rule if the adviser adopts fair value policies and procedures without the need for the fund to adopt duplicative policies separately.[132] Additionally, we believe that this approach helps to ensure that fair value policies and procedures include an appropriate amount of detail, while preserving a certain level of flexibility for the board or adviser, as applicable, to tailor the fair value policies and procedures to the unique facts and circumstances of the fund.[133]

B. Performance of Fair Value Determinations

Largely as proposed, under the final rule, a board may choose to determine fair value in good faith for any or all fund investments by carrying out all of the functions required in paragraph (a) of the final rule, including, among other things, selecting and applying valuation methodologies.[134] A board could also designate the performance of fair value determinations relating to any or all fund investments to a valuation designee, subject to the board's oversight. The final rule will require the valuation designee to make certain reports to the board, specify responsibilities regarding fair value determinations, and reasonably segregate portfolio management from fair value determinations.[135] The trustee or depositor will generally perform the fair value functions in paragraph (a) of the final rule for UITs, which do not have a board or adviser.[136] These provisions are designed to provide boards, valuation designees, and other parties involved with a consistent approach to the allocation of fair value functions that recognizes the important role that valuation designees can play in the fair value process, while also preserving a crucial role for boards to fulfill their obligations under section 2(a)(41) of the Act by meeting the requirements of the final rule.[137]

Designate or Assign

Section 2(a)(41) requires that the board determine fair value for securities that do not have readily available market quotations. The final rule provides that the board may ''designate'' the performance of these fair value determinations to a valuation designee. This is a change from the proposal that would have provided that the board may ''assign'' such task to an adviser. Some commenters questioned the use of the phrase ''assign'' in the proposed rule, stating that it was unique in the rules adopted under the Act. These commenters stated that the scope of an assignment was unclear.[138] One such commenter observed that other terms, such as ''designate,'' are used in other Commission rules and connote choosing a party for a particular purpose.[139] After considering comments, we believe that a board ''designating'' a valuation designee to perform fair value determinations better describes the relationship between the board and valuation designee under the final rule—that is, one where the valuation designee performs the fair value determinations for the fund on the board's behalf subject to appropriate oversight by the fund's board. Some commenters believed that the term ''assign'' could suggest that the board has completely delegated the entire valuation function and related obligations to the adviser.[140] We do not intend this result. Accordingly, the final rule uses the term ''designate'' instead of ''assign.''

Who May Be Designated

In a change from the proposal, which would have permitted boards to assign only to an adviser of the fund, the final rule will permit boards to designate the

[128] *See* Compliance Rules Adopting Release, *supra* footnote 82, at nn.39–47.

[129] *See* Proposing Release, *supra* footnote 2 at n.69.

[130] Additionally, as discussed below, rule 2a–5 continues to contain certain board reporting requirements specifically tailored to the requirements of the final rule. While the compliance rule separately requires the fund's chief compliance officer (''CCO'') to provide an annual report to the fund's board that addresses the operation of these policies and procedures, including any material changes to these policies and procedures, rule 2a–5's reporting requirements address a different set of concerns. *See* rule 38a–1(a)(4)(iii)(A). *See also* Compliance Rules Adopting Release, *supra* footnote 82.

[131] For an internally-managed fund, the fair value policies and procedures will be adopted by the fund regardless of whether the board determines the fair value of investments itself or designates an officer of the fund to perform fair value determinations.

[132] *See* Advisor's Inner Circle Trustees Comment Letter (requesting that the Commission clarify that a board can fulfill its responsibilities under rule 38a–1 by approving the adviser's fair value policies as reasonably designed to prevent violation of the Federal securities laws, without the investment company's having to ''adopt'' its own or the adviser's policies); NYC Bar Comment Letter. Furthermore, as we stated in the Proposing Release, for UITs, the fund's principal underwriter or depositor conducts the functions assigned to management company boards under rule 38a–1. Rule 38a–1(b). This would not be affected by the final rule.

[133] *See, e.g.,* SBIA Comment Letter; University of Miami Comment Letter; MFS Comment Letter; Vanguard Comment Letter; ABA Comment Letter; BlackRock Trustees Comment Letter (arguing that rule 2a–5 should give fund boards flexibility in developing fair value policies and procedures). *But see* IVSC Comment Letter (urging the Commission to consider requiring additional prescriptive elements that should be included in fair value policies and procedures).

[134] In this circumstance, the fund would need to adopt and implement policies and procedures under rule 38a–1 to address valuation issues and keep records consistent with the requirements of the rules. *See* rules 2a–5(b), 31a–4, and 38a–1(a)(1).

[135] Rule 2a–5(b).

[136] Rule 2a–5(d). *See also infra* footnotes 178 through 180 and accompanying text (discussing the limited circumstance under which other parties may perform the requirements of paragraph (a) of the final rule for UITs).

[137] Proposing Release, *supra* footnote 2, at 32.

[138] *See* ABA Comment Letter; MFDF Comment Letter; Stradley Comment Letter; Dechert Comment Letter (stating that ''assign'' applies to rights and interests, not responsibilities).

[139] *See* ABA Comment Letter (noting that this term is used in rule 38a–1).

[140] *See* Stradley Comment Letter (stating that ''assign'' seems broader than ''delegate''); ABA Comment Letter.

fund's adviser to perform fair value determinations or, if the fund is internally managed, an officer of the fund.[141] Many commenters recommended that we expand the types of entities that could perform fair value determinations on behalf of the board beyond the fund's adviser. Commenters suggested that we permit any affiliate of the adviser;[142] fund administrators and affiliates;[143] committees composed of a blend of personnel or officers of the fund, adviser, or administrator;[144] pricing services;[145] accounting firms;[146] or any party the board has determined has sufficient expertise and capacity to conduct the fair value determinations.[147] Some also recommended that we permit officers of internally managed funds to conduct this activity because these funds do not have advisers.[148]

These commenters suggested that an expanded list of permissible entities would more accurately reflect current organizational structures and practices, would make it easier for smaller funds to comply with rule 2a–5, and would facilitate boards that would prefer non-advisers that may have fewer conflicts of interest.[149] Some commenters believed it was unnecessary for the party performing fair value determinations to be a fiduciary of the fund.[150] In contrast, others suggested that a fiduciary relationship is important.[151]

We generally decline to expand permissible designees beyond the adviser in the final rule because we believe that it is critical for the entity actually performing the fair value determinations to owe a fiduciary duty to the fund and be subject to direct board oversight whenever possible.[152] While these other parties may not have the same conflicts as an adviser, they also generally have other conflicts that could influence their fair value determinations. For example, pricing services may have an interest in maintaining continuing business relationships with the adviser or fund, which could present conflicts[153] and in such cases, unlike advisers,[154] their performance of fair value determinations may not be subject to the same fiduciary obligations owed to the fund.[155] We believe that having fiduciary obligations to the fund will help ensure that the party performing fair value determinations acts in the fund's best interest and, as appropriate, eliminates, mitigates, or discloses conflicts.[156] Further, we believe that it is important for the valuation designee to have a direct relationship with the fund's board and have comprehensive and direct knowledge of the fund.[157] This is true of the fund's adviser, whose advisory contract is subject to substantive board oversight pursuant to the Act,[158] or, in the case of internally-managed funds, officers of the fund. To the extent that other parties provide services that are essential for fair value determinations, the board or valuation designee can seek their assistance as discussed below.

We recognize, as commenters stated, that internally managed funds have no adviser. Instead they rely on certain officers of the fund to perform the broad range of tasks that advisers to externally managed funds otherwise perform.[159] These officers also have fiduciary duties,[160] and as employees of the fund are subject to oversight by the fund's board of directors. We believe that internally managed funds should not be excluded from this provision of the final rule solely because they have no adviser. Thus, in a change from the proposal, the final rule also permits such a fund's board to designate an officer or officers of the fund to perform the fair value determinations if the fund does not have an adviser.[161]

In the Proposing Release, we stated that the proposed rule would permit boards to assign either to the fund's primary adviser or one or more sub-advisers.[162] While some commenters generally supported the flexibility this interpretation would afford,[163] others opposed or had concerns about it, arguing that sub-advisers do not currently perform this task and permitting them to do so could significantly increase costs.[164] Some did not object to the flexibility but stated that having sub-advisers involved in valuation was inconsistent with some current practices, with some questioning if this would be an appropriate role for a sub-adviser.[165] A number of commenters raised concerns about how permitting assignment to

[141] Rule 2a–5(b).

[142] *See* Sullivan Comment Letter; ICI Comment Letter; Seward & Kissel Comment Letter; Comment Letter of Russell Investment Management, LLC (July 20, 2020) (''Russell Comment Letter''); Dechert Comment Letter.

[143] *See* ICI Comment Letter; IDC Comment Letter; Seward & Kissel Comment Letter; Murphy Comment Letter (suggesting this would address ''turnkey'' fund situations where the adviser typically only provides investment advice but the administrator performs other functions such as valuation); John Hancock Comment Letter (suggesting affiliated administrators); Advisor's Inner Circle Trustees Comment Letter; Dechert Comment Letter; *see also* John Hancock Comment Letter (stating that if the administrator is an affiliate of the adviser, the board can exercise oversight through its relationship with the adviser and that staff guidance provides some further protections); Advisor's Inner Circle Trustees Comment Letter (recommending permitting reporting by non-advisers, such as fund administrators and pricing services).

[144] *See* ICI Comment Letter; Seward & Kissel Comment Letter.

[145] *See* CFA Institute Comment Letter; Dimensional Comment Letter. *But see* ICE Data Comment Letter (recommending that pricing services not be permitted to be assigned).

[146] *See* CFA Institute Comment Letter. *But see* ICE Data Comment Letter (recommending that accounting firms not be permitted to be assigned).

[147] *See* Murphy Comment Letter; VRC Comment Letter; Advisor's Inner Circle Trustees Comment Letter.

[148] *See* Sullivan Comment Letter; Deloitte Comment Letter; Seward & Kissel Comment Letter; SBIA Comment Letter; NYC Bar Comment Letter; *see also* Dechert Comment Letter; Franklin Comment Letter (recommending permitting officers generally).

[149] *See* ICI Comment Letter; IDC Comment Letter; Russell Comment Letter; Seward & Kissel Comment Letter (stating that advisers could raise their fees in response to the proposed rule, resulting in higher costs for funds if they can only assign to advisers).

[150] *See* Seward & Kissel Comment Letter; Russell Comment Letter; *see also* Harvest Comment Letter (stating that fiduciary duties or registration status should not matter and that the board should only assign to third parties based upon experience, expertise, accuracy, and documentation and be fully vetted).

[151] *See generally* IHS Market Comment Letter (recommending that we agree that pricing services are acting as fiduciaries when involved in the valuation process). We did not propose to require pricing services to act as fiduciaries as part of this rulemaking, and do not believe that it is appropriate to make such a mandate as part of this adoption.

[152] *See, e.g.,* Proposing Release, *supra* footnote 2, at 106.

[153] *See also supra* section II.A.4 (discussing these conflicts).

[154] *See infra* footnote 219 and accompanying text.

[155] *See also infra* footnotes 184–186 and accompanying text.

[156] *See, e.g.,* Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. 5248 (Jun. 5, 2019) [84 FR 33669 (July 12, 2019)] (''Commission Fiduciary Interpretation'').

[157] *See, e.g., supra* sections II.A.1 and II.A.2.

[158] *See* section 15(c) of the Act.

[159] To the extent that the officers tasked with performing these duties have additional conflicts, such as by being compensated with fund shares, boards should consider those conflicts and any other conflicts prior to permitting this delegation. *See infra* section II.B.1.

[160] *See, e.g., Zirn* v. *VLI Corp.,* 621 A.2d 773 (Del. 1993); *Guth* v. *Loft, Inc.,* 23 Del. Ch. 255, 5 A.2d 503, 510 (1939). *See also* SBIA Comment Letter (arguing that officers of internally managed funds should be permitted to perform fair value determinations because officers of such funds generally have fiduciary and similar duties to the fund and its equity holders).

[161] Rule 2a–5(e)(4). Because these officers are ''valuation designees'' under the final rule, they will be required to perform all the functions rule 2a–5 will require of valuation designees, including the mandatory board reporting.

[162] Proposing Release, *supra* footnote 2, at 33–34.

[163] *See, e.g.,* TRP Comment Letter; IAA Comment Letter; CFA Institute Comment Letter; Vanguard Comment Letter.

[164] *See* MFS Comment Letter; Seward & Kissel Comment Letter.

[165] *See* Capital Group Comment Letter; IAA Comment Letter; SIFMA AMG Comment Letter; *see also* TRP Comment Letter (noting it could increase costs to assign to a sub-adviser).

sub-advisers would work in practice, for example, how to resolve conflicting fair value determinations,[166] and requested that we provide guidance on how to reconcile in such circumstances.[167]

The final rule will not permit boards to designate the performance of fair value determinations to fund sub-advisers.[168] However, consistent with the guidance below, boards or their valuation designee can seek the assistance of sub-advisers as they see appropriate. We proposed allowing designation to sub-advisers as a method to provide additional flexibility to boards. After considering the increased complexity identified by commenters that this flexibility may create, and commenters' assertions that sub-advisers typically do not currently serve in this role,[169] we have determined that any benefits provided by this additional flexibility would not be justified by the additional challenges it may create. We also are concerned that allowing designation to sub-advisers may create complicated reconciliation and oversight issues for boards, advisers, and sub-advisers. However, we welcome engagement with respect to the role of sub-advisers in the fair value determination process.

The proposed rule would have permitted only the UIT's trustees to perform fair value determinations.[170] Commenters stated that the final rule should permit the parties specified as evaluators in the UIT's trust indenture or similar document, including the depositor and other entities, to perform fair value determinations under rule 2a–5. These commenters argued that these evaluators are the entities with relevant expertise in valuation matters and this change would make rule 2a–5 more consistent with current practice.[171] Others asked that we not apply the final rule's requirements to existing UITs given their trust indentures are currently drafted to permit entities other than trustees to value the UITs' investments.[172] One commenter stated that the cost to implement the proposed rule could be significant for UITs due to the change in practice.[173]

In other contexts under the Investment Company Act, the Commission has provided for a UIT's depositor to conduct activities that the board of directors would otherwise conduct, given that a UIT has neither a board of directors nor an adviser.[174] UIT depositors are subject to liability under section 36(a) of the Act for breach of fiduciary duty.[175] We agree, in light of these comments, that UITs should not be limited to trustees to perform their fair value determinations. As we understand that the trustee traditionally has not performed fair value determinations, and we have recognized in the past that depositors generally serve the most equivalent function to an adviser for UITs,[176] the final rule will permit either the fund's depositor or trustee to perform the fair value determinations required under rule 2a–5.[177] To the extent that the assistance of other parties (such as evaluators) is necessary, trustees or depositors can seek that assistance consistent with the guidance below regarding obtaining the assistance of others.

In recognition of commenters' statements that there would be significant costs for pre-existing UITs to change who engages in the fair value determination as they might need to amend their trust indenture (and potentially obtain a unit holder vote approving the change) we are grandfathering existing UITs under limited circumstances. Thus, the final rule will now require trustees or depositors to perform fair value determinations if the UIT's date of initial deposit (which would include a rollover) of portfolio securities occurred after the effective date of rule 2a–5. If the initial deposit of securities into the UIT took place *prior* to the effective date of the final rule, to the extent that an entity other than the UIT's trustee or depositor has been designated in the trust indenture to perform fair value determinations, that previously designated entity may perform such fair value determinations pursuant to paragraph (a) of the final rule.[178] We believe that this approach should be acceptable, even though the party making fair value determinations under this provision may not be subject to the same fiduciary duties, as this outcome reflects a balancing of the costs and risks, informed by the unmanaged and fixed nature of these UITs, and because of the limited nature of this relief.[179] Further, we believe that the number of these funds that will be able to utilize an entity other than a depositor or trustee will be small and decrease over time.[180] We are also concerned that it would be unlikely that pre-existing UITs could comply with the final rule absent this provision given the statutory requirement that UITs be organized under a trust indenture, contract of custodianship or agency, or similar instrument (the terms of which, in these limited cases, provide for an evaluator other than the trustee or depositor). Further, we believe that this approach should address commenter concerns about disrupting existing UIT fair value determination designees and the associated potential costly changes which could affect investors if the costs are passed on to them.

[166] *See* Seward & Kissel Comment Letter; SIFMA AMG Comment Letter.

[167] *See* Capital Group Comment Letter; CFA Institute Comment Letter; MFS Comment Letter; IAA Comment Letter; *see also* SIFMA AMG Comment Letter.

[168] Rule 2a–5(e)(4) (defining ''valuation designee'' as, among other things, an adviser other than a sub-adviser).

[169] *See* MFS Comment Letter; Seward & Kissel Comment Letter.

[170] Proposed rule 2a–5(d).

[171] *See* ICI Comment Letter; Comment Letter of Chapman and Cutler LLP (July 20, 2020) (''Chapman Comment Letter''); Comment Letter of Advisers Asset Management, Inc. (July 20, 2020) (''AAM Comment Letter''); Comment Letter of First Trust Portfolios L.P. (July 21, 2020) (''First Trust Comment Letter''); Comment Letter of Hennion & Walsh, Inc. (July 20, 2020) (''Hennion & Walsh Comment Letter''); Invesco Comment Letter; Comment Letter of the Bank of New York Mellon (July 20, 2020) (''BNY Mellon Comment Letter''); *see also* Seward & Kissel Comment Letter (suggesting permitting UIT trustees to assign to any assignee).

[172] *See* Chapman Comment Letter; AAM Comment Letter; First Trust Comment Letter.

[173] *See* BNY Mellon Comment Letter. Some commenters also asked that we clarify that the oversight elements of paragraph (b) do not apply to UITs. *See* Chapman Comment Letter; AAM Comment Letter; First Trust Comment Letter; Hennion & Walsh Comment Letter; BNY Mellon Comment Letter. Because paragraph (b) only applies when a board designates the performance of fair value determinations to a valuation designee, which a UIT will not have, we agree that it is inapplicable to UITs.

[174] *See, e.g.,* 17 CFR 270.17j–1(c)(1)(iii) (''rule 17j–1'') and 38a–1(b).

[175] *See* section 36 of the Act; *see also* Memorandum on the Regulation of Unit Investment Trusts from the Division of Investment Management to the Securities and Exchange Commission, Fed. Sec. L. Rep. (CCH) 84,328 (Sep. 22, 1988).

[176] *See, e.g.,* items 25 through 31 of Form N–8B–2 (requiring information regarding depositors that is similar to that required of an adviser to a management company in item 10 of Form N–1A).

[177] Rule 2a–5(d).

[178] To be clear, this exception from the requirement to utilize a depositor or trustee for fair value determinations will not continue to be available when a pre-existing UIT is rolled over to a new UIT after the termination date of the pre-existing UIT. In such a case, when the rollover occurs, the new UIT will be required to designate either the depositor or trustee to perform fair value determinations consistent with the final rule. In addition, if a pre-existing UIT has a trustee or depositor already designated to perform the fair value determination, then that entity would be the entity responsible for performing the fair value determination requirements under the final rule.

[179] *See generally* Fund of Funds Arrangements, Investment Company Release No. 34045 (Oct. 17, 2020) [85 FR 73924 (Nov. 19, 2020)] (''FOF Adopting Release'') at 92.

[180] We believe that the universe of UITs relying on this exception will be small. *See infra* footnote 550 and accompanying text. Further, as we have noted previously, many existing UITs have a limited term, sometimes of approximately 12 to 18 months. FOF Adopting Release, *supra* footnote 179, at n.332 and accompanying text.

As proposed, the final rule defines ''board'' both as the full board or a designated committee thereof composed of a majority of directors who are not interested persons of the fund.[181] We received limited comments on this aspect of the proposal. One commenter, however, suggested that the fund should be required to develop policies and procedures for when the whole board, rather than a committee, would be required to be involved.[182] Conversely, another stated that because state law permits fund boards to empower specific committees to act on behalf of the entire board, rule 2a–5 was sufficient as proposed.[183] We believe that no such changes are necessary to this provision because it is important that boards be able to utilize specialized committees, particularly on matters as detailed and important as valuation. Should a fund choose to develop policies and procedures regarding when a matter is more appropriate for the full board, it can do so, but it will not be required under the final rule.

One commenter wanted clarification that the fund's adviser could perform fair value determinations on the board's behalf regardless of whether it is acting pursuant to an advisory contract, administrative contract, or similar agreement.[184] Another asked that we clarify when a pricing service that is a Commission-registered adviser would be considered an ''investment adviser'' for purposes of the final rule.[185] The final rule, consistent with the proposal, provides that where the valuation designee is an adviser, it must be an ''adviser of the fund.'' This would not include other service providers, whether or not they are registered as advisers, or acting under a contract with the fund, unless they are actually serving as the adviser of the fund as defined under the Investment Company Act because they may not have a comprehensive and direct knowledge of the fund, a direct relationship with the board, or the same fiduciary duties to the fund in other cases.[186] As discussed above, it also would not include a sub-adviser to the fund.

Guidance on Obtaining the Assistance of Others

Some commenters also asked that we clarify that the adviser or the fund board could engage third parties to assist with certain functions of the fair value determination process, such as performing back-testing, fund accounting, or shareholder reporting, other than making the actual determinations themselves.[187] Others urged us to state that advisers assigned to perform fair value determinations under the proposed rule could, in turn, assign their responsibilities to other third parties.[188]

We believe that whether the board or the valuation designee makes fair value determinations under the final rule, it may of course obtain assistance from others in fulfilling its duties. It may, for example, seek assistance from pricing services, fund administrators, sub-advisers, accountants, or counsel.[189] That assistance can take different forms, and may include services such as performing back-testing as specified by the valuation designee and performing calculations required by the valuation method selected by the board or valuation designee. The board or the valuation designee, using this assistance, must of course also perform its responsibilities under the Act, the final rule, and other applicable rules under the Act. However, in seeking the assistance of others, the entity or officer designated to perform the fair value determination remains responsible for that determination and may not designate or assign that responsibility to the third party for the same reasons we are not permitting the board to designate performance of this task to a party other than the valuation designee.[190]

1. Board Oversight

The final rule, consistent with the proposal, specifically requires a board to oversee the valuation designee if the board has designated the performance of fair value determinations to the valuation designee.[191] In the proposal, we provided guidance on our expectations related to this board oversight.[192] A number of commenters supported this guidance,[193] with one commenter stating that the discussion properly reflects the general roles of boards and advisers under both current practices of properly functioning boards as well as Federal and state law.[194] However, other commenters questioned parts of the guidance or asked that we provide further guidance on certain issues.

Some of these commenters argued that board oversight of the valuation process should be the same as the oversight of other functions, such as liquidity risk.[195] While we agree that boards should provide oversight in those contexts as well, we believe that we should provide specific guidance with respect to board oversight in the context of making fair value determinations. We believe that specific guidance is appropriate because section 2(a)(41) is one of the few provisions of the Act that specifically imposes a requirement on fund boards, requiring boards to determine fair value in good faith. Therefore, this guidance supports our view that a board may still satisfy its statutory obligation to determine fair

[181] Rule 2a–5(e)(3).

[182] *See* IVSC Comment Letter.

[183] *See* Murphy Comment Letter.

[184] *See* John Hancock Comment Letter.

[185] *See* ICE Data Comment Letter.

[186] *See* section 2(a)(20) (defining investment adviser of an investment company). *See also supra* footnotes 152–156 and accompanying text (explaining why we are generally not permitting parties other than the adviser to be valuation designees under the final rule).

[187] *See* Sullivan Comment Letter; Fidelity Comment Letter; NYC Bar Comment Letter (asserting fund boards must be able to rely upon fund auditors and counsel); Dechert Comment Letter.

[188] *See* Russell Comment Letter.

[189] For example, some commenters suggested that the administrator may be better positioned to perform the fair value determinations under rule 2a–5 than an adviser. *See* Sullivan Comment Letter. For the reasons discussed above, we determined generally to limit the valuation designee to the fund's adviser. *See supra* footnotes 152–158 and accompanying text.

[190] *See supra* footnotes 152–158 and accompanying text.

[191] Rule 2a–5(b).

[192] Proposing Release, *supra* footnote 2, at nn.84–94 and accompanying text.

[193] *See* Council of Institutional Investors Comment Letter; Fidelity Comment Letter; VRC Comment Letter; Invesco Comment Letter; CFA Institute Comment Letter; Comment Letter of Better Markets (July 21, 2020) (''Better Markets Comment Letter''); *see also* IDC Comment Letter (agreeing with the lack of specificity of ''oversight'' in the proposed rule). One of these commenters recommended that we require that boards have the requisite experience, knowledge, and sufficient lack of conflicts to fulfill their obligations. Better Markets Comment Letter. Another suggested that directors be required to have ''valuation literacy.'' CFA Institute Comment Letter. The commenter did not clarify what is meant by ''valuation literacy'' and we do not believe that an affirmative requirement is necessary. However, the board's statutory obligation for determining fair value in good faith, as well its oversight obligation with respect to any valuation designee under new rule 2a–5, generally warrants consideration of the appropriateness of director qualifications, such as with respect to accounting and valuation matters, when funds and boards are identifying potential board candidates. The Commission understands that board members are often selected to provide a variety of specialized knowledge and experience, including in accounting and valuation.

[194] *See* Fidelity Comment Letter; *see also* ICI Comment Letter (stating that the proposal correctly distinguished oversight from design and administration).

[195] *See* MFDF Comment Letter; ABA Comment Letter (requesting the Commission to reiterate, as it had in the adopting release for 17 CFR 270.22e–4 (''rule 22e–4''), that the board role under this rule is substantially similar to its roles and responsibilities in other contexts under the Act and that providing a different standard of care for board action would not be appropriate); Advisor's Inner Circle Trustees Comment Letter; *see also* NYC Bar Comment Letter.

value even though it has designated another entity to perform the fair value determinations under the final rule, subject to appropriate oversight.[196]

A number of commenters questioned the guidance stating that boards must be active in their oversight role by probing reports written by advisers and being inquisitive,[197] but other commenters agreed that board oversight cannot be a passive activity.[198] We believe that boards are not providing appropriate oversight if they simply rely on information presented to them without actively probing it, asking questions, and seeking relevant information, particularly when there are red flags or other indications of problems. Some commenters asked us to state that the board does not have an independent duty to seek to discover conflicts of interest but can reasonably rely upon the adviser's identification of these conflicts,[199] but one stated we should clarify that the board has an affirmative duty to do so.[200] Another stated that the board should be able to rely upon the adviser much the same way that it can reasonably rely upon others, such as fund CCOs, administrators, and counsel.[201] As discussed below in the guidance on board oversight, we are reiterating our belief, stated in the Proposing Release, that boards should seek to identify potential conflicts of interest as part of their oversight duties under the final rule. Boards must work with valuation designees, which also have a duty to disclose their conflicts,[202] to address or manage these conflicts to the board's satisfaction.

Although several commenters asked us to confirm that boards may provide oversight of the performance of fair value determinations consistent solely with the business judgment rule under state law, we decline to do so.[203] Instead, we are providing guidance that we believe should be more useful to directors than the more generalized principles of the business judgment rule, as this new guidance specifically relates to directors' oversight responsibilities under section 2(a)(41) of the Act and the final rule.

Finally, several commenters recommended that we adopt additional oversight requirements, such as third-party reviews, attestations, or certifications by the adviser,[204] or that we require the board to make specific findings.[205] Others argued that additional requirements were unnecessary due to state law duties applicable to boards or because the expense was not justified by the regulatory benefits.[206] Several commenters also asked that we clarify whether directors are expected to ratify fair value determinations made by the adviser under rule 2a–5.[207] We are not adding specific oversight requirements in the final rule beyond those that were proposed. We believe that the oversight requirements of boards under the final rule, discussed below, taken together with the directors' fiduciary duties, are reasonably designed to establish a minimum set of requirements for addressing the conflict of interest and other concerns associated with permitting a valuation designee to make fair value determinations. As such, we believe that additional requirements like those suggested by these commenters may be duplicative or involve burdens that are not justified by their potential benefits. The final rule does not require boards to ratify fair value determinations made by the valuation designee, as we believe it is not a necessary component of active oversight.

Guidance on Board Oversight

We reiterate the guidance on board oversight of the fair value determination process from the Proposing Release.[208] When the board designates the performance of fair value determinations to the valuation designee, the final rule will require the board to satisfy its statutory obligation with respect to these determinations through the framework of rule 2a–5, including overseeing the valuation designee. Boards should approach their oversight of the performance of fair value determinations by the valuation designee of the fund with a skeptical and objective view that takes account of the fund's particular valuation risks, including with respect to conflicts, the appropriateness of the fair value determination process, and the skill and resources devoted to it.[209] Further, in our view appropriate oversight cannot be a passive activity. Directors should ask questions and seek relevant information.

The board should view oversight as an iterative process and seek to identify potential issues and opportunities to improve the fund's fair value processes.[210] The final rule will require the valuation designee to report to the board with respect to matters related to the valuation designee's fair value process, in part to ensure that the board has sufficient information to conduct this oversight.[211] Boards should also request follow-up information when appropriate and take reasonable steps to see that matters identified are addressed.[212]

We expect that boards engaged in this process would use the appropriate level of scrutiny based on the fund's valuation risk, including the extent to which the fair value of the fund's investments depend on subjective inputs. For example, a board's scrutiny would likely be different if a fund invests in publicly traded foreign companies than if the fund invests in private early stage companies. As the level of subjectivity increases and the inputs and assumptions used to determine fair value move away from more objective measures, we expect that

[196] *See* section 1(b) of the Act (''it is hereby declared that the national public interest and the interest of investors are adversely affected . . . when investment companies, in computing their earnings and the asset value of their outstanding securities . . . are not subjected to adequate independent scrutiny'').

[197] *See* IDC Comment Letter; ABA Comment Letter; Stradley Comment Letter; Capital Group Comment Letter; Advisor's Inner Circle Trustees Comment Letter; *see also* NYC Bar Comment Letter (stating that oversight should consist of reviewing reports and determining corrective action); Dechert Comment Letter; American Funds Trustees Comment Letter. *Cf.* Proposing Release, *supra* footnote 2, at nn.89–94 and accompanying text.

[198] *See* Fidelity Comment Letter; Invesco Comment Letter; CFA Institute Comment Letter; Better Markets Comment Letter.

[199] *See* Sullivan Comment Letter; ABA Comment Letter.

[200] *See* CFA Institute Comment Letter.

[201] *See* IDC Comment Letter; Stradley Comment Letter.

[202] *See, e.g.,* Commission Fiduciary Interpretation, *supra* footnote 156, at n.24.

[203] *See* ABA Comment Letter; Stradley Comment Letter.

[204] *See* IVSC Comment Letter; CFA Institute Comment Letter; *see also* ABA Comment Letter (recommending a certification by the adviser similar to that required in rule 17j–1); Council of Institutional Investors Comment Letter (supporting an attestation requirement).

[205] *See* ICE Data Comment Letter; Murphy Comment Letter.

[206] *See* Murphy Comment Letter; Comment Letter of Timothy Keehan, Vice President & Senior Counsel, American Bankers Association (''American Bankers Association Comment Letter'').

[207] *See* ABA Comment Letter.

[208] Proposing Release, *supra* footnote 2, at nn.84–94 and accompanying text.

[209] *See generally* Investment Company Governance, Investment Company Act Release No. 26520 (July 27, 2004) [69 FR 46378 (Aug. 2, 2004)] (''Governance Release'').

[210] *Cf.* Derivatives Adopting Release, *supra* footnote 6 (noting that ''the use of the word 'iterative' is not intended to imply that the board is responsible for the day-to-day management of the fund's derivatives risk, but is instead intended to clarify that the board's oversight role requires regular engagement with the derivatives risk management program rather than a one-time assessment'').

[211] Rule 2a–5(b)(1).

[212] *See also* Governance Release, *supra* footnote 209 (independent directors should ''bring to the boardroom 'a high degree of rigor and skeptical objectivity to the evaluation of management and its plans and proposals,' particularly when evaluating conflicts of interest'').

the board's level of scrutiny would increase correspondingly.[213]

We also believe that, consistent with their obligations under the Act and as fiduciaries, boards should seek to identify potential conflicts of interest, monitor such conflicts, and take reasonable steps to manage such conflicts.[214] In so doing, the board should serve as a meaningful check on the conflicts of interest of the valuation designee and other service providers involved in the determination of fair values.[215] In particular, the fund's adviser may have an incentive to value fund assets improperly in order to increase fees, improve or smooth reported returns, or comply with the fund's investment policies and restrictions.[216] Other service providers, such as pricing services or broker-dealers providing opinions on prices, may have incentives (such as maintaining continuing business relationships with the valuation designee) [217] or may otherwise be subject to pressures to provide pricing estimates that are favorable to the valuation designee.[218] In overseeing the valuation designee's process for making fair value determinations, the board should understand the role of, and inquire about conflicts of interest regarding, any other service providers used by the valuation designee as part of the process, and satisfy itself that any conflicts are being appropriately managed.

Boards should probe the appropriateness of the valuation designee's fair value processes. In particular, boards should periodically review the financial resources, technology, staff, and expertise of the valuation designee, and the reasonableness of the valuation designee's reliance on other fund service providers, relating to valuation.[219] In addition, boards should consider the valuation designee's compliance capabilities that support the fund's fair value processes, and the oversight and financial resources available for the fair value process.

Boards should also consider the type, content, and frequency of the reports they receive. The final rule will require reporting to the board (both periodically and promptly) regarding many aspects of the valuation designee's fair value determination process as a means of facilitating the board's oversight as discussed below. While a board can reasonably rely on the information provided to it in summaries and other materials provided by the valuation designee and other service providers in conducting appropriate oversight, it is incumbent on the board to request and review such information as may be necessary to be informed of the valuation designee's process for determining the fair value of fund investments.[220] Further, if the board becomes aware of material matters (whether the board identifies the matter itself or the fund's CCO, valuation designee, or another party identifies the issue), we believe that in fulfilling its oversight duty the board must inquire about such matters and take reasonable steps to see that they are addressed.

2. Board Reporting

As modified in response to comments received, the final rule will require a valuation designee that the board has designated to perform fair value determinations to report to the board regarding its performance of that responsibility, including certain periodic reports and prompt notification and reporting on matters that materially affect the fair value of investments whose fair value is determined by the valuation designee.[221] These requirements are intended to assist boards in their oversight responsibility under the final rule and to help ensure that boards receive the amount and type of information to oversee the valuation designee appropriately by familiarizing directors with the salient features of, and developments in, the valuation designee's process.[222] These are minimum requirements and boards may find, depending on the facts and circumstances, that additional information is necessary or appropriate in order to discharge their oversight responsibilities appropriately.

(a) Periodic Reporting

The final rule will require the valuation designee to make both annual and quarterly written reports to the board.[223] Specifically:

- *Quarterly Reports.* The valuation designee must provide at least quarterly, in writing, (1) any reports or materials requested by the board related to the fair value of designated investments or the valuation designee's process for fair valuing fund investments and (2) a summary or description of material fair value matters that occurred in the prior quarter. This summary or description must include (1) any material changes in the assessment and management of valuation risks, including any material changes in conflicts of interest of the valuation designee (and any other service provider), (2) any material changes to, or material deviations from, the fair value methodologies,[224] and (3) any material changes to the valuation designee's process for selecting and overseeing pricing services, as well as any material events related to the valuation designee's oversight of pricing services.[225]
- *Annual Reports.* The valuation designee must provide at least annually,

[213] For a discussion of valuation risks generally, *see supra* section II.A.1.

[214] *See, e.g.,* Governance Release, *supra* footnote 209 (''. . . state law duties of loyalty and care . . . oblige directors to act in the best interest of the fund when considering important matters the Act entrusts to them, such as approval of an advisory contract and the advisory fee.'').

[215] *See, e.g., id.* (''. . . . the Act and our rules rely heavily on fund boards of directors to manage the conflicts of interest that advisers have with funds they manage.''). *See also* Division of Investment Management, SEC, Protecting Investors: A Half Century of Investment Company Regulation, 252 (1992) (''the [Investment Company] Act . . . imposes requirements that assume the standard equipment of a corporate democracy: a board of directors . . . whose function is to oversee the operations of the investment company and police conflicts of interest . . . [W]e believe that independent directors perform best when required to exercise their judgment in conflict of interest situations'').

[216] *See, e.g.,* In re Piper Capital Management, et al., Investment Company Act Release No. 26167 (Aug. 26, 2003) (Commission opinion). For discussion of the conflicts of the fund's portfolio manager, see *infra* section II.B.3. Further, officers of internally managed funds may have other conflicts that boards should consider. *See supra* footnote 159.

[217] *See supra* footnote 97 and accompanying text.

[218] *Cf.* In re Morgan Asset Management, Investment Company Act Release No. 29704 (June 22, 2011) (settlement) (''In re Morgan Asset Management'') at 7 (broker-dealer ''induced to provide interim price confirmations that were lower than the values at which the Funds were valuing certain bonds, but higher than the initial confirmations that the [broker-dealer] had intended to provide''). *See also supra* footnote 154 and accompanying text.

[219] *See* In re Morgan Asset Management, *supra* footnote 218 (''the Valuation Committee left pricing decisions to lower level employees in Fund Accounting who did not have the training or qualifications to make fair value pricing determinations'').

[220] In the Proposing Release, we had characterized the board's role as requiring that it be ''fully informed'' of the adviser's process. Two commenters questioned what that means in this context. *See* Deloitte Comment Letter and ABA Comment Letter. Our intent was to make sure that the board was not solely relying upon the information provided to it by the valuation designee, but was thoughtful and sought additional information when needed. However, we did not intend to imply that the board should be actively managing the process. We have therefore deleted the word ''fully'' in this release to avoid that implication.

[221] Rule 2a–5(b)(1).

[222] *See also* Proposing Release, *supra* footnote 2, at 41–42.

[223] Rule 2a–5(b)(1)(i).

[224] Valuation designees can utilize this report to notify the board of changes to methodologies that are equally or more representative of fair value of the investments. *See supra* section II.A.2.a.

[225] Rule 2a–5(b)(1)(i)(A).

in writing, an assessment of the adequacy and effectiveness of the valuation designee's process for determining the fair value of the designated portfolio of investments. At a minimum, this annual report must include a summary of the results of the testing of fair value methodologies required under the final rule and an assessment of the adequacy of resources allocated to the process for determining the fair value of designated investments, including any material changes to the roles or functions of the persons responsible for determining fair value.[226]

After considering comments, we have made certain changes to the proposed periodic reporting requirements designed to enhance flexibility of reporting to better match boards' needs and to minimize the chance that boards receive reporting that is too detailed or repetitive to facilitate appropriate oversight. The proposed rule would have required quarterly reporting on a variety of valuation matters.[227] Commenters raised concerns regarding these proposed reporting requirements. Some stated that, while some reporting is necessary, the proposed reporting requirements were overly prescriptive and would not result in appropriate board oversight in practice.[228] Commenters also generally believed that we should give greater deference to boards to use their business judgment to request the information and the frequency of reports that they see as necessary.[229] Some of these commenters supported a program where the adviser would make quarterly reports on material changes to aspects of, or deviations from, the program, with a broader annual report covering the overall design and implementation of the program.[230] Others recommended that we permit the board to set reporting standards.[231]

The proposed rule would have included a number of specific items to be included in the quarterly assessment to boards. Specifically, the proposed rule would have required the quarterly report to include: (1) A summary or description of the assessment and management of material valuation risks (including material conflicts of interest), (2) material changes to, or material deviations from, established fair value methodologies, (3) testing results, (4) adequacy of resources allocated to fair value determinations, (5) material changes to the adviser's process for selecting and overseeing pricing services (including changes in service providers and price overrides), as well as (6) any other materials requested by the board. A number of commenters objected to many of these specific items being reported on a quarterly basis, asserting that the cost to produce them on a quarterly basis would exceed the costs the Commission assumed [232] and the requirements could result in over-reporting to satisfy regulatory obligations or liability concerns rather than to facilitate oversight.[233] Commenters also asserted that many of the reporting items, and particularly valuation risks and adequacy of resources, would not change frequently enough to justify quarterly reporting.[234] Many of these commenters suggested that we instead require advisers to report some or all of these items on an annual basis,[235] or remove some of them altogether, particularly reporting on specific price overrides, to provide more relevant information and to reduce burdens on boards.[236]

We agree that boards should have latitude to implement a flexible reporting mechanism that is tailored to their fund, recognizes judgment in exercising oversight, and minimizes rote reporting. That said, we believe that appropriate oversight, facilitated by a certain minimum level of reporting, is necessary in order for the designation process to be consistent with the Act.[237] As a result, we are making tailored changes to the proposed periodic reporting regime in the final rule designed to enable boards to receive the information they want and need to conduct appropriate oversight. We believe that the changes we are adopting today will allow reporting to address the specific circumstances of each fund, and reporting should be tailored to address the fund's holdings, valuation methodologies, and inputs, as urged by some commenters.[238]

Specifically, we have made adjustments to the overall proposed periodic reporting requirements. The final rule will require that the valuation designee report its assessment of the adequacy and effectiveness of the valuation designee's process for determining the fair value of designated investments, testing results, and adequacy of allocated resources at least annually rather than quarterly as proposed. In lieu of quarterly assessments of the entire fair value process, the final rule will instead require quarterly reports to address issues about which the board requests information, as well as information about material changes or events that occurred during the period.[239] These

[226] Rule 2a–5(b)(1)(i)(B).

[227] Proposed rule 2a–5(b)(1)(i).

[228] *See, e.g.,* ICI Comment Letter; SSGA Comment Letter; TRP Comment Letter; Guggenheim Comment Letter; Vanguard Comment Letter. *See also* JPMAM Comment Letter.

[229] *See, e.g.,* Fidelity Trustees Comment Letter; BlackRock Trustees Comment Letter; Murphy Comment Letter; Fidelity Comment Letter (asserting the proposed reporting mechanism would lead to reporting designed to fulfill a regulatory requirement rather than assist with board oversight).

[230] *See, e.g.,* Sullivan Comment Letter; JPMAM Comment Letter; ICI Comment Letter; IDC Comment Letter; ABA Comment Letter; Murphy Comment Letter. *See also* Federated Hermes Comment Letter; Baillie Gifford Comment Letter (recommending that, to the extent that quarterly reporting is retained, it be permitted to focus on material changes or exceptions and allow summary dashboards). *See also generally* BlackRock Trustees Comment Letter (detailing their current reporting mechanism of annual reports on the overall framework, quarterly valuation reports with the information the board wants, and monthly reports concerning NAV accuracy and pricing errors).

[231] *See, e.g.,* BlackRock Trustees Comment Letter; MFDF Comment Letter; SSGA Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; Advisor's Inner Circle Trustees Comment Letter; *see also* American Funds Trustees Comment Letter (stating that they rely upon the oversight of the compliance process under rule 38a–1 to perform oversight); SIFMA AMG Comment Letter (urging flexible reporting depending upon the type of inputs).

[232] *See* Sullivan Comment Letter; TRP Comment Letter; SIFMA AMG Comment Letter; American Trustees Comment Letter.

[233] *See* TRP Comment Letter; Fidelity Comment Letter; Dechert Comment Letter; SIFMA AMG Comment Letter; *see also* Capital Group Comment Letter.

[234] *See, e.g.,* Fidelity Trustees Comment Letter; JPMAM Comment Letter; IDC Comment Letter; BlackRock Trustees Comment Letter; Murphy Comment Letter; TRP Comment Letter; Guggenheim Comment Letter; SIFMA AMG Comment Letter; NYSSCPA Comment Letter; *see also* ICI Comment Letter (recommending removing adequacy of resources reporting); Baillie Gifford Comment Letter (recommending removing adequacy of resources reporting). *But see* ABA Comment Letter (recommending that we further require a narrative description of testing results); VRC Comment Letter (suggesting requiring the reporting of specific information on each individual portfolio holding for securities with a higher perceived risk profile).

[235] *See, e.g.,* Sullivan Comment Letter; JPMAM Comment Letter; ICI Comment Letter; ABA Comment Letter; TRP Comment Letter. *See also* Federated Hermes Comment Letter; Advisor's Inner Circle Trustees Comment Letter; IHS Market Comment Letter (stating that it had observed best practices for reporting on pricing services to be board or committee approval of the provider itself and at least annual review of performance based upon back testing).

[236] *See, e.g.,* Sullivan Comment Letter; Fidelity Trustees Comment Letter; Murphy Comment Letter; Fidelity Comment Letter; *see also* IAA Comment Letter (stating that significant increases in price challenges or overrides should not be considered a material valuation risk due to their routine nature); American Fund Trustee Comment Letter.

[237] *See* section 1(b)(5) of the Act and *supra* footnote 196 and accompanying text discussing the need for independent oversight of the valuation process.

[238] *See, e.g.,* SIFMA AMG Comment Letter.

[239] Material fair value matters that occurred in the prior quarter related to the items reported on annually, such as significant changes to testing

revisions are consistent with the suggestions from commenters noted above that we require annual overall reporting with quarterly updates regarding material changes. We believe that the changes in the final rule establish the necessary minimum reporting needed for appropriate oversight. Further, by expressly recognizing boards' authority to require any additional reports they want on a quarterly basis, the final rule seeks to empower boards to tailor periodic reporting to suit the needs of their fund, as recommended by commenters.

We have also made adjustments, in response to comments, from the proposal regarding the specific items that will be required to be part of periodic reports. In lieu of a discussion of the assessment and management of material valuation risks as part of the valuation designee's assessment, the final rule will instead require that the quarterly report identify material changes, including the identification of any material changes in the assessment or management of these risks that occurred during the quarter. We agree with commenters that this reporting could become rote if it does not change and have focused it upon material changes as a result.[240]

Some commenters suggested that the proposed rule, as worded, would have required the adviser to report every test result, service provider change, or price override to the board, which we did not intend.[241] We agree that these items may have provided a level of detail that may not be necessary. Therefore, we clarified that the annual assessment can contain a summary of testing results and removed a requirement to report service provider changes or price overrides. Lastly, we agree with commenters that the reporting of the summary of testing results and assessment of the adequacy of allocated resources is not needed quarterly because they are unlikely to change on a quarterly basis. Consistent with the overall change to an annual assessment, the final rule will require these results to be reported annually. However, based upon the summaries that they receive, boards can seek more information from the valuation designee if necessary to conduct appropriate oversight.[242]

Some commenters requested more clarification as to what constitutes ''material'' in the context of the final rule's reporting requirements,[243] suggesting that we create a ''material valuation matter'' standard that would be reported similar to serious compliance matters under the compliance rule,[244] that we permit the board to define materiality,[245] or use different terminology altogether to avoid confusion with accounting or auditing standards.[246] We believe that material matters in this context would generally be those matters about which the board would reasonably need to know in order to exercise appropriate oversight of the valuation designee's fair value determination process.[247] For example, material matters include significant deficiencies or material weaknesses in internal control over financial reporting related to fair value determinations that have been identified and generally would include those items that ''could have materially affected'' the fair value of the fund's investments as proposed.[248] We believe that material matters also include other issues, such as a change to a pricing service affiliated with the valuation designee or material changes to or deviations from methodologies, including changes to critical inputs or assumptions.[249] As another example, with regards to material changes to the selection or oversight of pricing services, a pattern of price challenges or overrides over time that raise concerns with the overall valuation process may be material. The valuation designee should identify material issues, and the board should follow-up as necessary for its oversight.

The final rule will require the valuation designee's reports to include such information as may be reasonably necessary for the board to evaluate the matters covered in the reports.[250] Based upon that information, the board can determine whether to ask additional questions or request additional information, as appropriate. For example, if a valuation designee reports that there is a new material conflict of interest, the valuation designee should provide, and the board should seek,[251] additional information as necessary for the board to evaluate the potential impact of the conflict on the adequacy and effectiveness of the valuation designee's determinations of fair value. As another example, where a valuation designee has materially changed a fair value methodology, the report could summarize the relevant market conditions or other circumstances leading to the decision to apply an alternate methodology and the alternate fair value methodology used.

Some commenters were concerned that this requirement will result in advisers providing extraneous or out-of-context information, such as back-testing results, to the board.[252] The specific content of the periodic or prompt reports and supplemental information under the final rule is left to the board and valuation designees. These reports can take the form of narrative summaries, graphical representations, statistical analyses, dashboards, or exceptions-based

results or material reductions in the resources provided for the determination process, would, however, still be reported as part of the quarterly material change report.

[240] However, boards may wish to consider periodically requesting a report assessing all material valuation risks (not just changes) faced by the fund, so that they remain apprised of the fund's overall valuation risk landscape.

[241] *See, e.g.,* Sullivan Comment Letter; Fidelity Trustees Comment Letter; Murphy Comment Letter; Fidelity Comment Letter; *see also* IAA Comment Letter (stating that significant increases in price challenges or overrides should not be considered a material valuation risk due to their routine nature); American Fund Trustee Comment Letter.

[242] *See supra* section II.B.1. *See also* rule 2a–5(b)(1)(i)(A)(*1*).

[243] *See* ABA Comment Letter; MFDF Comment Letter; SIFMA AMG Comment Letter (stating that the industry will likely look to the serious compliance issues standard from rule 38a–1 for guidance); AIMA Comment Letter (with regard to prompt reporting); Deloitte Comment Letter; *see also* University of Miami Comment Letter (suggesting that differences in what constitutes materiality could lead to delays in prompt reporting); MFS Comment Letter (the prompt reporting requirement is unnecessary because of the similarity of materiality in this rule with serious compliance matters under rule 38a–1).

[244] *See* Stradley Comment Letter; Dechert Comment Letter.

[245] *See* Vanguard Comment Letter.

[246] *See* Duff & Phelps Comment Letter.

[247] This standard is similar to that of ''material compliance matter'' found in rule 38a–1. *See* rule 38a–1(e)(2).

[248] To align the material matters that would be reported with Commission rules and auditing standards better, we are eliminating the term ''could have materially affected'' from the final rule and instead are using the term material matter alone. Material matters under the final rule would generally include, for example, material weaknesses and significant deficiencies as defined in 17 CFR 210.1–02(a)(4) that are related to fair value determinations. Some commenters questioned the relevance of financial reporting concepts when reporting regarding fair value determinations. *See* ABA Comment Letter; TRP Comment Letter (regarding prompt, but not periodic, reporting). We believe that these issues can be significant as the lack of sufficient controls over financial reporting could have significant implications in the fund's fair value determinations. *See also* TRP Comment Letter (supporting a system of annual reporting for many items but quarterly reporting for significant deficiencies and material weaknesses in internal controls over financial reporting in lieu of prompt reporting on these items).

[249] *See* Proposing Release, *supra* footnote 2, at n.104 and accompanying text.

[250] Rule 2a–5(b)(1).

[251] *See supra* section II.B.1 (''Further, in our view effective oversight cannot be a passive activity. Directors should ask questions and seek relevant information.'').

[252] *See, e.g.,* Capital Group Comment Letter; TRP Comment Letter. *But see* CFA Institute Comment Letter (arguing that the results of testing methods such as calibration/back-testing can assist in identifying issues with methodologies, including poor performance or conflicts of interest).

reporting, among other methods.[253] Boards should work with valuation designees to determine what information and the format of such information is most useful to the board.

In the Proposing Release, we provided a list of specific items that a board could review and consider, if relevant. These included a number of data-driven reporting items like reports regarding portfolio holdings whose price has changed outside of pre-determined ranges over time, reports regarding stale prices, and analyzing trends in the number of the fund's portfolio holdings that received a fair value.[254]

A number of commenters objected to this list, suggesting that boards and advisers would see these items as mandatory, leading to advisers providing unwanted data to boards in an abundance of caution.[255] The items we identified in the Proposing Release were intended to provide a list of examples of the types of information that a board could request to facilitate data-driven reviews of the fair value process if the board found such information helpful. We continue to believe that boards should request, and valuation designees should provide, such relevant trend dashboards and other analytical tools that the board believes it needs in order to perform appropriate oversight.[256] However, the final rule will not require the production of any particular data or data tool unless the board requests it. We also continue to believe that the types of potential reporting items included in the proposal may be helpful for some boards. They are not mandatory, however. Boards should use their judgment in determining what types of optional reporting they wish to receive beyond the required reporting contained in the final rule.

(b) Prompt Board Notification and Reporting

With modifications made to address comments received on this aspect of the proposal, the final rule will require the valuation designee to provide a written notification of the occurrence of matters that materially affect the fair value of the designated portfolio of investments (defined as ''material matters'') within a time period determined by the board, but in no event later than five business days after the valuation designee becomes aware of the material matter.[257] Material matters in this instance include, as examples, a significant deficiency or material weakness in the design or effectiveness of the valuation designee's fair value determination process or of material errors in the calculation of net asset value.[258] The valuation designee must also provide such timely follow-on reports as the board may reasonably determine are appropriate.[259] This process is designed to ensure that the valuation designee notifies the board of certain issues that may require its immediate attention in a timely manner, but also empower boards to seek the appropriate level of follow-up reporting that they need to exercise appropriate oversight.

The proposal included a reporting requirement that would have required prompt reporting on matters that could have materially affected the fair value of the designated portfolio of investments.[260] Commenters argued that this requirement could be interpreted broadly and would result in excessive reporting, particularly in relation to the requirement to report material changes in valuation risks.[261] They also suggested it could involve the board in the day-to-day process of determining investments' fair values despite the designation of that function to the adviser,[262] and could open the valuation program to post-facto questioning by third parties, particularly the proposed requirement to promptly report matters that ''could have'' impacted valuations.[263]

Some suggested alternatives, such as the adviser making a prompt notification within the prescribed period and then subsequently providing a report to the board following an assessment of the issue as soon as reasonably practicable.[264] Others suggested that the specific items required to be promptly reported, such as significant deficiencies or material weaknesses in the design or implementation of the adviser's fair value determination process or material changes to the fund's current valuation risks, be clarified or made in the periodic reports instead.[265] Some suggested that the prompt reporting requirement be eliminated altogether,[266] or that the final rule should allow boards or advisers to set reporting parameters.[267]

The purpose of this requirement is to ensure that boards receive timely information that demands their immediate attention. We believe that it is critical for appropriate oversight under the final rule that the board be

[253] *See* ABA Comment Letter (recommending we require the production of narrative summaries of testing results).

[254] *See* Proposing Release, *supra* footnote 2, at 46–47.

[255] *See* Fidelity Trustees Comment Letter; ICI Comment Letter; IDC Comment Letter; ABA Comment Letter (further suggesting that it should be incumbent upon the adviser, similar to the requirements of section 15(c) or 17 CFR 270.12b–1, to provide this type of information, rather than upon the board to request it); MFDF Comment Letter; Fidelity Comment Letter; Vanguard Comment Letter; Capital Group Comment Letter; SIFMA AMG Comment Letter; *see also* Federated Hermes Comment Letter.

[256] *See, e.g.,* Capital Group Comment Letter (stating that reporting of trends, outliers, and similar analysis of price overrides and challenges would be more helpful for board oversight than requiring all price overrides or challenges to be reported).

[257] The proposed rule would have required prompt reporting regarding matters associated with the adviser's process that had this effect. The purpose of this requirement is to inform boards quickly of issues associated with fair value determinations that may require their immediate attention. *See* Proposing Release, *supra* footnote 2, at 49. We have updated the text of rule 2a–5 to clarify that this reporting is not limited to issues relating to the valuation designee's process.

[258] Rule 2a–5(b)(1)(ii). *See also supra* footnotes 243 through 249 and accompanying text (discussing ''materiality'') and *infra* footnote 272 through 274 and accompanying text (discussing price errors).

[259] Rule 2a–5(b)(1)(ii). The notifications or reports, like the periodic reports discussed above, must also include such information as may be reasonably necessary for the board to evaluate the matter covered in the report. *See* rule 2a–5(b)(1) and *supra* footnotes 243–256 and accompanying text. This information need not be voluminous, particularly the prompt notification. If boards want more information, however, they should seek it out.

[260] Proposed rule 2a–5(b)(1)(ii). The proposed rule identified significant deficiencies or material weaknesses in the design or implementation of the adviser's fair value determination process or material changes in the fund's valuation risks, but not material errors in the calculation of net asset value, as examples of these material matters. *Id. See also* Proposing Release, *supra* footnote 2, at n.115 and accompanying text. Also, in the Proposing Release, we provided guidance that advisers could take an additional three days to determine the materiality of the issue at hand. *Id.* at 49–50.

[261] *See, e.g.,* ICI Comment Letter; IAA Comment Letter (stating that a significant increase in price challenges should not be considered a material valuation risk); *see also* Federated Hermes Comment Letter.

[262] *See, e.g.,* Fidelity Trustees Comment Letter; ICI Comment Letter; IDC Comment Letter; BlackRock Trustees Comment Letter; ABA Comment Letter; Fidelity Comment Letter.

[263] *See, e.g.,* Fidelity Trustees Comment Letter; JPMAM Comment Letter; ICI Comment Letter; IDC Comment Letter; Murphy Comment Letter; *see also* Federated Hermes Comment Letter. *See also supra* footnote 248 and accompanying text (discussing the final rule's treatment of matters that the valuation designee or fund's auditors have determined ''could have'' materially affected fair value).

[264] *See* JPMAM Comment Letter; Murphy Comment Letter; John Hancock Comment Letter.

[265] *See, e.g.,* ICI Comment Letter; TRP Comment Letter; Vanguard Comment Letter (regarding a significant increase in price challenges as a material change to the fund's current valuation risk); Capital Group Comment Letter; *see also* Federated Hermes Comment Letter.

[266] *See* ICI Comment Letter; IDC Comment Letter; BlackRock Trustees Comment Letter; MFDF Comment Letter; AIMA Comment Letter; *see also* Federated Hermes Comment Letter.

[267] *See, e.g.,* Fidelity Comment Letter; Stradley Comment Letter; NYC Bar Comment Letter; Guggenheim Comment Letter; Vanguard Comment Letter; *see also* Duff & Phelps Comment Letter.

kept informed of material changes or events in a timely manner, rather than waiting until the next periodic report. However, we also agree that boards should be receiving information tailored to this purpose. As a result, in a modification from the proposal, the final rule will require that the valuation designee provide a prompt written notification of the material matter,[268] with such follow-on reporting as the board may determine [269] appropriate.[270] Examples of material matters that would need to be reported under this provision include significant deficiencies or material weaknesses in the design or effectiveness of the valuation designee's fair value determination process [271] as well as material errors in the calculation of net asset value.[272] Some commenters had suggested that we set an NAV error threshold, similar to that generally utilized in the industry at $0.01 a share or 0.5% of the NAV, as the threshold for prompt reporting.[273] While we decline to establish that specific standard as what constitutes a ''material error in the calculation of net asset value'' for purposes of the final rule, we agree that relying upon that standard would not be unreasonable.[274]

Commenters also had concerns about the proposed three-business-day time period for making these reports, arguing that it was insufficient time to provide a meaningful report to the board.[275] Some suggested that we either remove or extend the specified reporting period.[276] We believe that it is important to specify some time period for these reports so that the board receives timely information within an appropriate window of time, but we agree with commenters that three business days may be insufficient time to prepare the necessary communication. As a result, we are extending the period to five business days to give valuation designees sufficient time to coordinate and prepare communications for the board regarding a material matter that meets the standard for prompt notification.[277] In light of the changes discussed above, we are not extending the period beyond five business days as we believe it is important that boards receive information about material matters as promptly as practicable. However, the final rule also empowers boards to require that valuation designees make this notification within a shorter time frame should boards determine that more timely notification or reporting is necessary for their oversight of these matters.

Under this revised requirement, a valuation designee must promptly notify the board of material matters related to valuation controls or errors that either the valuation designee has identified itself or that the valuation designee has been notified of by an independent third party, including the fund's auditor. We believe that the valuation designee should promptly determine the materiality of matters it identifies consistent with its fiduciary duties and then notify the board within the five business day period after determining that the matter is material. In cases where the materiality of a matter is immediately apparent, the designee would report the material matter to the board within the five business day period.[278] If, after 20 business days of becoming aware of the relevant valuation matter, the designee has not been able to determine the matter's materiality, we would expect the designee to then notify the board of its ongoing evaluation of the matter within the five-business-day prompt reporting period.[279] A valuation designee should act promptly in seeking to determine the materiality of a matter, and not take the 20 business days as a matter of course, in order to enable the board to provide effective oversight. This is a change from the proposal, where we would have required materiality determinations to be made within three business days.[280]

In combination, these changes should clarify and focus the prompt reporting

[268] Some commenters suggested that the prompt reporting element in particular should be oral rather than in writing. *See* JPMAM Comment Letter; John Hancock Comment Letter; SIFMA AMG Comment Letter; AIMA Comment Letter; MFS Comment Letter. We believe that it is important to ensure that records are kept of these notifications and thus the notification must be in writing. Rule 2a–5(b)(1). However, the final rule does not prescribe the information that must be included in the written notification, and advisers may, if appropriate, provide a brief written notification (*e.g.,* in an email) of the issue and follow up with supplemental information.

[269] Consistent with the guidance above regarding board oversight, the board can utilize this follow-up reporting process to inquire about the matter raised in the notification and take reasonable steps to see that matters identified in the notification are addressed. *See supra* footnote 212 and accompanying text.

[270] The notifications and reports that will be required under this provision are records that will need to be maintained pursuant to new rule 31a–4. *See* rule 31a–4(b)(1); *see also infra* section II.C. Further, to the extent that the board does seek follow-on reporting, appropriate records of that report will need to be maintained, consistent with the requirement to maintain appropriate documentation to support fair value determinations. *See* rule 31a–4(a). If such reporting occurs as part of the valuation designee's periodic reports required under the final rule, a separate record will not need to be maintained.

[271] We have changed this requirement from the proposed ''implementation'' to ''effectiveness'' to clarify the intent of this provision and better align it with auditing concepts of internal control. This specific example was, as proposed, based upon these auditing concepts. *See* Proposing Release, *supra* footnote 2, at n.115. This change should help address comments that the proposed rule was insufficiently clear as to when this report is needed as it will now be tied to the auditing concepts with which funds and valuation designees are already familiar. *See supra* footnote 261 and accompanying text.

[272] Rule 2a–5(b)(1)(ii). Some commenters had recommended this as a reporting item and we agree that valuation designees should promptly notify boards of this issue. *See* Advisor's Inner Circle Trustees Comment Letter. *See generally* BlackRock Trustees Comment Letter; ABA Comment Letter (arguing that ''material'' in the reporting context should be considered synonymous with material NAV errors); Murphy Comment Letter (recommending this as a quarterly reporting item); TRP Comment Letter (recommending this as a quarterly reporting item); Vanguard Comment Letter (suggesting that ''material'' for prompt reporting purposes could be based upon an NAV error threshold test).

[273] *See* ABA Comment Letter; Vanguard Comment Letter.

[274] *See also supra* footnotes 243 through 249 and accompanying text (discussing materiality).

[275] *See, e.g.,* Sullivan Comment Letter; JPMAM Comment Letter; MFDF Comment Letter; Fidelity Comment Letter; TRP Comment Letter (recommending we incorporate the concept of ''reasonable diligence'' from certain ''Dear CFO'' staff letters relating to tax liabilities); John Hancock Comment Letter (stating that this is particularly difficult timing when an adviser would need to consult with a sub-adviser); *see also* ABA Comment Letter (stating that three days was arbitrary); Duff & Phelps Comment Letter (stating that additional time may be necessary); Federated Hermes Comment Letter; American Funds Trustees Comment Letter; MFS Comment Letter; Advisor's Inner Circle Trustees Comment Letter. *But see* NYC Bar Comment Letter (stating that three days was sufficient if the adviser is simply informing the board of an error in implementation or risk of material effects on the valuation of the fund's portfolio): University of Miami Comment Letter.

[276] *See, e.g.,* Sullivan Comment Letter; ICI Comment Letter; IAA Comment Letter; AIMA Comment Letter; NYSSCPA Comment Letter; ABA Comment Letter (recommending ten days).

[277] As discussed in more detail below, the final rule does not require valuation designees to complete their materiality assessment within this five-day window. *See infra* footnote 280 and accompanying text. As a result, once materiality has been determined, valuation designees must notify the board within five business days.

[278] If the materiality of the event is not in question, such as when an independent third party (for example an auditor), notifies the valuation designee of a material matter and that notification includes a conclusion as to the impact of the material matter upon the fund's portfolio or the fund's control deficiencies' severity, then the five business day notification period is triggered immediately.

[279] We believe that taking longer than 20 business days to determine materiality, or at least begin the five business day period to notify the board if materiality cannot be determined that quickly, would be excessive and thus not consistent with the promptness contemplated by the reporting requirement.

[280] The proposed rule would have provided three business days to report to the board on these matters, and the Proposing Release clarified that an adviser would have been permitted to take an additional three business days to verify and make a final determination of the matter's materiality prior to reporting to the board. Proposing Release, *supra* footnote 2, at 50–51.

and provide boards and valuation designees with more flexibility. As adopted, the final rule also should be better suited for the ongoing dialogue between boards and valuation designees that commenters stressed as important when the board is exercising oversight,[281] in that it gives boards discretion to get in-depth analysis they may need to provide appropriate oversight rather than mandating a quickly produced formal report. We also believe that these modifications make clear that the board's role under rule 2a–5, where the board has designated the valuation designee to perform fair value determinations, is one of oversight and that the final rule's prompt reporting requirements will help boards to effectively perform this function.

Some commenters recommended that we permit a designated board member, such as an independent board member, to receive the prompt report.[282] We believe that the reports should be made to the board members that are tasked with carrying out appropriate oversight over valuations, which can be a committee. Therefore, the final rule, consistent with the proposal, permits reporting to either the full board or a designated committee of such board composed of a majority of directors who are not interested persons of the fund.[283]

3. Specification of Functions

We are adopting the specification of functions requirement largely as proposed. Under the final rule, if the board designates the performance of fair value determinations to a valuation designee, rule 2a–5 will require the valuation designee to specify the titles of the persons responsible for determining the fair value of the designated investments, including by specifying the particular functions for which the persons identified are responsible.[284] Consistent with this requirement, the specific personnel with duties associated with price challenges should be identified, including those with the authority to override a price, along with the roles and responsibilities of such persons, and the valuation designee is required to establish a process for the review of price overrides.[285] Finally, the final rule requires the valuation designee reasonably to segregate fair value determinations from the portfolio management of the fund such that the portfolio manager may not determine, or effectively determine by exerting substantial influence on, the fair values ascribed to portfolio investments.[286]

Commenters generally supported these provisions.[287] One commenter, however, stated that the proposed rule lacked clarity as to which individuals are required to be identified and stated that ''little appears to be gained by the mechanical exercise'' of naming individuals and their titles, which may be generic, and identifying with specificity their roles in the valuation function.[288] We disagree with the commenter because these provisions cannot be satisfied by simply listing the generic titles of those involved in valuation. As we stated in the Proposing Release, we believe, and other commenters agreed, that it is important for funds clearly to identify, in their fair value policies and procedures, the titles of persons, and a description of their roles and responsibilities, who make fair value determinations to enhance accountability and provide clear lines of responsibility.[289] We believe requiring the identification of the titles of the responsible individuals and a description of their roles will facilitate an effective fair value process and promote accountability.[290]

Additionally, commenters generally supported the proposed requirement that the adviser reasonably segregate fair value determinations from the portfolio management of the fund.[291] These commenters agreed with our assertions in the Proposing Release that a significant source of potential adviser conflicts of interest in the fair value determination process is the level and kinds of input that fund portfolio managers or persons in related functions have in the design or modification of fair value methodologies, or in the calculation of specific fair values.[292] Three commenters stated that portfolio managers have ''insurmountable'' conflicts of interest because they are often compensated based on the returns of the fund.[293] These commenters urged the Commission to prohibit portfolio managers from participating in the process of fair value determinations in any way. Other commenters, however, stated that in many circumstances, the fund's portfolio manager may be the most knowledgeable person at an adviser regarding a fund's portfolio holdings and it is appropriate for him or her to provide input into the process for determining the fair value of fund investments.[294] Two commenters also stated the segregation requirement may create challenges for smaller managers due to their limited resources and personnel, but recognized the importance of appropriately mitigating portfolio managers' biases or conflicts of interest.[295] One commenter stated that,

[281] *See, e.g.,* BlackRock Trustees Comment Letter; MFS Comment Letter.

[282] *See* Murphy Comment Letter (stating that such an approach would be helpful with small fund boards); Fidelity Comment Letter; AIMA Comment Letter.

[283] Rule 2a–5(e)(3) (''board'' defined as either fund's entire board of directors or designated committee of such board composed of majority of directors who are not interested persons of the fund).

[284] Rule 2a–5(b)(2). To comply with this requirement, the fair value policies and procedures adopted under rule 38a–1 generally should specify the titles of the persons responsible for determining the fair value of the designated investments and should specify the particular functions for which persons with the identified titles are responsible. Similarly, if the valuation designee uses a valuation committee or similar body to assist in the process of determining fair value, the fair value policies and procedures should generally describe the composition and role of the committee, or reference any related committee governance documents as appropriate. *See* Proposing Release, *supra* footnote 2, at text following n.117.

[285] *See also* rule 2a–5(a)(4) (requiring the oversight of pricing services).

[286] Rule 2a–5(b)(2). The valuation designee of an internally managed fund would also be required to reasonably segregate fair value determinations from the portfolio management of the fund.

[287] *See, e.g.,* AIMA Comment Letter; ICI Comment Letter; ABA Comment Letter; Fidelity Comment Letter; Dechert Comment Letter.

[288] *See* Sullivan Comment Letter.

[289] *See* Proposing Release, *supra* footnote 2, at n.118 and accompanying text. *See also, generally,* AIMA Comment Letter; ICI Comment Letter; ABA Comment Letter; Fidelity Comment Letter; Dechert Comment Letter. *See supra* section II.A.5.

[290] *See, e.g.,* AIMA Comment Letter.

[291] SBIA Comment Letter; AIMA Comment Letter; IVSC Comment Letter; Duff & Phelps Comment Letter; Stradley Comment Letter; Vanguard Comment Letter; MFS Comment Letter; Fidelity Comment Letter; American Bankers Association Comment Letter; Dechert Comment Letter. *See* Proposing Release, *supra* footnote 2, at text accompanying n.122.

[292] *Id. See also* Investment Company Institute Independent Directors Council, Fair Valuation Series: The Role of the Board at 10 (2006) (''IDC Role of the Board''), *available at http://www.ici.org/pdf/06_fair_valuation_board.pdf* (noting that portfolio managers can be important sources of information about the value of securities, but there may be conflict of interest concerns when portfolio managers select fair values that boost a fund's performance, particularly when the compensation of the portfolio manager is based on the fund's performance).

[293] Better Markets Comment Letter; CFA Institute Comment Letter; University of Miami Comment Letter.

[294] SBIA Comment Letter; AIMA Comment Letter; IVSC Comment Letter; Stradley Comment Letter; Vanguard Comment Letter; MFS Comment Letter; Fidelity Comment Letter; American Bankers Association Comment Letter; Dechert Comment Letter. One commenter further argued that the Commission should mandate the involvement of portfolio managers in the valuation process because they have ''the most relevant investment specific information pertaining to an investment.'' Duff & Phelps Comment Letter.

[295] Duff & Phelps Comment Letter; American Bankers Association Comment Letter (suggesting that, in certain situations where segregation may be burdensome, the Commission should allow alternative processes for managing conflicts, including establishing reconciliation procedures

by requiring a fund reasonably to segregate portfolio management from the *process* of making fair value determinations in the text of rule 2a–5, the condition could be read to prohibit any involvement of fund portfolio management in any part of the process of making fair value determinations.[296]

We continue to believe that our proposed approach strikes the appropriate balance. The final rule will not prohibit portfolio managers from participating in the process of fair value determinations because of the unique insights that portfolio management may have regarding the value of fund holdings. Keeping the functions reasonably segregated in the context of fair value determinations should help mitigate the possibility that a portfolio manager's competing incentives diminish the effectiveness of fair value determinations. However, in a change from the proposal, the final rule would remove the phrase ''process of'' from this subsection of rule 2a–5. This change is meant to clarify that the segregation requirement would not prevent portfolio managers from providing inputs that are used in the process for determining fair value, as raised by one commenter.[297] However, in a change from the proposal, the final rule clarifies that, to satisfy the reasonable segregation requirement, the portfolio manager may not determine, or effectively determine by exerting substantial influence on, the fair values ultimately ascribed to portfolio investments.[298] A portfolio manager determining the fair value of fund investments would not be consistent with the reasonable segregation of functions required by the final rule.

As discussed in the Proposing Release, this requirement is designed to address concerns regarding a portfolio manager's conflicts of interest while recognizing the important perspective and insight regarding the value of fund holdings that portfolio management personnel can provide.[299] Reasonable segregation of functions facilitates these important checks and balances, and funds could institute this requirement through a variety of methods, such as independent reporting chains, oversight arrangements, or separate monitoring systems and personnel.[300] We recognize that this requirement may create certain challenges for smaller advisers and internally managed funds due to their limited numbers of personnel, but we believe that this requirement is necessary to manage potential conflicts of interest. Additionally, to alleviate some of these challenges, the final rule's reasonable segregation approach is designed to allow funds to structure their fair value determination process and portfolio management functions in ways that are tailored to each fund's facts and circumstances, including the size and resources of a particular fund. However, the final rule clarifies that a fund should limit the extent of influence portfolio managers may have on administration of the fair value process. If portfolio managers provide a significant amount of input on the fair value of an investment, the segregation process should be appropriately rigorous and robust to mitigate any potential conflicts of interest. For example, in such a circumstance, the valuation designee could, as part of its reasonable segregation process, seek to provide independent voices as a check on any potential conflicts of interest to the extent appropriate.[301]

C. Recordkeeping

We are adopting new rule 31a–4 that applies to both registered investment companies and business development companies[302] to contain the recordkeeping requirements associated with the final rule.[303] Rule 31a–4 will require, substantially as proposed as part of rule 2a–5, funds or their advisers to maintain appropriate documentation to support fair value determinations.[304] In addition, rule 31a–4 provides that, in cases where the board has designated the performance of fair value determinations to a valuation designee, the reports and other information provided to the board must include a specified list of the investments or investment types for which the valuation designee has been designated.[305] These records will, in a change from the proposal,[306] generally be required to be maintained for six years, the first two in an easily accessible place.[307] In another change from the proposal, rule 31a–4 will require funds or their advisers to maintain appropriate documentation to support fair value determinations, rather than requiring a fund or adviser to keep records of the specific methodologies applied and assumptions and inputs that form the basis of the fair value determination in all cases. Lastly, as proposed, the fund will be required to maintain these records unless the board has designated the performance of fair value determinations to the fund's investment adviser. In that case, the investment adviser will maintain the records.[308]

Comments on the recordkeeping aspects of the proposal were mixed, with some commenters broadly agreeing with them,[309] and others stating that the proposed requirements would add significant additional costs.[310]

that are designed to protect against improper valuation of fund investments).

[296] Dechert Comment Letter.

[297] Dechert Comment Letter. *See also* Proposing Release, *supra* footnote 2, at text following n.122 (stating that the reasonable segregation requirement is not meant to indicate that portfolio management must necessarily be subject to a communications ''firewall'').

[298] An example of effectively determining by exerting substantial influence would be if the fair values ascribed to portfolio investments are based solely on information provided by the portfolio manager,

[299] *See* Proposing Release, *supra* footnote 2, at text following n.122.

[300] *See* American Bankers Association Comment Letter.

[301] *See* Proposing Release, *supra* footnote 2, at n.122. *See also supra* footnote 189 (noting that an evaluation designee, once designated by the board, could seek to obtain the assistance from other parties such as the fund administrator).

[302] *See* section 64 of the Act (generally applying section 31 of the Act to business development companies to the same extent as if they were registered closed-end investment companies).

[303] Except as discussed in more detail below, the provisions of this rule are the same as the recordkeeping requirements proposed to be part of rule 2a–5. *See* proposed rule 2a–5(a)(6) and (b)(3).

[304] Rule 31a–4(a).

[305] Rule 31a–4(b).

[306] We proposed a five-year retention period for these records. *See* proposed rule 2a–5(a)(6) and (b)(3). Other than the list of designated investments, this retention period will, as proposed, begin when the determination is made for documentation to support fair value determinations and from the end of the relevant fiscal year for valuation designee reports. Rule 31a–4(a) and (b). *Cf.* Murphy Comment Letter (questioning the beginning of the retention period) and *infra* footnote 307 and accompanying text (discussing the retention period for the list of designated investments).

[307] The list of designated investments will be required to be kept for a period beginning with the designation and ending at least six years after the end of the fiscal year in which the designation was terminated, in an easily accessible place until two years after such termination, instead of the proposed period of five years beginning at the end of the fiscal year in which the investments or investment types were assigned to the adviser, the first two years in an easily accessible place. *See* rule 31a–4(b)(2) and proposed rule 2a–5(b)(3)(ii). We had requested comment on, among other things, whether the proposed holding periods were sufficient to evidence compliance with the proposed rule. *See* Proposing Release, *supra* footnote 2, at 57. While we did not receive any specific comments on this point, we are concerned that in cases where a valuation designee's appointment lasts longer than five or six years, third parties, including Commission staff, will not have access to this information.

[308] Rule 31a–4(c).

[309] *See* IVSC Comment Letter; Council of Institutional Investors Comment Letter; CFA Institute Comment Letter. Some commenters approved of the proposed recordkeeping requirements, but only for records created by the fund or adviser, not records of a pricing service. *See* Fidelity Comment Letter; TRP Comment Letter; Vanguard Comment Letter.

[310] *See, e.g.,* ICI Comment Letter; Fidelity Comment Letter; Vanguard Comment Letter;

Continued

Specifically, these commenters stated that the proposed requirement to maintain documentation to support fair value determinations, including information regarding the specific methodologies applied and the assumptions and inputs considered when making fair value determinations, would result in the adviser needing to obtain and retain significant amounts of data that it would not otherwise obtain and retain when it utilizes a pricing service, and could hamper flexibility in making fair value determinations.[311]

One commenter suggested that the proposed recordkeeping requirements were more appropriate as a rule under section 31 of the Act, stating that this would both help centralize investment company recordkeeping provisions and would also ensure that a failure to keep the required records would not lead to a board being found to have not fair valued in good faith.[312] We agree, and are therefore moving these amended recordkeeping requirements to a new rule under section 31. Another suggested that these requirements are duplicative with the existing recordkeeping rules adopted under section 31 of the Act.[313] While some records currently required to be maintained pursuant to the rules adopted under section 31 of the Act may be the appropriate documentation to support fair value determinations in some circumstances,[314] they may not always be sufficient to meet that standard. Thus, we do not believe that rule 31a–4's recordkeeping requirements are duplicative of the existing rules adopted under section 31.[315]

A number of commenters also recommended that we tie the recordkeeping requirements to the three-tier fair value hierarchy within U.S. GAAP[316] or otherwise not require obtaining or maintaining detailed records regarding the level 2 categorized fair value measurements of securities for which funds use pricing services.[317] These commenters stated that, because the fund or adviser would not have access to the appropriate level of information on the pricing service's specific inputs considered or assumptions applied in each particular case, the proposed requirement would be a significant departure from industry practice. Instead, these commenters asked that we only require detailed recordkeeping to support fair value determinations for those investments for which the fund or valuation designee establishes or applies its own methodologies.[318] A number of commenters suggested that we provide additional guidance regarding exactly what records fit within the rule's requirements.[319] One commenter requested that the Commission confirm that the view that funds and advisers must maintain documentation sufficient for a third party to verify the fair value determination is not intended to mandate documentation detailed enough to fully recreate it.[320]

We believe that the requirement to maintain appropriate documentation to support fair value determinations should include documentation that would be sufficient for a third party, such as the Commission's staff, not involved in the preparation of the fair value determinations to verify, but not fully recreate, the fair value determination, as further described below.[321] We understand that advisory personnel currently produce working papers supporting fair value determinations that include, for example, copies of internally developed valuation models, including inputs and assumptions used therein and relevant supporting documentation.[322] These records that valuation designees currently create in the ordinary course of performing fair value determinations are examples of the types of records that we consider to be ''appropriate documentation to support fair value determinations.''

In a change from the proposal, we are not requiring detailed records relating to the specific methodologies a pricing service applied and the assumptions and inputs a pricing service considered when providing each piece of pricing information as we are persuaded that such a requirement would be impractical. Rather, we believe appropriate documentation to support a fair value determination that takes into account inputs from pricing services consists of the records related to the fund or valuation designee's initial due diligence investigation prior to selecting a pricing service and records from its ongoing monitoring and oversight of the pricing services.[323] As discussed above, for example, this diligence should consider the valuation methods or techniques, inputs, and assumptions used by the pricing service for different classes of holdings, and how they are affected as market conditions change, among other matters.[324] Other appropriate documentation also includes work papers created by the valuation designee while overseeing pricing services or testing fair value methodologies, such as those documenting the valuation designee's monitoring and conducting of price challenges, stale price analysis, and testing such as calibration or back-testing.[325] The fund or adviser will not be required to maintain the internal records of the pricing service or the specific inputs the pricing service used for each piece of pricing information it provides to the fund.

We also believe that different types of records will be appropriate depending on the security or fair value

Guggenheim Comment Letter (asserting that funds or advisers would need to hire additional personnel to comply with the rule as proposed); and Guggenheim Trustees Comment Letter. *But see* Comment Letter of Elena Davidson (July 20, 2020) (''Davidson Comment Letter'') (suggesting that the Commission provided ample reason to believe that the costs of compliance would be on the smaller side).

[311] *See, e.g.,* ICI Comment Letter; IDC Comment Letter; SSGA Comment Letter; Sullivan Comment Letter; ICE Data Comment Letter (stating that pricing services would need to increase fees to compensate for the demands for records under the proposed regime).

[312] Murphy Comment Letter.

[313] NYC Bar Comment Letter.

[314] Schedules evidencing and supporting each computation of net asset value as required under 17 CFR 270.31a–2(a)(2) (''rule 31a–2'') are examples of records that could also be considered appropriate documentation to support fair value determinations.

[315] Also, the reports to the board and specified list of designated investments that will be required to be maintained under rule 31a–4 are not clearly required as part of the existing section 31 rules. *See also* Compliance Rules Adopting Release, *supra* footnote 82, at n.94 (adopting a similar requirement for rule 38a–1 for similar reasons).

[316] ASC Topic 820 categorizes inputs to valuation techniques used to measure fair value into three levels. The fair value hierarchy gives the highest priority to quoted, observable inputs (level 1) and the lowest priority to unobservable inputs (level 3). *See infra* section II.D.

[317] *See* TRP Comment Letter; Franklin Comment Letter; MFS Comment Letter; Fidelity Comment Letter; John Hancock Comment Letter; *see also* Vanguard Comment Letter (stating that the prosed requirements differ from industry practice); SIFMA AMG Comment Letter.

[318] *See* ICI Comment Letter (noting this approach is similar to that in rule 22e–4); IDC Comment Letter; SSGA Comment Letter; Fidelity Comment Letter; TRP Comment Letter; Franklin Comment Letter; Vanguard Comment Letter; Capital Group Comment Letter; SIFMA AMG Comment Letter; Dechert Comment Letter; ICE Data Comment Letter; Dimensional Comment Letter.

[319] *See* Harvest Comment Letter; Guggenheim Comment Letter.

[320] Guggenheim Comment Letter.

[321] *See* Proposing Release, *supra* footnote 2, at n.74 and accompanying text.

[322] *See, e.g., infra* section III.B.2.h.

[323] We expect that the type of documentation discussed in this paragraph would be the type of documentation that would be sufficient for a third party to verify the fair value determination as discussed in the text accompanying n.321.

[324] *See also supra* section II.A.4 regarding various matters a board or valuation designee should consider in approving, monitoring, and evaluating pricing services.

[325] Stale price analysis can include an evaluation of whether a price quote that may be used to support a fair value price is sufficiently timely to be useful.

methodology used. For example, the documentation to support the fair value determination of an investment valued with level 3 inputs would typically require different and more extensive documentation [326] than an investment that was valued only with level 2 inputs. We expect that the records kept may vary based on a variety of factors, including the subjectivity of the inputs used in determining fair value (*e.g.,* level 2 or level 3).

Under rule 31a–4, and consistent with proposed rule 2a–5, an adviser designated to perform fair value determinations will be required to maintain the relevant records.[327] While commenters disagreed about whether the fund or adviser should keep these records,[328] we continue to believe the adviser should maintain them when it is the valuation designee. As one commenter suggested,[329] the adviser would need to keep valuation records anyway. The reporting requirement should give boards the access to the documentation they deem necessary without mandating that the fund also directly hold these duplicative records.[330]

We are not expanding the records to be maintained under the rule as suggested by some commenters.[331] We believe that further recordkeeping requirements are not necessary because, as discussed above, we believe that the records required under rule 31a–4 should be sufficient to meet the purpose of the recordkeeping requirements, which is to assist third party oversight. We are also adopting as proposed the requirement to maintain records of the reports and other information provided to the board in accordance with rule 2a–5(b)(1) so that we and our staff will have access to them. Also, because we are not adopting the proposed requirement to establish fair value policies and procedures in light of the existing requirements of rule 38a–1, the final rule will not contain the proposed requirement to maintain copies of fair value policies and procedures, as policies and procedures adopted under rule 38a–1 have their own existing recordkeeping requirements.[332]

Under the final rule, funds and advisers will be generally required to maintain these records for a total of six, rather than the proposed five, years.[333] We had proposed a five year period to align with the retention period of rule 38a–1. In light of the commenters noting the relationship between certain records required to be maintained under rule 31a–2 and rule 31a–4, we believe that aligning the retention period with rule 31a–2, regarding schedules evidencing and supporting each computation of net asset value, is more appropriate.

D. Readily Available Market Quotations

We are adopting the definition of readily available market quotations as proposed. The board's role in the valuation of a portfolio holding for purposes of fair value depends on whether or not market quotations are readily available for such a holding.[334] Under section 2(a)(41) of the Investment Company Act, if a market quotation is readily available for a portfolio security, it must be valued at the market value. Conversely, if market quotations are ''not readily available,'' a portfolio security value must be fair valued as determined in good faith by the board (or the valuation designee under the final rule).[335]

The final rule will provide that a market quotation is readily available for purposes of section 2(a)(41) of the Investment Company Act with respect to a security only when that ''quotation is a quoted price (unadjusted) in active markets for identical investments that the fund can access at the measurement date, provided that a quotation will not be readily available if it is not reliable.'' [336] This definition is consistent with the definition of a level 1 input in the fair value hierarchy outlined in U.S. GAAP. Thus, under the final definition, a security will be considered to have readily available market quotations if its value is determined solely by reference to these level 1 inputs. Fair value, as defined in the Act and further defined in rule 2a–5,[337] therefore must be used in all other circumstances.[338]

Some commenters that addressed our proposed definition of readily available market quotations generally supported it.[339] However, some commenters asked

[326] Examples of the records that may be needed for level 3 inputs include documentation supporting the inputs, assumptions, and calculation methodology used in determining fair value, for example selected financial models, financial reporting information, income or growth projections, or public company comparable data.

[327] Rule 31a–4(c).

[328] *Compare* CFA Institute Comment Letter; Council of Institutional Investors Comment Letter; and VRC Comment Letter *with* Murphy Comment Letter and Sullivan Comment Letter.

[329] *See* Sullivan Comment Letter.

[330] For internally managed funds that have delegated the performance of fair value determinations to an officer or officers of the fund, the fund will need to preserve these records. *See* rule 31a–4(c). Also, we would expect that, in the event of a change in advisers, the fund will take appropriate action to ensure that the records are transferred. *Cf.* Murphy Comment Letter.

[331] *See* IVSC Comment Letter (suggesting that the Commission require keeping records relating to the background details of valuation professionals); MFS Comment Letter (stating that the recordkeeping requirements should reflect the relevant details of prompt board reports by maintaining a log or meeting minutes).

[332] Rule 38a–1(d)(1). *See supra* section II.A.5. *But see* Fidelity Comment Letter (stating that it would be appropriate to have a separate policies and procedures record retention requirement in rule 2a–5 and that the interplay between the rules was sufficiently explained in the Proposing Release).

[333] *See* Duff & Phelps Comment Letter (recommending that the retention period mirror fund documents and ''statutory requirements,'' stating that six or seven years is common). *But see* CFA Institute Comment Letter (agreeing with a five-year retention period).

[334] Section 2(a)(41) requires the use of market values only for *securities* for which market quotations are readily available. Non-security holdings must always be fair valued regardless of whether readily available market quotations exist for that holding. *See also infra* footnote 338.

[335] Section 2(a)(41). Neither the Investment Company Act nor the rules thereunder currently define ''readily available.''

[336] Rule 2a–5(c). ASC Topic 820 defines level 1 inputs as ''[q]uoted prices (unadjusted) in active markets for *identical* assets . . . that the reporting entity can access at the measurement date.'' ASC Topic 820–10–20 (emphasis added). In ASR 113, the Commission interpreted ''readily available market quotations'' to refer ''to reports of current public quotations for securities similar in all respects to the securities in question.'' Despite the respective references to ''securities similar in all respects'' in the Commission's prior guidance and ''identical assets'' in ASC Topic 820, we view these respective definitions as being substantively the same. *See also* Proposing Release, *supra* footnote 2, at n.129 and accompanying text.

[337] We decline, as suggested by one commenter, to clarify that the final rule's definition of readily available market quotations only applies to determinations made pursuant to rule 2a–5. *See* Seward & Kissel Comment Letter. As discussed below, we believe that this definition is appropriate for all contexts under the Investment Company Act and its rules. *See infra* footnotes 359 through 364 and accompanying text.

[338] Rule 2a–5(e)(2). *See also supra* section II.A.2. One commenter recommended that certain assets that are not considered securities under the Act but have readily available market quotations should be valued at market value rather than fair valued. *See* Comment Letter of Practus, LLP (July 21, 2020) (''Practus Comment Letter''). The Act requires boards to determine fair value for all assets other than securities regardless of the existence of readily available market quotations. *See* section 2(a)(41). However, as we noted in the Proposing Release, U.S. GAAP requires funds to maximize the use of relevant observable inputs and minimize the use of unobservable inputs in valuing any asset. *See* Proposing Release, *supra* footnote 2, at 59. As a result, we believe that application of U.S. GAAP would generally provide for consideration of this information in determining fair value.

[339] AIMA Comment Letter; Better Markets Comment Letter; ICI Comment Letter; Murphy Comment Letter; Stradley Comment Letter; Duff & Phelps Comment Letter. Other commenters asked that we go further, and depart from the binary approach laid out in the Act and instead mirror the approach established in U.S. GAAP that treats all values as fair values, but establishes a three-tier hierarchy of inputs that are used in making fair value determinations. Fidelity Comment Letter; TRP Comment Letter; Capital Group Comment Letter; Baillie Gifford Comment Letter. We have not modified the final rule as they suggested because the Investment Company Act provides a binary framework in section 2(a)(41) under which a security either has readily available market quotations or must be fair valued.

that we treat all securities that are valued using level 2 inputs in the U.S. GAAP hierarchy, including evaluated prices, as also having readily available market quotations under our definition.[340] We believe that the best conceptual analogue for readily available market quotations are securities whose values are determined solely by reference to level 1 inputs, as we proposed. We also believe that this approach is consistent with many funds' practices today.[341] We believe that level 2 inputs under the U.S. GAAP hierarchy are not consistent with the concept of readily available market quotations under the Act and therefore our final definition. Securities valued using level 2 inputs include securities that are not traded on an active market, and/or are valued using inputs other than quoted prices for the specific security (such as credit spreads).[342] Accordingly, we do not believe that securities valued with level 2 inputs are consistent with the definition of readily available market quotations.

As we stated in the proposal, under the final rule, evaluated prices are not readily available market quotations as they are not based upon unadjusted quoted prices from active markets for identical investments.[343] In addition, for the same reason, ''indications of interest'' and ''accommodation quotes,'' would also not be ''readily available market quotations'' for the purposes of rule 2a–5(c).[344]

Two commenters asked whether certain pooled investment vehicle securities, such as those of funds that publish their NAV daily and issue and redeem shares at that NAV (such as mutual funds), or that are valued using their NAV as a practical expedient (such as many private fund shares),[345] would qualify as having readily available market quotations.[346] We understand that, under ASC Topic 820, an investment in a mutual fund or similar structure that has a readily determinable fair value per share that is determined and published and is the basis for current transactions,[347] such as a daily NAV for mutual fund shares, is generally considered to have observable level 1 inputs under U.S. GAAP.[348] Accordingly, we agree with the commenter and believe that such investments are generally consistent with the definition of having readily available market quotations under the final rule.

Conversely, securities that are valued using NAV as a practical expedient, like certain private funds, do not require disclosure of the level of input associated with them under the U.S. GAAP fair value hierarchy.[349] We understand that the fair value of those investments for which use of NAV as a practical expedient is permitted under U.S. GAAP may generally require less effort and resources than other securities without readily available market quotations because fair value measurement utilizing such a fund's NAV involves less subjectivity and more objective measures. Nevertheless, we believe that these securities generally do not have readily available market quotations under the final definition because their value is not based on unadjusted quoted prices.[350]

One commenter stated that securities exchanges such as NASDAQ or the NYSE often adjust prices to establish a closing price or address technical issues. This commenter asked that we clarify that by ''unadjusted'' we did not mean to disqualify securities adjusted by exchanges in this way.[351] We agree. The word unadjusted in the final definition refers to adjustments in market prices made by the fund or valuation designee, not adjustments made by the exchange on which the security is listed.

Consistent with the requirements for preparing fund financial statements,[352] we will presume a fair value methodology not determined in accordance with U.S. GAAP to be misleading or inaccurate and thus not an appropriate methodology under the final rule.[353] U.S. GAAP requires the maximization of the use of relevant observable inputs and minimization of the use of unobservable inputs. However, under U.S. GAAP there are circumstances where otherwise relevant observable inputs become unreliable.[354] Consistent with this, we will generally presume that a quote would be unreliable under final rule 2a–5(c) where it would require adjustment under U.S. GAAP or where U.S. GAAP would require consideration of additional inputs in determining the value of the security. For example, under the final rule funds would, consistent with U.S. GAAP, use previous closing prices for securities that principally trade on a closed foreign market to calculate the value of that security, except when an event has occurred since the time the value was established that is likely to have resulted in a change in such value.[355] In such circumstances, the quote would be

[340] *See* Guggenheim Comment Letter (suggesting that not including bonds, which usually have level 2 inputs, would face a significant burden under this definition); IAA Comment Letter (stating that fund boards may treat some securities with level 2 inputs as having readily available market quotations); ICE Data Comment Letter. *But see, e.g.,* ICI Comment Letter (agreeing with the proposed definition).

[341] *See, e.g.,* ICI Comment Letter.

[342] ASC Topic 820–10–35–48.

[343] *See* Proposing Release, *supra* footnote 2, at nn.133–134 and accompanying text; *see also* 2014 Money Market Fund Release, *supra* footnote 11, at text accompanying n.895.

[344] *See* Investment Company Liquidity Risk Management Programs, Investment Company Act Release No. 32315 (Oct. 13, 2016) [81 FR 82142 (Nov. 18, 2016)], at nn.800–801 and accompanying text.

[345] *See* ASC 820–10–35–59 through 35–62 in 820, a topic called ''Measuring the Fair Value of Investment in Certain Entities That Calculate Net Asset Value per Share (or Its Equivalent) (''A reporting entity is permitted, as a practical expedient, to estimate the fair value of an investment within the scope of paragraphs 820–10–15–4 through 15–5 using the net asset value per share (or its equivalent, such as member units or an ownership interest in partners' capital to which a proportionate share of net assets is attributed) of the investment, if the net asset value per share of the investment (or its equivalent) is calculated in a manner consistent with the measurement principles of Topic 946 as of the reporting entity's measurement date.'').

[346] *See* ICI Comment Letter (recommending that mutual funds and other pooled investment vehicles with daily NAVs be considered to have readily available market quotations); CFA Institute Comment Letter (recommending that we not consider private funds that utilize NAV as a practical expedient as having readily available market quotations).

[347] *See* definition of readily determinable fair value, item c. with ASC 820–10–20. One commenter sought clarification as to whether the proposed definition was seeking to incorporate the concept of ''readily determinable'' fair value from U.S. GAAP as well. American Bankers Association Comment Letter. ''Readily determinable'' fair value is not utilized to value all securities but for certain limited purposes under U.S. GAAP. Specifically the concept is similar but narrower in that it only applies with respect to equity securities. While readily determinable is a similar concept to ''readily available market quotations'' in that it utilizes similar concepts (*e.g.,* it references prices or quotations of securities exchanges), it is not what we are utilizing for this definition.

[348] Investments in mutual fund shares are not valued using NAV as a ''practical expedient.'' *See* ASC 820–10–35–54B. *See also* ICI Comment Letter.

[349] *See* Proposing Release, *supra* footnote 2, at n.213. *See also* ASC 820–10–65–7.

[350] As under our proposal, for purposes of our economic analysis we assume that such securities had no readily available market quotations, and would be thus fair valued under the final rule. *See* Proposing Release, *supra* footnote 2, at n.213.

[351] Practus Comment Letter.

[352] *See* 17 CFR 210.4–01(a)(1).

[353] When referencing ASC Topic 820 throughout this release, we intend to reference the accounting topic on Fair Value Measurements within U.S. GAAP and the principles therein.

[354] *See* Proposing Release, *supra* footnote 2, at n.131 and accompanying text and ASC Topic 820–10–35–41C (outlining circumstances when a reporting entity shall make an adjustment to a Level 1 input).

[355] *See* ASC Topic 820–10–35–41C at b; *see also supra* footnote 77 and accompanying text. One commenter suggested that these adjustments are not required, which is inconsistent with our understanding of ASC Topic 820–10–35–36B and 35–41C. *See* NYC Bar Comment Letter.

unreliable and the fund would need to fair value the security.

A number of commenters raised concerns that the proposed definition of readily available market quotations may affect current practices on cross trades under 17 CFR 270.17a–7 (''rule 17a–7'').[356] For a fund to engage in a cross trade under rule 17a–7, the security first must have a ''readily available market quotation'' and then the transaction must meet the other conditions of that rule.[357] These commenters stated that funds and their affiliates regularly engage in cross trades of certain fixed-income securities that they believed would not qualify as having readily available market quotations under the proposed definition, and asked that we clarify that the proposed definition was not meant to disrupt current cross-trading practices.[358]

The definition of readily available market quotations that we are adopting will apply in all contexts under the Investment Company Act and the rules thereunder, including rule 17a–7.[359] In the adopting release for rule 17a–7, the Commission stated that ''[t]he phrase 'which market quotations are readily available' also is found in section 2(a)(41) of the Act and rule 2a–4 and is intended to have the same meaning ascribed to it in those other provisions.'' [360] Further, the Commission has previously suggested that active secondary markets are an important indicator of readily available market quotations.[361] We continue to believe it is important to have a consistent definition of the term in all contexts, including in rule 17a–7, where it serves to ensure that there is an independent basis for determining the value of securities.

We recognize that whenever we define a term, to the extent market participants are currently engaged in practices that are not consistent with that definition, they will need to conform their practices. As a result, certain securities that had been previously viewed as having readily available market quotations and being available to cross trade under rule 17a–7 may not meet our new definition and thus would not be available for such trades.[362] We also understand that many cross trades today are done taking into consideration certain letters by our staff that address, among other things, the application of the term readily available market quotations in the context of certain transactions under rule 17a–7.[363] The staff is reviewing these letters to determine whether these letters, or portions thereof, should be withdrawn. Separately, consideration of potential revisions to rule 17a–7 is on the rulemaking agenda.[364] We welcome input from the public as we undertake our consideration of rule 17a–7.

E. Rescission of Prior Commission Releases

As proposed, we are rescinding ASR 113 and ASR 118 in their entirety. We believe that rescission is appropriate because the guidance included in ASR 113 and ASR 118 is superseded or made redundant by the adoption of rule 2a–5 and by the requirements under the current accounting and auditing standards.[365]

Commenters generally supported the rescission of ASR 113 and ASR 118.[366] These commenters agreed with our assertion in the Proposing Release that the guidance within the ASRs is not inconsistent with current accounting standards, but they are not considered essential or additive to the existing accounting standard framework.[367] One commenter stated that at a minimum the Commission should retain ASR 118's interpretive guidance that permits fund boards to appoint persons to assist them in making fair value determinations, and to make actual calculations pursuant to the board's discretion.[368] Some commenters opposed rescinding ASRs 113 and 118, stating that certain specific fair value matters are not covered in the relevant accounting standards and that certain content within those releases should be reissued or restated by the Commission.[369] Other commenters disagreed, generally stating that valuation matters are addressed in the principles and framework of ASC Topic 820 and the concepts that are necessary to retain are now either included in the relevant accounting standards or were included in the rule as proposed.[370]

One commenter argued that we should retain the ASRs, as it believed that the ASRs addressed certain fund specific issues, such as those related to the valuation of ''odd lots'' it believed were not addressed in U.S. GAAP.[371] Others specifically disagreed with this point, and argued that the principles of ASC Topic 820 and related U.S. GAAP standards address such ''odd lot'' cases.[372] We agree that the odd lot valuation practices, such as those that occurred in the cases referenced by the commenter (*e.g.,* a fund with an investment, held in an odd-lot quantity, valued at a round-lot price when the entity has no ability to access the round-lot market to exit such investment at the measurement date) do not reflect an appropriate methodology consistent with the principles of ASC Topic 820 and the existing U.S. GAAP framework.

[356] *See, e.g.,* ICI Comment Letter; Capital Group Comment Letter.

[357] *See* rule 17a–7.

[358] *See, e.g.,* ICI Comment Letter; Murphy Comment Letter. One commenter noted that they agreed with the Fixed Income Market Structure Advisory Committee recommendation on reform of rule 17a–7. *See https://www.sec.gov/spotlight/fixed-income-advisory-committee/preliminary-recommendation-re17a-7.pdf.*

[359] *See, e.g.,* Exemption of Certain Purchase or Sale Transactions Between a Registered Investment Company and Certain Affiliated Persons Thereof, Investment Company Act Release No. 11136 (Apr. 21, 1980) [45 FR 29067 (May 1, 1980)] (''17a–7 Proposing Release''), at 12–13; Exemption of Certain Purchase or Sale Transactions Between a Registered Investment Company and Certain Affiliated Persons Thereof, Investment Company Act Release No. 11676 (Mar. 10, 1981) [46 FR 17011 (Mar. 17, 1981)] (''17a–7 Adopting Release'') at 10 (''If the rule were expanded to include securities for which market quotations are not readily available, the independent basis for determining the value of securities would be eliminated.'').

[360] *See* 17a–7 Proposing Release, *supra* footnote 359, at n.16.

[361] 17a–7 Adopting Release *supra* footnote 359, at 7 (noting the importance of active secondary markets to provide an independent basis for cross-trade pricing).

[362] We discuss in the economic analysis section below the impact that the adoption of this definition may have on such fund cross trading practices. *See infra* section III.D.5

[363] *See, e.g.,* United Municipal Bond Fund, SEC Staff No-Action Letter (Jan. 27, 1995) and Federated Municipal Funds, SEC Staff No-Action Letter (Nov. 20, 2006).

[364] *See* Spring 2020 Securities and Exchange Commission Regulatory Actions, *available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=1A4EE40E5F597FA80ECBE64464FA72F1716FCD8F60FDF1D26B9A8644E274D25057FE57666F0C582CC5575C6CC8DC0DCE11D3.*

[365] *See* Proposing Release, *supra* footnote 2 at n.150.

[366] *See* ICI Comment Letter; Comment Letter of PricewaterhouseCoopers LLP (July 21, 2020) (''PWC Comment Letter''); KPMG Comment Letter; ABA Comment Letter; Comment Letter of Ernst & Young LLP (July 20, 2020) (''E&Y Comment Letter''); Council of Institutional Investors Comment Letter; MFDF Comment Letter, Duff & Phelps Comment Letter; Invesco Comment Letter; Federated Hermes; Comment Letter of Charles E. Andrews, et al. (July 21, 2020) (''Capital Group Directors Comment Letter''); Capital Group Comment Letter.

[367] *See* ICI Comment Letter.

[368] *See* Scheidt Comment Letter 2.

[369] *See* Scheidt Comment Letter 1; Scheidt Comment Letter 2; NYC Bar Comment Letter and Vanguard Comment Letters that highlight reaffirming certain concepts from ASR 118 and the 1999 Letter to ICI (there can be differences in valuation depending on fund structures).

[370] *See* Duff & Phelps Comment Letter; ICI Comment Letter; KPMG Comment Letter; E&Y Comment Letter; PWC Comment Letter.

[371] *See* Scheidt Comment Letter 1 (discussing previous SEC enforcement actions regarding odd-lots, including Pacific Investment Management Company LLC, Investment Company Act Release No. 4577 (Dec. 1, 2016) and Semper Capital Management, LP, Investment Advisers Act Release No. 5489 (Apr. 28, 2020)).

[372] *See, e.g.,* ICI Comment Letter.

With respect to the comments concerning odd lot valuation practices, the rescission of the ASRs will not change the Commission's ability to bring similar enforcement cases in the future. The cases were brought under several legal bases, including section 34(b) of the Act and 17 CFR 270.22c–1, because the funds made misstatements related to their performance and sold shares at a price other than their current net asset values. Although the guidance in the ASRs has been cited in prior cases, these cases were brought under independent legal bases as stated above, and valuing odd lots at a price that a fund cannot access on the measurement date will continue to be inconsistent with these requirements and ASC Topic 820 after the rescission of the ASRs.[373]

Among other things, ASC Topic 820 provides a principles-based framework for valuing all investments. The accounting standards are not designed to describe specific fair value measurement fact patterns; we disagree with certain commenters that certain fund specific valuation issues are not addressed in U.S. GAAP and continue to believe that the principles in ASC Topic 820 provide a framework appropriate to utilize for all fair value measurements.[374] In light of this, and in connection with the adoption of rule 2a–5, the specific incremental guidance included in the ASRs is no longer necessary.

Furthermore, as discussed in the proposing release, the guidance in ASR 118 states that auditors of funds should verify all quotations for securities with readily available market quotations, implicating the auditor's requirement to test the valuation assertion for all securities when auditing a fund's financial statements.[375] We believe, and commenters agreed, that rescinding the auditing guidance included in ASR 118 would allow fund auditors to apply only PCAOB standards, which would permit sampling and other techniques to verify the value of a fund's investments, and believe that such a change is appropriate. [376] While this will provide the auditors with greater flexibility in carrying out their audit procedures, a fund board or valuation designee could request that its auditor continue current practice to verify 100% of the values of the fund's investments if it determines that this approach is preferable.[377] Therefore, after review of the comments received and for the reasons noted above, ASR 113 and ASR 118 are rescinded in their entirety upon the compliance date of the final rule.[378]

F. Existing Commission Guidance, Staff No-Action Letters, and Other Staff Guidance

In addition to our rescission of ASR 113 and ASR 118, certain Commission guidance, staff letters and other staff guidance addressing a board's determination of fair value and other matters covered by the rules will be withdrawn or rescinded in connection with this adoption. Upon the compliance date of these rules, some staff letters and other Commission and staff guidance, or portions thereof, will be moot, superseded, or otherwise inconsistent with the rules and, therefore, will be withdrawn or rescinded.

Commenters generally agreed that certain existing Commission and staff guidance should be withdrawn as part of the adoption of rule 2a–5.[379] While many commenters agreed with the scope of the guidance we identified for withdrawal in the proposal, others suggested that additional guidance be withdrawn or rescinded, such as the guidance on overseeing pricing services contained in the 2014 Money Market Fund Release.[380] As discussed in section II.A.4 above (relating to pricing services), the guidance on oversight of pricing services contained in the 2014 Money Market Fund Release is superseded by the guidance on pricing service oversight contained in this release.[381] Additionally, as discussed in the fair value methodologies section above, we are rescinding and restating certain guidance the Commission provided in the 2014 Money Market Fund Release regarding the valuation of thinly traded securities.[382] As proposed, however, we are not modifying or supplementing the Commission's prior guidance regarding the use of the amortized cost method because the Commission continues to believe that our prior guidance, as discussed in the 2014 Money Market Fund Release, remains relevant, adequate, and appropriate.[383] Finally, two commenters [384] asked that one staff no-action letter be retained regarding the meaning of ''good faith,'' which characterizes ''good faith'' as ''a flexible concept that can accommodate many different considerations.'' [385] Retaining the staff letters as recommended by these commenters is unnecessary because the framework set out in U.S. GAAP along with the guidance provided in the fair value methodologies section of this release supports this flexible meaning of good faith.[386]

Upon the compliance date of the rules, certain Commission guidance as well as all the staff letters and other staff guidance listed below will be withdrawn. Some commenters also asked that we confirm that, to the extent staff guidance not identified in the proposal conflicts with the requirements of the rules, such guidance is superseded.[387] To the extent any staff guidance is inconsistent or conflicts with the requirements of the rules, even if not specifically identified below, that guidance is superseded.

[373] ASC Topic 820 requires that the reporting entity have access to the principal or most advantageous market used to measure fair value (see ASC 820–10–35–6A), and so a reporting entity may not use round lot pricing if it is not able to access the round lot market at the measurement date.

[374] *See* Scheidt Comment Letter 1.

[375] *See* Proposing Release, *supra* footnote 2, at n.149

[376] *See* PWC Comment Letter; KPMG Comment Letter; E&Y Comment Letter; Deloitte Comment Letter; ICI Comment Letter; IDC Comment Letter; NYSSCPA Comment Letter. *See also* Proposing Release, *supra* footnote 2, at n.149, stating that the statutory requirement in section 30(g) of the Investment Company Act, which requires the independent public accountant to verify securities owned, implicates the auditors requirement to test the existence assertion of all securities. The statutory requirement under section 30(g) remains distinct from the rescinded valuation guidance in ASR 118 and the auditing standards established by the PCAOB concerning accounting estimates, including fair value.

[377] See ICI Comment Letter.

[378] *See infra* footnote 391 and accompanying text (stating that a fund may voluntarily comply with the final rule in advance of the compliance date).

[379] *See, e.g.,* ICI Comment Letter; IDC Comment Letter; ABA Comment Letter; MFDF Comment Letter; Capital Group Comment Letter; Invesco Comment Letter.

[380] ABA Comment Letter; MFDF Comment Letter; Fidelity Trustees Comment Letter; IDC Comment Letter; NYC Bar Comment Letter; American Funds Trustees Comment Letter; Council of Institutional Investors Comment Letter.

[381] *See supra* section II.A.4.

[382] *See supra* section II.A.2.

[383] *See supra* footnote 116 (noting that the guidance in the 2014 Money Market Fund Release on the use of amortized cost valuation remains valid).

[384] ICI Comment Letter; Federated Hermes Comment Letter. *See also* SIFMA AMG Comment Letter.

[385] *See* Investment Company Institute, SEC Staff No-Action Letter (Dec. 8, 1999).

[386] *See supra* section II.A.2. For example, under U.S. GAAP, investments generally have a range of acceptable values. Accordingly, different funds, based on the various factors and market conditions considered could reasonably come to different conclusions on the price of a particular investment.

[387] ABA Comment Letter.

Name	Date	Topic
Paul Revere Investors, Inc	Feb. 21, 1973	Delegation to a board valuation committee.
The Putnam Growth Fund and Putnam International Equities Fund, Inc.	Jan. 23, 1981	Fair value of portfolio securities which trade on a closed foreign exchange.
Form N–7 for Registration of Unit Investment Trusts under the Securities Act of 1933 and the Investment Company Act of 1940, Investment Company Act Release No. 15612, Appendix B, Guide 2.	Mar. 17, 1987	Fair value for UITs to be determined by the trustee or its appointed person.
Investment Company Institute	Dec. 8, 1999	Fair value generally.
Investment Company Institute	Apr. 30, 2001	Fair value generally.
Last paragraph of Section III.D.2.(a) and the entirety of Section III.D.2.(b) of the 2014 Money Market Fund Release.	July 23, 2014	Guidance regarding the fair value of thinly traded securities and use of pricing services.
Valuation Guidance Frequently Asked Questions (FAQ 1 *only*)	2014	Fund directors' responsibilities when determining whether an evaluated price provided by a pricing service, or some other price, constitutes fair value.

G. Transition Period

The Commission is adopting an eighteen month transition period beginning from the effective date of the rules to provide sufficient time for funds and valuation designees to prepare to come into compliance with rules 2a–5 and 31a–4.[388] Some commenters urged the Commission to provide more time beyond the one-year transition period we discussed in the Proposing Release, suggesting an extended time period of eighteen months for compliance in light of the aspects of the proposed rule that they believed may require funds to change certain of their practices.[389] We appreciate these concerns, and accordingly, the compliance date will be eighteen months following the effective date of the rules. We will rescind ASRs 113 and 118 on the compliance date, and the other identified guidance will also be withdrawn. Additionally, we agree with one commenter that urged the Commission to provide funds with the option of complying with the rules prior to the compliance date.[390] Once the rules become effective, a fund may voluntarily comply with the rules in advance of the compliance date. To promote regulatory consistency, however, any fund that elects to rely on rules 2a–5 and 31a–4 prior to the compliance date may rely only on rules 2a–5 and 31a–4, and not also consider Commission and staff letters and other guidance that will be withdrawn or rescinded on the compliance date in determining fair value in good faith for purposes of section 2(a)(41) of the Act and rule 2a–4 thereunder.[391]

H. Other Matters

Pursuant to the Congressional Review Act,[392] the Office of Information and Regulatory Affairs has designated these rules, collectively, as a ''major rule,'' as defined by 5 U.S.C. 804(2). If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

III. Economic Analysis

A. Introduction

Rule 2a–5 provides requirements for determining fair value in good faith for purposes of section 2(a)(41) of the Act and rule 2a–4 thereunder. The Commission is adopting rule 2a–5 for the reasons provided above in section II. The final rule provides that determination of fair value in good faith requires assessing and managing material risks associated with fair value determinations; selecting, applying, and testing fair value methodologies; and evaluating any pricing services used.[393] The Commission is also adopting rule 31a–4, which includes the recordkeeping requirements associated with rule 2a–5.

Rule 2a–5 permits a fund's board of directors to designate certain parties to perform such fair value determinations in good faith, who will then carry out these functions for some or all of the fund's investments. This designation will be subject to board oversight and certain reporting and other requirements designed to facilitate the board's ability to oversee effectively this party's fair value determinations.[394] These requirements of the final rule directly address conflicts of interest and other risks posed when fair value determinations are performed by persons other than the board. It also provides a mechanism for coordinating the requirements of the Act with U.S. accounting standards. Lastly, rule 2a–5 defines when market quotations are readily available for purposes of section 2(a)(41) of the Act.[395]

We are sensitive to the economic effects that may result from the rules, including the benefits, costs, and the effects on efficiency, competition, and capital formation.[396] Section 2(c) of the Investment Company Act requires us, when engaging in rulemaking that requires us to consider or determine whether an action is consistent with the public interest, to also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

We discuss potential effects of the rules as well as possible alternatives to the rules in more detail below. Where possible, we have attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from the rules. In some cases, however, we are unable to quantify the economic effects because we lack the information necessary to provide a reliable estimate. Where we are unable to quantify the economic effects of the rules, we provide a qualitative assessment of the potential effects.

[388] The compliance date will require boards and valuation designees to implement the new rules as of that date regardless of their fiscal year end or financial reporting period.

[389] *See, e.g.,* ICI Comment Letter; Dechert Comment Letter; IDC Comment Letter; Invesco Comment Letter.

[390] *See* ABA Comment Letter.

[391] As evidence of the date of early compliance, the records to be kept under rule 2a–5 would also need to begin being maintained as of that date.

[392] 5 U.S.C. 801 *et seq.*

[393] *See* rule 2a–5(a). Additionally, upon the adoption of rule 2a–5, rule 38a–1 will require the adoption and implementation of written policies and procedures reasonably designed to prevent violations of the requirements of rule 2a–5.

[394] *See* rule 2a–5(b).

[395] *See* rule 2a–5(c).

[396] Our analysis of the final rule takes into account the rescission of ASR 113 and ASR 118 as well as the withdrawal and rescission of certain staff letters and Commission and staff guidance addressing a board's determination of fair value and other matters covered by rule 2a–5. *See supra* sections II.E and II.F.

B. Economic Baseline

1. Current Regulatory Framework

To understand the effects of the rules, we compare the requirements of the rules to the current regulatory framework and current industry practices. As discussed in greater detail in section II above, the regulatory framework regarding fair value determinations and the role of the board of directors in the determination of fair value is set forth in the Investment Company Act and the rules thereunder. The Commission has also expressed its views on the role of the board regarding fair value under the Investment Company Act in several releases, including ASR 113 and ASR 118, the 2014 Money Market Fund Release, and the Compliance Rules Adopting Release.[397]

Section 2(a)(41) of the Investment Company Act defines the value of assets for which market quotations are not readily available as fair value as determined by the board of directors in good faith. Under the Investment Company Act, whenever market quotations are readily available for a security, these market quotations must be used to value that security.[398] Whenever market quotations are not readily available for a fund security or if the investment is not a security, the fund must value that investment using its fair value as determined by the board in good faith.

As discussed in the Proposing Release, the Commission stated in ASR 113 and ASR 118 that the board need not itself perform each of the specific tasks required to calculate fair value in order to perform its role under section 2(a)(41).[399] However, ASR 113 and ASR 118 stated that the board should choose the methods used to arrive at fair value and continuously review the appropriateness of such methods.[400] In addition, the Commission stated that boards should consider all appropriate factors relevant to the fair value of fund investments for which market quotations are not readily available.[401] Finally, the Commission stated that whenever technical assistance is requested from individuals who are not directors, the findings of such individuals must be carefully reviewed by the directors in order to satisfy themselves that the resulting valuations are fair.[402]

The 2014 Money Market Fund Release stated that funds ''may consider evaluated prices from third-party pricing services, which may take into account these inputs as well as prices quoted from dealers that make markets in these instruments and financial models.'' [403] The 2014 Money Market Fund Release also stated that ''evaluated prices provided by pricing services are not, by themselves, 'readily available' market quotations or fair values 'as determined in good faith by the board of directors' as required under the Investment Company Act.'' [404] In addition, the Commission discussed in that release the factors that the fund's board of directors may want to consider ''[b]efore deciding to use evaluated prices from a pricing service to assist it in determining the fair values of a fund's portfolio securities.'' [405]

Finally, for a fund to engage in a cross trade under rule 17a–7, the security first must have a ''readily available market quotation'' and then the transaction must meet the other conditions of rule 17a–7. Currently, funds and their affiliates rely on rule 17a–7 and consider related staff no-action letters when engaging in cross trades of certain fixed-income securities. Funds' reliance on rule 17a–7 and funds' practices in consideration of related staff no-action letters form part of our baseline for the economic analysis of the final rules.[406]

2. Current Practices

Our understanding of current fair value practices is based on fund disclosures, staff discussions with industry representatives, staff's experience, review of relevant industry publications and academic papers, and commenters' letters.[407] We expect that funds' policies and procedures generally reflect their fair value practices.[408] We discuss below our understanding of current practices but acknowledge that practices may vary across funds and through time.[409]

(a) Fair Value Calculation

Most fund boards or UIT trustees do not play a day-to-day role in the pricing of fund investments.[410] Typically, an adviser to a fund or other service providers perform the actual day-to-day fair value calculations.[411] Commenters stated that sub-advisers play a role or assist in the fair value determination process.[412] In addition to performing day-to-day calculations, advisers also typically develop (or assist the board in developing) the fund's fair value methodologies.[413] Commenters generally validated this view of boards' oversight role and advisers' roles in day-

[397] *See supra* footnotes 1, 2, and 4. *See also supra* section I (discussing other aspects of funds' regulatory framework that are related to boards' fair value role (*e.g.,* ASC Topic 820)).

[398] *See* section 2(a)(41) and rule 2a–4.

[399] *See* Proposing Release, *supra* footnote 2, at n.14.

[400] *Id.*

[401] *See* Proposing Release, *supra* footnote 2, at n.15.

[402] *See* Proposing Release, *supra* footnote 2, at n.16; ASR 118.

[403] 2014 Money Market Fund Release, *supra* footnote 11, at 47813.

[404] *Id.* at 47814.

[405] *Id.*

[406] *See supra* section II.D.

[407] *See, e.g.,* IDC Role of the Board, *supra* footnote 215; K&L Gates, *Mutual Fund Valuation and Liquidity Procedures* (2013), *available at https://files.klgates.com/files/upload/dc_im_07-valuation.pdf* (''2013 K&L Report''); Arthur Delibert, *Mutual Fund Pricing and Fair Valuation,* K&L Gates 2016 Investment Management Conference; (2016), *available at https://files.klgates.com/files/upload/2016im_dc_conference_presentations_sessioniv.pdf;* Mutual Fund Directors Forum, *Practical Guidance for Fund Directors on Valuation Oversight* (June 2012), *available at https://www.mfdf.org/docs/default-source/default-document-library/publications/white-papers/practical-guidance-for-fund-directors-on-valuation-oversight.pdf?sfvrsn=68e27dc6_2* (''MFDF Valuation Report''); *supra* footnote 10 and accompanying discussion. *See also* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; American Bankers Association Comment Letter; American Funds Comment Letter; Better Markets Comment Letter; Dechert Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Fidelity Comment Letter; Fidelity Trustees Comment Letter; Franklin Comment Letter; IAA Comment Letter; ICI Comment Letter; IDC Comment Letter; Invesco Comment Letter; IVSC Comment Letter; MFS Comment Letter; Murphy Comment Letter; New York City Bar Association Comment Letter; SIFMA AMG Comment Letter; TRC Comment Letter; VRC Comment Letter.

[408] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 6–7. *See also* AIMA Comment Letter; Fidelity Trustees Comment Letter; ICI Comment Letter; Invesco Comment Letter; SIFMA AMG Comment Letter.

[409] *See supra* footnote 8 and accompanying discussion, and section II; *see also infra* footnotes 407 and 408.

[410] *See, e.g.,* Investment Company Institute, Independent Directors Council, & ICI Mutual Insurance Company, *An Introduction to Fair Valuation* (Spring 2005), at 7, *available at https://www.icimutual.com/system/files/Fair%20Valuation%20Series%20An%20Introduction%20to%20Fair%20Valuation.pdf* (''ICI Fair Valuation Report''). Nevertheless, ''[t]here may be circumstances at a particular fund group that leads a board and adviser to determine that it is desirable for an independent director to be involved in day-to-day decision-making, whether as part of the adviser's valuation committee or by reviewing and ratifying the committee's decisions daily.'' *See* MFDF Valuation Report, *supra* footnote 407, at 9.

[411] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 4. In addition, officers of internally managed funds may also perform this function in lieu of an adviser. *See* Sullivan Comment Letter; Deloitte Comment Letter; Seward & Kissel Comment Letter; SBIA Comment Letter; Franklin Comment Letter; NYC Bar Comment Letter; Dechert Comment Letter; *see also supra* section II.B.

[412] *See, e.g.,* IAA Comment Letter, (stating that ''while sub-advisers currently may provide input and support to the primary adviser on pricing and the fair value process, ultimately fund boards rely on the primary adviser, not the sub-adviser, to conduct the day-to-day valuation work.'')

[413] *See, e.g.,* 2013 K&L Report, *supra* footnote 407, at 14; MFDF Valuation Report, *supra* footnote 407, at 11.

to-day fair value calculations.[414] We understand that for UITs, which do not have a board of directors or an adviser, it is generally the evaluator designated in the UIT's trust indenture, which is often the UIT's depositor, that conducts the valuation activities equivalent to fund boards.[415] This evaluator may also seek assistance from service providers (such as pricing services) to perform the actual day-to-day fair value calculation. As discussed above,[416] pricing services provide advisers, funds, and depositors with information such as evaluated prices, matrix prices, price opinions, or other information for a wide range of investments, including fixed-income securities (*e.g.,* corporate and municipal bonds), securitized assets, and bank loans, that are used as prices or as inputs to the fair value determination process, as many commenters acknowledged.[417]

(b) *Fair Value Practices—Assess and Manage Risks* [418]

It is our understanding that boards, advisers, and UIT evaluators currently play an important role in identifying and managing valuation risks,[419] and many commenters confirmed this understanding.[420] Examples of valuation risks that funds often address include changes in market liquidity, reliance on a single source for pricing data, reliability of data obtained from pricing services for investments that are not traded on exchanges, reliability of data provided by credit rating agencies, use of internal information provided by portfolio managers to estimate fair values, use of internally developed models to value investments, extensive use of matrix pricing, the process surrounding the adviser's price overrides, timely identification of material events, and valuation risks arising from new investments.[421]

Many of these risks are operational in nature, such as model risk, which includes the risk of loss caused by using inaccurate models (methodologies) to make decisions such as determinations of fair value.[422] To the extent that valuation is less informed by liquid markets and price discovery mechanisms and is more informed by models, the risk of biased valuations rises. Model risk includes misspecified models, biased information provided by those with conflicts of interest, use of inappropriate inputs and assumptions, and incorrect implementation.

Funds' valuation practices generally focus on mitigating potential conflicts of interest of the adviser as well as conflicts of interest of other parties that assist the board with fair value determinations (*e.g.,* portfolio managers).[423] Some advisers currently have in place processes to address potential conflicts of interest when portfolio management personnel provides input regarding valuation for a fund.[424] UIT depositors may have weaker conflicts of interest in valuation processes because such depositors are generally compensated based on the number of units, rather than the trust's net assets.[425]

Valuation risks can change with changes in market conditions, changes in fund investments, changes in inputs and assumptions, and changes in methodologies or models. Hence, funds may periodically review any previously identified valuation risks.[426] Some boards meet with the fund's chief risk officer or members of the risk committee on a periodic basis to discuss the valuation of the portfolio investments as part of the assessment and management of previously identified risks.[427]

Many commenters noted that assessing and managing valuation risks is a part of current practice,[428] with one commenter noting the necessity of considering valuation risk in the context of determining whether a given fair value methodology would be appropriate.[429]

(c) Fair Value Practices—Establish Fair Value Methodologies [430]

Funds with investments that are fair valued currently have in place written policies and procedures that describe the methodologies used when calculating fair values.[431] Commenters confirmed our understanding of this

[414] *See, e.g.,* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; BNY Mellon Comment Letter; Dechert Comment Letter; Scheidt Comment Letter 2; Fidelity Comment Letter; First Trust Comment Letter; IAA Comment Letter; ICI Comment Letter; Invesco Comment Letter; JPMAM Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; Seward & Kissel Comment Letter.

[415] *See* ICI Comment Letter; Chapman Comment Letter; AAM Comment Letter; First Trust Comment Letter; Hennion & Walsh Comment Letter; Invesco Comment Letter; BNY Mellon Comment Letter.

[416] *See supra* section II.A.4 and *infra* section III.B.2.c).

[417] *See* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; American Bankers Association Comment Letter; American Funds Comment Letter; Baillie Gifford Comment Letter; Capital Group Comment Letter; Dechert Comment Letter; Deloitte Comment Letter; Dimensional Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Fidelity Trustees Comment Letter; First Trust Comment Letter; Franklin Comment Letter; Guggenheim Comment Letter; Guggenheim Trustees Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; IHS Markit Comment Letter; Invesco Comment Letter; IVSC Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; MFDF Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; NYSSCPA Comment Letter; Refinitiv Comment Letter; SSGA Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; TRC Comment Letter; VRC Comment Letter.

[418] *See supra* section II.A.1.

[419] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 6–8; Paul Kraft et al., *Fair Valuation Pricing Survey, 17th Edition, Executive Summary,* DELOITTE INSIGHTS (2019), at 10, *available at https://www2.deloitte.com/us/en/insights/industry/financial-services/fair-valuation-pricing-survey.html#:~:text=The%2017th%20annual%20Deloitte%20Fair,use%20of%20technology%2C%20internal%20controls* (''Deloitte Survey''). We lack information on how the Deloitte survey sample was constructed or how the survey data was collected, so we cannot speak to the representativeness of the sample or the unbiasedness of the survey responses. Nevertheless, the results of the survey are largely consistent with Commission staff's experience and in line with practices as described in prior Commission staff's letters. *See, e.g.,* staff letters, *supra* section II.F.

[420] *See, e.g.,* ABA Comment Letter; AIMA Comment Letter; American Bankers Association Comment Letter; American Fund Trustees Comment Letter; Baillie Gifford Comment Letter; CFA Institute Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Fidelity Trustees Comment Letter; Guggenheim Comment Letter; Harvest Comment Letter; IHS Markit Comment Letter; Invesco Comment Letter; IVSC Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; MFDF Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; Vanguard Comment Letter; VRC Comment Letter.

[421] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 6–8.

[422] *See, e.g.,* Clifford Rossi, *How to Reduce Model Risks: 4 Basic Principles,* GLOB. ASS'N OF RISK PROF'L; *https://www.garp.org/#!/risk-intelligence/all/all/a1Z1W000003PzmhUAC;* SR 11–7: Guidance on Model Risk Management, BD. OF GOVERNORS OF THE FED. RESERVE SYS., *https://www.federalreserve.gov/supervisionreg/srletters/sr1107.htm;* and Model Risk Management Guidance, FED. HOUSING FIN. AGENCY, *https://www.fhfa.gov/SupervisionRegulation/AdvisoryBulletins/Pages/AB-2013-07-Model-Risk-Management-Guidance.aspx.*

[423] According to a Deloitte survey, ''22 percent of survey participants noted that their boards seek to identify areas in the valuation process where there might be a conflict of interest and provide oversight relative to these conflicts.'' *See* Deloitte Survey, *supra* footnote 419, at 10. The cited statistic does not imply that the remaining funds do not have policies in place to manage conflicts of interest of advisers but it means that any such policies may not be valuation specific.

[424] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 9.

[425] *See, e.g.,* Chapman Comment Letter; ICI Comment Letter.

[426] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 8.

[427] According to a Deloitte Survey, 34% of survey participants reported that the board or one of its subcommittees met with the chief risk officer or members of the risk committee to discuss valuation matters. *See* Deloitte Survey, *supra* footnote 419, at 10.

[428] *See supra* section II.A.1 and section III.B.2.b).

[429] *See* Vanguard Comment Letter.

[430] *See supra* section II.A.2.

[431] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 6–7; MFDF Valuation Report, *supra* footnote 407, at 5; rule 38a–1.

practice.[432] UITs may provide for the methodology in which the assets shall be valued by the evaluator within the UIT's trust indenture.[433]

The methodologies provided in policies and procedures or trust indentures can require multiple data sources and entail various assumptions.[434] Methodologies often establish a suggested ranking of the pricing sources that an adviser should use when valuing investments, and different rankings can be established for different types of investments.[435] Many funds and advisers periodically review the appropriateness and accuracy of the methodologies used in valuing investments and make any necessary adjustments.[436] Further, funds and advisers generally monitor the circumstances that may necessitate the use of fair values.[437] For example, many funds establish triggering mechanisms in their policies and procedures to monitor circumstances that require the use of fair value methodologies, and third-party pricing services may be used to identify those triggering events.[438] As discussed above, pricing services also play an important role in the fair value determination process and, as such, help to establish fair value methodologies that are reviewed by funds and advisers.[439]

We understand that fund boards, advisers, and UIT depositors and evaluators have generally established fair value methodologies for their investments that lack readily available market quotations, which are generally applied consistently in accordance with policies and procedures or trust indentures as described above.[440] Similarly, many commenters stated that pricing services establish their own methodologies,[441] subject to the due diligence of the board or adviser,[442] and one commenter stated that pricing services recommend methodologies.[443]

(d) Fair Value Practices—Test Fair Value Methodologies [444]

We understand that funds or pricing services generally test the appropriateness and accuracy of internally selected methodologies used to value investments.[445] Funds may utilize methods such as back-testing to review the appropriateness and accuracy of the methodologies used.[446] We understand that many funds use systems to identify security valuations that may require additional attention, such as security prices that have not changed over a period of time and price changes beyond a certain threshold.[447] Many commenters confirmed our understanding that testing fair value methodologies is common practice.[448]

(e) Fair Value Practices—Identify Responsibilities

As discussed above, a fund's adviser often plays an important and valuable role in carrying out the day-to-day work of determining fair values, while the board reviews periodic reports from the adviser regarding the fair value of fund investments and fair value practices (*e.g.,* methodologies, testing, etc.).[449] UITs, which lack a board of directors, generally describe who is responsible for valuation duties in the UIT's trust indenture, with the depositor or evaluator generally performing fair value determinations, sometimes with the assistance of other parties such as evaluators.[450] As discussed above [451] and as acknowledged by many commenters,[452] pricing services provide advisers and funds with information such as evaluated prices, matrix prices, price opinions, or other information that is used as prices or as inputs to the fair value determination process. Some boards create separate valuation committees with clearly established

[432] *See, e.g.,* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; Capital Group Comment Letter; Chapman Comment Letter; Dechert Comment Letter; Dimensional Comment Letter; Duff & Phelps Comment Letter; First Trust Comment Letter; Franklin Comment Letter; Guggenheim Comment Letter; Guggenheim Trustees Comment Letter; Harvest Comment Letter; IAA Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; IHS Markit Comment Letter; Invesco Comment Letter; University of Miami Comment Letter; IVSC Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; Refinitiv Comment Letter; Russell Investments Comment Letter; Scheidt Comment Letter 2; SSGA Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; VRC Comment Letter.

[433] *See* ICI Comment Letter; Chapman Comment Letter; AAM Comment Letter; First Trust Comment Letter; Hennion & Walsh Comment Letter; Invesco Comment Letter; BNY Mellon Comment Letter.

[434] *See, e.g.,* AIMA Comment Letter; ASA Comment Letter; CFA Institute Comment Letter; Dechert Comment Letter; Duff & Phelps Comment Letter; Harvest Comment Letter; ICI Comment Letter; Invesco Comment Letter; MFS Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; SIFMA AMG Comment Letter; Chapman Comment Letter.

[435] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 5.

[436] According to the Deloitte survey, 72% of survey participants performed periodic reviews of valuation models relating to private equity investments to determine the appropriateness and accuracy relative to the investment being valued, and 56% of participants reported that the valuation models used for private equity investments are explicitly subject to internal control policies and procedures. According to the same survey, 63% of survey participants made a change or revision to their valuation policies over the last year. *See* Deloitte Survey, *supra* footnote 419, at 9 and 14.

[437] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 5.

[438] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 6–7 and 10–11; MFDF Valuation Report, *supra* footnote 407, at 5.

[439] *See supra* section II.A.4.

[440] *See, e.g.,* AAM Comment Letter; BNY Mellon Comment Letter; Chapman Comment Letter; First Trust Comment Letter; Hennion & Walsh Comment Letter; ICI Comment Letter; Invesco Comment Letter.

[441] *See, e.g.,* ABA Comment Letter; American Bankers Association Comment Letter; Dechert Comment Letter; Dimensional Comment Letter; Guggenheim Comment Letter; IAA Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; John Hancock Comment Letter; Refinitiv Comment Letter; Russell Investments Comment Letter; SSGA Comment Letter; Sullivan Comment Letter.

[442] *See, e.g.,* ABA Comment Letter; Dechert Comment Letter; IAA Comment Letter; ICE Data Comment Letter; IDC Comment Letter; John Hancock Comment Letter; Russell Investments Comment Letter; SSGA Comment Letter;

[443] *See* NYC Bar Comment Letter.

[444] *See supra* section II.A.3.

[445] *See infra* section III.B.2.f).

[446] *See, e.g.,* ICI Fair Valuation Report, *supra* footnote 410, at 17–18.

[447] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 6–7.

[448] *See, e.g.,* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; American Funds Comment Letter; Capital Group Comment Letter; Dimensional Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Franklin Comment Letter; Guggenheim Comment Letter; Harvest Comment Letter; ICI Comment Letter; IHS Markit Comment Letter; Invesco Comment Letter; University of Miami Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; MFDF Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; NYSSCPA Comment Letter; Refinitiv Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; TRC Comment Letter.

[449] *See supra* section II.B and section II.B.3.

[450] *See supra* section II.B, footnotes 171–173 and accompanying discussion. *See also* AAM Comment Letter; BNY Mellon Comment Letter; Chapman Comment Letter; First Trust Comment Letter; Hennion & Walsh Comment Letter; Invesco Comment Letter; MFS Comment Letter; Seward & Kissel Comment Letter.

[451] *See supra* section II.A.4, section III.B.2.a), and section III.B.2.c).

[452] *See* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; American Bankers Association Comment Letter; American Funds Comment Letter; Baillie Gifford Comment Letter; Capital Group Comment Letter; Dechert Comment Letter; Deloitte Comment Letter; Dimensional Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Fidelity Trustees Comment Letter; First Trust Comment Letter; Franklin Comment Letter; Guggenheim Comment Letter; Guggenheim Trustees Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; IHS Markit Comment Letter; Invesco Comment Letter; IVSC Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; MFDF Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; NYSSCPA Comment Letter; Refinitiv Comment Letter; SSGA Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; TRC Comment Letter VRC Comment Letter.

functions that help the board provide oversight of the advisers' valuation practices.[453] If used, the structure of the valuation committees can differ across funds. Finally, fund policies and procedures may include ''escalation procedures'' that describe the circumstances under which certain adviser personnel or board members should be notified when fair value issues arise that are not addressed in existing fair value policies and procedures.[454]

The commenters who weighed in on this aspect confirmed our understanding of these practices.[455] Commenters stated that advisers currently have the ''means to ensure that portfolio managers do not exert undue influence on the fair value process'' [456] and that other practices such as ''establish[ing] [a] 'middle office' that facilitates the establishment of [fair value]'' determinations mitigates ''undue influence'' from portfolio managers.[457] Another commenter described segregating duties by ''delegating the calculation, determination, and production of the NAV to a suitably independent, competent and experienced third-party valuation service provider'' and that ''[i]f the investment manager is responsible for determining the NAV, and/or acts as the fund governing body, robust controls over conflicts of interest should be established.'' [458] The same commenter also described appointing an investment manager valuation committee to mitigate conflicts of interest and ensuring that a broker or dealer that provides inputs to fair value ''is free of relationships with the fund through which the investment manager can directly or indirectly control or influence the broker or dealer.'' [459] Other commenters underscored the importance of segregating duties and described practices to mitigate the risk from conflicts of interest in the valuation process.[460]

(f) Fair Value Practices—Evaluate Pricing Services [461]

We understand that, under existing practice, fund boards, advisers, and UIT depositors frequently use third-party pricing service providers to assist in determining fair values.[462] Before engaging a pricing service, boards may review background information on the vendor, such as the vendor's operations and internal testing procedures, emergency business continuity plans, and methodologies and information used to form its recommended valuations.[463] Boards may develop an understanding of the circumstances in which third-party pricing services would provide assistance in the valuation of fund investments.[464] In reviewing the performance of these pricing services, boards also may seek input from the fund's adviser or the pricing service itself, including probing whether the adviser performed adequate due diligence when selecting the service.[465] In particular, boards may consider whether the adviser tests prices received from pricing services against subsequent sales or open prices, whether the pricing services are periodically reviewed, and to what extent the pricing service considers adviser input. Funds may establish procedures for ongoing monitoring of the pricing services—including the pricing service's presentations to the board, the adviser's due diligence, and on-site visits to the pricing service—to determine whether the pricing service continues to have competence in valuing particular investments and maintains an adequate control environment.[466] Further, boards may seek to understand the circumstances under which the adviser may challenge or override the prices obtained from the pricing service provider.[467] Many commenters confirmed our understanding of common practices in the evaluation of pricing services.[468] While some commenters stated that some advisers (*e.g.,* small advisers) lack the resources or staffing to perform due diligence of pricing services, back-testing of methodologies, analysis of pricing challenge efficacy, and back-testing of fair value determinations,[469] most commenters stated that funds routinely rely on advisers to conduct due diligence on pricing services.[470]

(g) Board Reporting [471]

Many commenters confirmed our understanding of current practices of board reporting.[472] On a periodic basis, as part of their current fair value oversight, boards may review reports from the adviser regarding the fair value of fund investments [473] and fair value methodologies, but rely on the adviser for the day-to-day calculation of fair values.[474] Many boards review fair value determinations based on information provided in quarterly reports, but some boards review the determinations in more or less frequent reporting depending on the type of fund investments and the market conditions.[475] Boards also may have ad-hoc discussions on valuation matters outside of their regular meetings.[476] In some circumstances, board members may play an active role in shaping the type of information contained in and the format of valuation reports given to the

[453] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 8–10.

[454] *Id.* at 7.

[455] *See, e.g.,* AIMA Comment Letter; ABA Comment Letter; Murphy Comment Letter; MFS Comment Letter.

[456] ICI Commenter Letter; *see also* Seward & Kissel Comment Letter;

[457] *See* VRC Comment Letter.

[458] *See* AIMA Comment Letter.

[459] *Id.*

[460] *See, e.g.,* ABA Comment Letter; Fidelity Comment Letter; IVSC Comment Letter; Murphy Comment Letter.

[461] *See supra* section II.A.4.

[462] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 10; IDC Role of the Board, *supra* footnote 215, at 10–11.

[463] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 11.

[464] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 10.

[465] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 11.

[466] *Id.*

[467] *Id.* at 10–11.

[468] *See, e.g.,* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; Capital Group Comment Letter; Dechert Comment Letter; Deloitte Comment Letter; Dimensional Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Fidelity Trustees Comment Letter; First Trust Comment Letter; Guggenheim Comment Letter; Harvest Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; IHS Markit Comment Letter; Invesco Comment Letter; University of Miami Comment Letter; IVSC Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; KPMG Comment Letter; MFDF Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; Practus Comment Letter; Refinitiv Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; TRC Comment Letter; Vanguard Comment Letter; VRC Comment Letter.

[469] *See, e.g.,* MFS Comment Letter; Sullivan Comment Letter.

[470] *See, e.g.,* ABA Comment Letter; Advisors' Inner Circle Comment Letter; American Funds Comment Letter; Capital Group Comment Letter; Dimensional Comment Letter; First Trust Comment Letter; Guggenheim Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; Invesco Comment Letter; John Hancock Comment Letter; Refinitiv Comment Letter; Russell Investments Comment Letter; TRC Comment Letter.

[471] *See supra* section II.B.1.

[472] *See, e.g.,* ABA Comment Letter; Advisors' Inner Circle Comment Letter; AIMA Comment Letter; American Funds Comment Letter; Capital Group Comment Letter; Dechert Comment Letter; Fidelity Comment Letter; Fidelity Trustees Comment Letter; Guggenheim Comment Letter; IAA Comment Letter; IDC Comment Letter; MFS Comment Letter; Murphy Comment Letter; SIFMA AMG Comment Letter; Vanguard Comment Letter.

[473] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 12–13.

[474] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 2 as well as *supra* section III.B.2.e).

[475] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 10. *See also* Deloitte Survey, *supra* footnote 419, at 10 (stating that 26% of the participants mentioned that the board held a valuation discussion in the prior 12 months with management outside of a regularly scheduled meeting to address a valuation matter or question).

[476] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 14.

board.[477] The content of reports boards receive depends on the type of fund and fund investments.[478] The type of general information that boards may receive includes a summary of back-testing data and an analysis of the impact of fair values on the fund's NAV.[479] The reports also may include more specific information about fund investments that are more difficult to value, such as the fair values assigned to each investment, the size of the holding, the effect of the fair value on the fund's NAV, and the rationale for the decision to fair value.[480] Some board reports may also include security-specific information in cases where advisers override prices provided by pricing services.[481] Finally, some funds also include in board reports the minutes of, or summary memoranda and other written documentation from, valuation committee meetings held during the prior period.[482]

Valuation reports may vary depending on the volume and complexity of fair value determinations.[483] For example, some boards require a case-by-case review of each asset that received fair value, whereas other boards require the adviser to provide a sample report on an asset that was assigned a fair value to illustrate the methodology that is used by the adviser.[484]

(h) Recordkeeping [485]

It is our understanding that funds and advisers currently retain records related to fair value determinations. These records generally include identifying information for each portfolio investment, data used for pricing, and any other information related to price determinations and fund valuation policies and procedures. Commenters generally confirmed our understanding of common practices in recordkeeping.[486] We recognize that some fund boards may not apply these same recordkeeping practices for some investments, including, for example, those for which the board relies on pricing services for fund investments using level 2 inputs for fair value determinations.[487] Furthermore, commenters described common recordkeeping practices such as maintaining specific methodologies, inputs, and assumptions for investments fair valued with level 3 inputs and conducting due diligence of pricing services' methodologies and testing for investments fair valued with level 2 inputs;[488] maintaining records of methodologies and other detailed inputs and assumptions for cases when a fund, board, or adviser establishes and applies its own methodologies;[489] maintaining only prices from a pricing service (*e.g.,* evaluated prices for securities fair valued with level 2 inputs) that were actually used as an input by the adviser;[490] and not maintaining records for investments for which the funds rely on pricing services to calculate fair value for assets valued with level 2 inputs.[491]

(i) Cross Trades [492]

It is our understanding that some funds currently rely on rule 17a–7 and consider staff no-action letters when engaging in cross trades in investments, including fixed-income securities.[493] Commenters confirmed our understanding of the common practice of cross trades.[494] Furthermore, some commenters noted that some funds may currently cross trade certain assets that rely on level 2 inputs.[495]

3. Affected Parties

Rules 2a–5 and 31a–4 potentially affect all registered investment companies and BDCs (because their fund investments must be fair valued under the Act), those funds' boards of directors, advisers, and investors. The rules also affect funds that engage in cross trades. Table 1 below presents descriptive statistics for the funds that could be affected by the rules. As of September 11, 2020, there were 14,010 registered investment companies: (i) 12,680 open-end funds; (ii) 664 closed-end funds; (iii) 661 UITs; and (iv) 14 variable annuity separate accounts

[477] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 14.

[478] *Id.*

[479] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 12.

[480] *Id.* at 12–13.

[481] *Id.* at 13. *See also* Deloitte Survey, *supra* footnote 419, at 10 (noting that 74% of the participants in the 2019 survey reported that their boards receive price challenge information as part of the valuation reports).

[482] *See, e.g.,* IDC Role of the Board, *supra* footnote 215, at 13.

[483] *See, e.g.,* MFDF Valuation Report, *supra* footnote 407, at 14.

[484] *Id.*

[485] *See supra* section II.C.

[486] *See, e.g.,* Advisors' Inner Circle Comment Letter; AIMA Comment Letter; Baillie Gifford Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Franklin Comment Letter; Guggenheim Comment Letter; Guggenheim Trustees Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; Invesco Comment Letter; University of Miami Comment Letter; JPMAM Comment Letter; John Hancock Comment Letter; MFS Comment Letter; NYC Bar Comment Letter; SIFMA AMG Comment Letter; SSGA Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; TRC Comment Letter; Vanguard Comment Letter; VRC Comment Letter.

[487] *See, e.g.,* American Bankers Association Comment Letter; Baillie Gifford Comment Letter; Capital Group Comment Letter; ICE Data Comment Letter; John Hancock Comment Letter; SSGA Comment Letter; TRC Comment Letter; Vanguard Comment Letter.

[488] *See, e.g.,* Vanguard Comment Letter.

[489] *See, e.g.,* IDC Comment Letter.

[490] *See, e.g.,* SSGA Comment Letter.

[491] *See, e.g.,* Franklin Comment Letter; Baillie Gifford Comment Letter.

[492] *See supra* section II.C.

[493] *See supra* footnotes 356, 357, and 358 and accompanying discussion.

[494] *See, e.g.,* ABA Comment Letter; Capital Group Comment Letter; Dechert Comment Letter; Dimensional Comment Letter; ICE Data Comment Letter; ICI Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; Stradley Comment Letter; Sullivan Comment Letter; TRC Comment Letter.

[495] *See supra* section II.D.

registered as management companies.[496] As of the same date, (i) open-end funds held total net assets of $27,112 billion; (ii) closed-end funds held total net assets of $308 billion; (iii) UITs held total net assets of $2,113 billion; and (iv) variable annuity separate accounts registered as management companies held total net assets of $226 billion. As of September 2020, there were 97 BDCs with $62 billion in total net assets.[497] Not all funds hold investments that must be fair valued under the Act, and not all funds engage in cross trades. In addition, for those funds that hold investments that must be fair valued under the Act or that engage in cross trades, the extent of those investments and activities varies. Hence, the rules affect only a subset of the funds listed in Table 1 below.

TABLE 1—DESCRIPTIVE STATISTICS FOR FUNDS

	Number of funds (1)	Total net assets (in billion $) (2)
Open-end funds	12,680	27,112
Closed-end funds	664	308
UITs	661	2,113
Management company separate accounts	14	226
BDCs [1]	97	62
Total	14,116	29,821

Note 1. Out of 97 BDCs reporting on Form N–CEN, nine were reported as being internally managed.
Sources: Form 10–K; Form 10–Q; Form N–CEN.

To understand the extent of current boards' involvement in the valuation of funds' investments and the extent to which the rules could affect funds' operations (including for funds that engage in cross trades), we examine funds' investments under the U.S. GAAP fair value hierarchy.[498] For purposes of this economic analysis, we treat investments that are valued using level 1 inputs as investments for which readily available market quotations are available, and investments valued using level 2 and 3 inputs as investments that must be fair valued in good faith under the Act's definition of value.[499] We therefore expect that funds that hold more investments that are valued using level 2 and level 3 inputs will be more affected by the rules than funds with no or fewer such investments. In particular, as commenters noted, some funds currently treat some investments valued with level 2 inputs as having readily available market quotations and perform determinations of fair value in good faith on other investments valued with level 2 inputs.[500]

Table 2 provides descriptive statistics on funds' investments measured based on level 1, 2, and 3 inputs using Form N–PORT data as of September 2020.[501] As Table 2 shows, there are 13,101 funds with $24,417 billion in net assets that filed Form N–PORT.[502] About 62% of fund assets are valued using level 1 inputs. Nevertheless, the average percentage of investments valued using level 1 inputs varies depending on the type of fund, ranging from 26% for closed-end funds to 99% for ETFs registered as UITs. About 34% of fund assets are valued using level 2 inputs, which also varies depending on the type of fund. Only a small percentage of fund assets are valued using level 3 inputs.[503]

[496] We estimate the number of registered investment companies by reviewing the most recent filings of Forms N–CEN filed with the Commission as of September 2020. Open-end funds are series of trusts registered on Form N–1A. Closed-end funds are trusts registered on Form N–2. UITs are variable annuity separate accounts organized as UITs registered on Form N–4, variable life insurance separate accounts organized as UITs registered on Form N–6, or series, or classes of series, of trusts registered on Form N–8B–2. Separate accounts registered as management companies are trusts registered on Form N–3.

[497] Estimates of the number of BDCs and their net assets are based on a staff analysis of Form 10–K and Form 10–Q filings as of September 2020, which are the most recent available filings. Our estimates include BDCs that may be delinquent or have filed extensions for their filings, and they exclude eight wholly owned subsidiaries of other BDCs and feeder BDCs in master-feeder structures.

[498] According to ASC Topic 820, assets and liabilities are classified as using level 1, level 2, or level 3 inputs. Level 1 inputs are ''quoted prices (unadjusted) in active markets for identical assets or liabilities that the reporting entity can assess at the measurement date.'' Level 2 inputs are ''inputs other than quoted prices included within level 1 that are observable for the asset or liability, either directly or indirectly.'' Level 3 inputs are ''unobservable inputs for the asset and liability.'' *See* ASC Topic 820, *supra* footnote 1.

[499] *See* rule 2a–5(c). *See also supra* section II.D.

[500] *See, e.g.,* Capital Group Comment Letter; IAA Comment Letter.

[501] UITs (other than the ETFs registered as UITs) and BDCs do not file Form N–PORT, and thus are excluded from Table 2. We estimate the statistics in Table 2 by reviewing the most recent filings of Forms N–PORT filed with the Commission as of September 2020. The average ratio of securities by fair value hierarchy (*i.e.,* Columns 3 to 6 in Table 2) is retrieved from Item C.8 of Form N–PORT. Our analysis excludes funds with non-positive net assets and funds with total assets less than net assets because these observations are likely data errors. The Average Level 1, Level 2, and Level 3 Inputs is the average ratio of level 1, level 2, or level 3 long positions divided by the fund's total gross assets across all funds within each fund category. Open-end funds are series of trusts registered on Form N–1A. Closed-end funds are trusts registered on Form N–2. ETFs registered as UITs are series, or classes of series, of trusts registered on Form S–6. Separate accounts registered as management companies are trusts registered on Form N–3. The last row in Table 2 represents the sum of the previous rows within the same column for Columns 1 and 2, and it represents the asset-weighted average of the previous rows within the same column for columns 3 to 6.

[502] The numbers of open-end funds, closed-end funds, and separate accounts registered as management companies that filed Form N–PORT reported in Table 2 differ from those that filed Form N–CEN reported in Table 1 due to differing reporting requirements and the frequency of reporting. Total net assets in Form N–CEN also may be different from total net assets in Form N–PORT because Form N–CEN reports average net assets estimated over the reporting period while Form N–PORT reports point-in-time net assets as of the reporting date.

[503] Investments that are valued at NAV, and thus do not have a level associated with them, are classified as ''N/A'' in Form N–PORT. These investments have no level under the U.S. GAAP fair value hierarchy and for purposes of this analysis we assume they are securities for which there are no readily available market quotations. Nevertheless, the valuation of those investments arguably requires less effort than the valuation of investments valued using level 2 and 3 inputs because funds' NAVs are easily obtainable. About 1% of the fund assets are classified as ''N/A'' investments. For open-end funds, approximately 1% of ''N/A'' investments are classified as private fund investments and approximately 85% are classified as registered fund investments; for closed-end funds, approximately 68% are classified as private fund investments and approximately 23% are classified as registered fund investments. The sum of the average using level 1, 2, 3, and ''N/A'' within each fund category may not sum up to 100% due to rounding error.

TABLE 2—DESCRIPTIVE STATISTICS FOR FUNDS BY ASC TOPIC 820 FAIR VALUE HIERARCHY1

	Number of funds (1)	Total net assets (in billion $) (2)	Average level 1 inputs (percent) (3)	Average level 2 inputs (percent) (4)	Average level 3 inputs (percent) (5)	Average "N/A" inputs (percent) (6)
Open-end funds	12,387	23,475	62	35	0.2	1
Registered closed-end funds	696	305	26	53	6	12
ETFs registered as UITs	5	423	99	0	0	0
Management company separate accounts	13	212	75	26	0	0
Total/Average	13,101	24,415	62	34	0	1

Note 1: Out of the 12,387 open-end funds, two reported being internally managed with net assets of $7 billion. Out of the 696 registered closed-end funds, 12 reported being internally managed with net assets of $18 billion. No ETFs registered as UITs or management company separate accounts reported being internally managed. Approximately 19.5% of assets of open-end funds were foreign holdings; less than 1% of assets of closed-end funds, ETFs registered as UITs, and management company separate accounts were foreign holdings.

Source: Form N–PORT.

As of September 2020, there were 1,518 advisers that reported providing portfolio management for investment companies or BDCs with regulatory assets under management of $61.6 trillion, of which $33.6 trillion was attributable to investment company and BDC clients.[504] Among the open-end funds reported in Table 2, approximately 2% reported not engaging a pricing service. Among the closed-end funds reported in Table 2, approximately 12% reported not engaging a pricing service. No ETF registered as a UIT reported engaging a pricing service, and all management company separate accounts reported engaging a pricing service. As of December 2019, there were 59.7 million U.S. households and 103.9 million individuals owning U.S. registered investment companies that could be affected by the rules.[505] Untabulated analysis shows that 29% of the funds report having 100% of their investments valued using level 1 inputs.[506] Based on this, we estimate that approximately 9,804 funds may be affected by the rules, of which 9,335 are not UITs.[507] However, foreign holdings made up approximately (1) 20% of assets of open-end funds; (2) 24% of assets of closed-end funds; (3) 23% of assets of ETFs registered as UITs; and (4) 3% of assets of management company separate accounts. Overall, approximately 20% of assets were foreign holdings. Thus, to the extent that funds determined that these foreign holdings had readily available market quotations (*i.e.,* are reported falling in level 1 in the fair value hierarchy), the 29% estimate of funds unaffected by the rules may be overstated. Furthermore, approximately 28% of funds reported relying on 17a–7 for cross trades, but we cannot determine to what extent reliance on 17a–7 is limited to investments meeting the definition under the final rule of having readily available market quotations.

C. General Economic Considerations

1. Investment Adviser Role in Fair Value Determinations

Unbiased valuation of fund investments is important because it affects the prices at which fund shares are purchased or redeemed by shareholders. Similarly, to the extent that valuation reflects what would be obtained in a current arm's length transaction, such valuation could also provide fund managers and investors a more accurate picture of the funds' volatility.[508] This could help fund managers better tailor their portfolios to specific risk-reward profiles or benchmarks and ensure that their portfolios comply with the fund's risk appetite statement. Likewise, investors could better evaluate how a given fund fits their risk appetite and ability to bear risk. Valuation of fund investments is also important because it can affect funds' fee and performance calculations, and also can affect funds' compliance with regulatory requirements. Finally, properly valuing a fund's investments is a critical component of the accounting and financial reporting for investment companies.[509]

As explained above, we understand that boards typically rely on fund advisers to perform the day-to-day calculation of fair value determinations for fund investments that do not have readily available market quotations.[510] Because a board's role is focused on oversight rather than day-to-day involvement in fund activities such as valuation, this is appropriate to ensure that boards are not engaging in duties that distract them from oversight and governance of the fund and its fair value process. Furthermore, a board's members are unlikely to have the necessary experience, knowledge, skills,

[504] Based on Form ADV Items 5.G.(3), 5.F.2.(c), 5.D.(d)(3), and 5.D.(e)(3) of Part 1A of Forms ADV filed with the Commission as of September 2020.

[505] Investment Company Institute, *Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry,* 60th Edition (2020), *available at https://www.ici.org/pdf/2020_factbook.pdf,* (last accessed on Sept. 4, 2020).

[506] 29% = (3,810 open-end funds with investments valued using only level 1 inputs that filed Form N–PORT + 45 closed-end funds with investments valued using only level 1 inputs that filed Form N–PORT + 5 ETFs registered as UITs with investments valued using only level 1 inputs that filed Form N–PORT + 3 variable annuity separate accounts registered as management companies with investments valued using only level 1 inputs that filed Form N–PORT)/13,101 funds that filed Form N–PORT. *See supra* footnote 502.

[507] 9,804 funds = 13,101 funds that filed Form N–PORT from Table 2—3,863 funds that hold investments valued using only level 1 inputs and filed Form N–PORT + 97 BDCs from Table 1 above + 469 affected UITs. 469 = 661 UITs that filed Form N–CEN * (1—29% of funds that only report securities valued using level 1 inputs based on N–PORT data). This calculation assumes that the distribution of investments valued using level 1 inputs for registered investment companies that filed Form N–PORT is similar to the distribution of investments valued using level 1 inputs for UITs that filed Form N–CEN. This calculation also assumes that all 97 BDCs in our sample hold a non-zero amount of investments valued using level 2 and level 3 inputs. This assumption is made because BDCs are required to invest at least 70% of their assets in private or public U.S. firms with market values of less than $250 million, and these investments usually are securities valued using level 2 or level 3 inputs. *See* 15 U.S.C. 80a–54(a).

[508] *See* Comment Letter of Will Gornall and Ilya Strebulaev (May 19, 2020) (describing the difficulty of valuation and consequences of low quality valuations, including mismeasurement of risk and returns, which in turn leads to overly smoothed valuations, inflated risk-adjusted performance measures, misallocation of capital, and, ultimately, economic inefficiency).

[509] *See supra* section II for more discussion on the importance of unbiased valuation of fund investments.

[510] *See supra* section II.B.1 and footnote 201 as well as section III.B.2.

or resources to carry out the day-to-day calculation of fair value determination.

Fund advisers' interests may conflict with the interest of shareholders,[511] an issue that many commenters echoed.[512] In particular, advisers have incentives to inflate fund asset values (or deflate fund liability values) because they typically receive a management fee that is calculated as a percentage of the value of net assets under management.[513] Relatedly, advisers have incentives to inflate fund asset values because investors tend to invest more in funds with good recent performance, which would increase assets under management and ultimately increase advisers' compensation.[514] Advisers also have incentives to mismeasure fund investments in a way that would smooth reported fund performance over time to lower the funds' perceived risk.[515] Finally, advisers may mismeasure values of fund investments as a result of expending less effort than the effort required to ensure more accurate and unbiased valuations.[516] Any such mismeasurement likely will be more pronounced for investors of funds whose shares are not publicly traded (*e.g.,* open-end funds (other than ETFs), UITs, and some BDCs) because there is no secondary market for the shares of those funds, and fund investors can transact only at a price based on NAV, which is determined by the fund's fair value determinations.

The degree of such conflicts of interest may vary across funds,[517] depending on the extent to which funds or their advisers rely on pricing services for fair value determinations,[518] the types of assets being subjected to fair value determinations[519] (*e.g.,* there may be a tension between expertise that an adviser may provide for particularly complex assets or alternative investments and the consequent lack of independence), and the manner in which an adviser or depositor is compensated. In particular, advisers' incentives to misreport fund investments may be more pronounced for funds that face higher competition to attract new investors and for actively managed funds that face higher demands from investors to beat certain benchmarks. Relatedly, advisers' incentives to underinvest in effort may be higher for funds whose performance is more difficult to measure and evaluate, and thus advisers' performance is also more difficult to measure and evaluate (*e.g.,* funds that hold complex investments).[520] Conflicts of interest may be lower for parties whose compensation is not based on the value of assets, as is the case with depositors or evaluators of some UITs. Officers of internally managed funds who make determinations of fair value may also be subject to conflicts of interest to the extent that their compensation is related to the value of assets. Boards of directors currently serve as a check on the conflicts of interest of the adviser, officers of the fund, and the other service providers involved in the calculations of fair values.[521] BDCs face similar conflicts of interest, which likewise should be managed by their boards. The final rule retains the important safeguard of board oversight of fair value determinations, while making more efficient use of boards' time and expertise and recognizing the important role of valuation designees in the fair value determination process.

2. Board Considerations When Designating Fair Value Determinations

Under the final rule, boards may designate the performance of fair value determinations for investments of the fund to a valuation designee.[522] It is our understanding that funds' advisers or officers of internally managed funds already perform or assist the board with respect to many of those functions subject to the board's oversight. When deciding whether to designate a party to perform fair value determinations for the fund, we anticipate that a board will

[511] Some academic literature suggests that fund fair values are not always measured in an accurate and unbiased way. *See, e.g.,* Vikas Agarwal et al., *Private Company Valuations by Mutual Funds* (Working Paper, Aug. 2019), *available at https://ssrn.com/abstract=3066449;* Rahul Bhargava, Ann Bose, & David A. Dubofsky, *Exploiting International Stock Market Correlations with Open-End International Mutual Funds,* 25 J. BUS. FIN. & ACCT. 765 (1998); Scott Cederburg & Neal Stoughton, *Discretionary NAVs* (Working Paper, Nov. 2019), available at *https://www.wu.ac.at/fileadmin/wu/d/i/finance/BBS-Papers/SS2019/20190515_STOUGHTON.pdf;* John M. R. Chalmers, Roger M. Edelen, & Gregory B. Kadlec, *On the Perils of Financial Intermediaries Setting Security Prices: The Mutual Fund Wild Card Option,* 56 J. FIN. 2209 (2001); Nandini Chandar & Robert Bricker, *Incentives, Discretion, and Asset Valuation in Closed-End Mutual Funds,* 40 J. ACCT. RES. 1037 (2002) (''Chandar and Bricker 2002''); Jaewon Choi, Mathias Kronlund, & Ji Yeol Jimmy Oh, *Sitting Bucks: Zero Returns in Fixed Income Funds* (Working Paper, Aug. 2020), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244862; Gjergji Cici, Scott Gibson, & John J. Merrick Jr., Missing the marks? Dispersion in corporate bond valuations across mutual funds, 101 J. Fin. Econ. 206 (2011) (*''Cici et al. 2011''*);* Vladimir Atanasov, John J. Merrick Jr., & Philipp Schuster, *Mismarking Fraud in Mutual Funds* (Working Paper, Apr. 2019), *available at http://www.fmaconferences.org/Glasgow/Papers/Fraud_in_OpenEndMutualFunds_2018_1126.pdf.* As noted above, officers of internally managed funds that perform these functions in lieu of an adviser may face conflicts that are different from those of advisers. *See supra* footnote 159.

[512] *See, e.g.,* AAM Comment Letter; ABA Comment Letter; AIMA Comment Letter; American Bankers Association Comment Letter; American Funds Trustees Comment Letter; Better Markets Comment Letter; BlackRock Trustees Comment Letter; CFA Institute Comment Letter; Chapman Comment Letter; Dechert Comment Letter; Duff & Phelps Comment Letter; Fidelity Comment Letter; Fidelity Trustees Comment Letter; First Trust Comment Letter; Franklin Comment Letter; Guggenheim Comment Letter; Hennion & Walsh Comment Letter; ICE Data Comment Letter; IDC Comment Letter; IHS Markit Comment Letter; University of Miami Comment Letter; IVSC Comment Letter; John Hancock Comment Letter; MFS Comment Letter; Murphy Comment Letter; NYC Bar Comment Letter; Scheidt Comment Letter 2; Seward & Kissel Comment Letter; SIFMA AMG Comment Letter; TRC Comment Letter; VRC Comment Letter.

[513] *See, e.g.,* Joseph Golec, *Regulation and the Rise in Asset-Based Mutual Fund Management Fees,* 26 J. FIN. RES. 19 (2003) for evidence on the percentage of mutual funds that use asset-based management fees. In addition to explicit contracts that link advisers' compensation to fund size, there may be implicit contracts that provide incentives to advisers to mismeasure fund investments. For example, advisers may mismeasure fund investments to meet or beat certain benchmarks. *See, e.g.,* Chandar and Bricker 2002.

[514] *See, e.g.,* Judith Chevalier & Glenn Ellison, *Risk Taking by Mutual Funds as a Response to Incentives,* 105 J. POL. ECON. 1167 (1997); Erik R. Sirri & Peter Tufano, *Costly Search and Mutual Fund Flows,* 53 J. FIN. 1589 (1998). Portfolio managers also have incentives to inflate fund asset values and thus increase fund performance because fund performance is positively related to the portfolio managers' compensation and negatively related to the probability that a portfolio manager will be terminated. *See, e.g.,* Judith Chevalier & Glenn Ellison, *Career Concerns of Mutual Fund Managers,* 114 Q.J. ECON. 389 (1999); Linlin Ma, Yuehua Tang, & Juan-Pedro Gomez, *Portfolio Manager Compensation in the U.S. Mutual Fund Industry,* 74 J. FIN. 587 (2018).

[515] *See, e.g.,* Cici et al. 2011.

[516] Advisers may have incentives to underinvest in effort (or ''shirk'') because they do not internalize the benefits accruing to the fund board of directors and fund investors from the expenditure of effort to estimate accurate and unbiased fair values. *See, e.g.,* David Brown & Shaun Davies, *Moral Hazard in Active Asset Management,* 125 J. FIN. ECON. 311 (2017) (''Brown and Davies 2017'').

[517] *See, e.g.,* AAM Comment Letter; Chapman Comment Letter; First Trust Comment Letter; Hennion & Walsh Comment Letter on the notion that UITs pose a lower level of concern in regard to such conflicts of interest.

[518] Pricing services may mitigate conflicts of interest by, for example, contributing to a clearer segregation between fair value determinations and portfolio management. On the other hand, pricing services also may be incentivized to provide higher or more aggressive valuations generally to retain business. *See, also, e.g.,* AIMA Comment Letter; American Bankers Association Comment Letter; Dechert Comment Letter; Fidelity Trustees Comment Letter; Guggenheim Comment Letter; ICE Data Comment Letter; IHS Markit Comment Letter; John Hancock Comment Letter; Murphy Comment Letter; VRC Comment Letter.

[519] *See, e.g.,* AIMA Comment Letter; American Bankers Association Comment Letter; American Funds Comment Letter; Fidelity Comment Letter; Guggenheim Comment Letter; SIFMA AMG Comment Letter; TRC Comment Letter.

[520] *See, e.g.,* Brown and Davies 2017.

[521] *See supra* footnote 423.

[522] *See* rule 2a–5(b).

consider certain trade-offs. In particular, fund boards' decisions to oversee valuation designees' fair value determinations instead of determining fair value themselves may depend on the number, amount, or allocation of investments that must be fair valued, the nature and complexity of the valuation of those investments, the type of fund, the valuation designee's willingness to assume additional fair value responsibilities, and the fund's current practices. Boards' decisions may also depend on the resources of the valuation designee.[523] Boards of funds that hold more investments that must be fair valued and harder-to-value investments may be more likely to designate a valuation designee to perform these fair value determinations and to oversee the process of determining fair value by the valuation designee because valuation designees may be better suited to value those types of investments. A board's decision may also depend on the type of fund. For example, a board of an open-end fund that must calculate NAVs on a daily basis may be more likely to designate the performance of fair value determinations (on which the fund's NAV is based) to a valuation designee than the board of a fund that calculates value less regularly. As another example, the board of a BDC may choose to determine fair value itself through its officers due to specialized expertise retained internally.

The decision to oversee valuation designees' fair value determinations may also depend on valuation designees' willingness to assume the designated responsibilities. Such willingness may depend on the valuation designee's valuation expertise and experience, whether the valuation designee has available resources to satisfy new obligations, and the extent to which the valuation designee could be compensated for those increased responsibilities, including by passing through to the fund and its investors any higher costs. Finally, a board's decision to designate responsibilities under the final rule may depend on the expected costs of compliance, which ultimately depend on how different the fund's current practices and policies and procedures are from the requirements of the final rule.

We lack comprehensive information on funds' current fair value practices and do not have visibility into boards' decision-making processes when seeking assistance with fair value determinations from valuation designees.[524] Further, boards' decision-making processes with respect to seeking assistance with fair value determinations from valuation designees is complex. Hence, we are unable to estimate precisely the number of fund boards that will designate responsibilities to a valuation designee under the final rule instead of the boards making fair value determinations in good faith themselves. Nevertheless, we believe the vast majority of boards will designate these responsibilities to a valuation designee[525] because the valuation designee has valuation experience and expertise, is involved with the fund's operations on a daily basis and, thus, may be better suited than the board to deal with fair value matters that arise on a daily basis. We believe this is true regardless of whether the board designates an adviser or an officer of the fund to perform the valuation responsibilities. Further, valuation designees already provide significant assistance with the fair value determinations to the board of directors and so funds that designate a valuation designee to perform fair value determinations under the final rule should not need to modify their operations significantly to comply with the final rule. For the purpose of our economic analysis, we assume all funds with some investments that need to be fair valued under the final rule are affected parties.

3. General Discussion of Benefits and Costs of Good Faith Determinations of Fair Value

Overall, the requirements of the final rule provide a framework for appropriate oversight of determinations of fair value in good faith. As such, the final rule helps the board oversee the fund and helps to promote, for example, the mitigation of conflicts of interest of those involved in the fair value process and in the management of investments and the management of the fund for the benefit of the fund's shareholders. Another benefit arising from appropriate oversight of the fair value process is that fair value determinations will be more likely to reflect a price that could be obtained in arm's length transactions with less bias. This will contribute to better measurement of the risk and return profile of individual investments and their contribution to the risk and return profile of the fund, which will help promote the management of the fund in accordance with its investment objectives; ensure the accuracy of asset-based and performance-based fee calculations; and affect the accuracy of disclosures of fund fees, performance, NAV, and portfolio holdings.

Similarly, as less biased fair value determinations help to ensure that a fund's value more accurately reflects the value that a current arm's length transaction would produce when purchasing or selling fund shares, as well as in cross trades, the final rule aims to provide investors their pro rata share of the fund's assets. Thus, proper valuation promotes the purchase and sale of fund shares at fair prices, and helps to avoid dilution of shareholder interests. Furthermore, investors may have stronger assurance that they can rely on valuations to express the risk and return profile of a fund, making investors' decisions better informed. Thus, investors may be better able to evaluate a fund and consider whether a fund fits into their investment goals in terms of returns and risk (*e.g.,* ability and willingness to bear risk). Improper valuation can cause investors to pay fees that are too high or to base their investment decisions on inaccurate information.

Finally, as described in the proposal, the increased specificity of the rules could reduce compliance costs for some funds that may expend less effort and time to design policies and procedures, reporting, and recordkeeping than trying to determine appropriate compliance under the statute alone. For funds whose current practices are more burdensome than the requirements of the rules, this increased specificity also could reduce compliance costs to the extent that funds might be less likely to put in place overly burdensome and unnecessary policies and procedures, reporting, and recordkeeping to comply with the statute. Relatedly, the rules and rescission of existing no-action letters and guidance may increase certainty because funds will follow a single rule rather than following various no-action letters and guidance when determining fair values, which could ultimately reduce compliance costs. Conversely, to the extent that the specificity of the requirements of the rules prompts some funds or advisers to devote greater resources to ensure compliance with their fair value obligations, the requirements of the rules may impose greater costs on such funds and advisers. Changes in costs of compliance for funds or advisers

[523] *See supra* footnote 295 and accompanying discussion.

[524] The industry reports cited in section II above only provide qualitative information on certain aspects of funds' current practices. *See also supra* footnote 419 for a discussion of limitations of the Deloitte survey data. Funds have discretion in the type of disclosures they provide regarding their fair value determinations. As discussed throughout section III.B.2, commenters provided descriptions of current practice.

[525] Commenters agreed with this view. *See, e.g.,* IDC Comment Letter.

ultimately could affect fund investors to the extent that any changes in costs would be passed down to them in the form of changed fund operating expenses.

In the next section, we discuss the benefits and costs; in a subsequent section, we discuss effects on efficiency, competition, and capital formation.

D. Benefits and Costs

1. Fair Value as Determined in Good Faith Under Section 2(a)(41) of the Act

Rule 2a–5 sets forth certain required functions that must be performed to determine the fair value of the fund's investments in good faith. As discussed above,[526] we are adopting these required functions substantially as proposed, with several changes from the proposal based on the comments the Commission received. These required functions constitute an important part of the framework that the final rule establishes and thus contribute to the benefits described in section III.C.3 To the extent that a function required by the final rule is in line with a fund's current practice, the additional costs and benefits described below are likely to be limited with respect to the fund.

(a) Periodically Assess and Manage Valuation Risks

The final rule will require the periodic assessment of any material risks associated with the determination of the fair value of the fund's investments, including material conflicts of interest, and management of those identified valuation risks. The final rule does not specify which risks are to be assessed or the frequency of reassessments.[527] As discussed above, many funds or their advisers already periodically assess and manage their valuation risks.[528] Some fund boards may not, however, assess such risks for all investments, including, for example, those with level 2 inputs.[529]

To the extent that funds or valuation designees do not currently assess and manage valuation risks, the final rule will impose both one-time costs to develop or augment practices that conform to the requirements of the final rule as well as ongoing costs associated with implementing those practices. Likewise, to the extent that funds experience additional costs associated with developing or augmenting practices to conform with the requirements of the final rule to assess and manage valuation risks, these costs may be less burdensome for larger funds that could spread any such costs across a larger amount of assets under management. The final rule will, however, provide investors the benefit of assurances that mechanisms are in place to identify, assess, and manage valuation risks. To the extent that funds or valuation designees already assess and manage valuation risks in a manner consistent with rule 2a–5, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds or valuation designees may have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements.

(b) Establish and Apply Fair Value Methodologies

(1) Select and Apply Appropriate Fair Value Methodologies

The final rule will require funds or valuation designees to select and apply in a consistent manner appropriate fair value methodologies for determining (which includes calculating) the fair value of fund investments.[530] The final rule permits methodologies to be changed (so long as the different methodology is equally or more representative of the fair value of fund investments)[531] and does not require funds or valuation designees to specify methodologies that will apply to anticipated or intended investments. As a matter of course in performing fair value determinations, we understand that funds or valuation designees currently establish and apply fair value methodologies.[532] Some fund boards may not, however, consistently use these methodologies for all investments.

To the extent that funds currently deviate from the requirements of the final rule to select and apply in a consistent manner fair value methodologies, the final rule will impose additional costs on funds or valuation designees. For example, a fund currently may make fair value determinations for certain securities, but not clearly select and apply the fair value methodology used to do so; under the final rule, the fund would have to clearly select and apply that methodology in a consistent manner. We recognize that there will be costs for funds that do not currently select and apply fair value methodologies in a consistent manner for all fund investments without readily available market quotations as defined in the final rule. These costs include one-time costs to evaluate the requirements of the final rule and make changes to practices as well as ongoing additional costs due to implementing these changes on an ongoing basis (*e.g.,* determining fair value in good faith for assets that rely on level 2 inputs). Likewise, to the extent that funds experience additional costs associated with developing or augmenting practices to conform to the requirements of the final rule to select and apply fair value methodologies in a consistent manner, these costs may be less burdensome for larger funds that could spread any such costs across a larger amount of assets under management.

(2) Periodically Review Appropriateness and Accuracy of Selected Methodologies

The final rule will require the periodic review of the appropriateness and accuracy of the valuation methodologies selected. The final rule will also require that funds make changes or adjustments to existing methodologies where necessary. As discussed above, many funds already incorporate such reviews into their current practices.[533] However, some fund boards may not conduct these periodic reviews for all methodologies. To the extent that funds already periodically engage in such reviews that are currently consistent with the final rule, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds will have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements. However, for funds that do not currently conduct such reviews, the final rule will impose both one-time costs to create practices that conform to the requirements of the final rule as well as ongoing costs arising from these new reviews, but will provide the benefit of promoting appropriate methodologies and improving the governance for such funds.

(3) Monitor for Circumstances That May Necessitate the Use of Fair Value

The final rule will require that funds or valuation designees monitor for circumstances that may necessitate use of fair value.[534] As discussed above, this monitoring is common in practice,[535]

[526] *See supra* section II.A.

[527] *See supra* section II.A.1.

[528] *See supra* section III.B.2.b).

[529] *See, e.g.,* Capital Group Comment Letter; IAA Comment Letter.

[530] *See supra* section II.A.2.

[531] *See supra* footnote 57 and accompanying discussion in section II.A.2.a).

[532] *See supra* section III.B.2.

[533] *See supra* section III.B.2.c).

[534] *See supra* section II.A.2.c).

[535] *See supra* section III.B.2.c).

though some fund boards may not monitor for such circumstances with respect to all fund investments.[536] To the extent that funds already engage in such monitoring, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds may have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements. However, for funds that did not previously conduct such monitoring, the final rule will impose both one-time costs to create practices that conform to the requirements of the final rule as well as ongoing costs of monitoring, but will provide the benefit of ensuring that investments for which market quotations become unreliable will have fair value determined for them. Likewise, to the extent that funds bear additional costs associated with developing or augmenting practices to conform to the requirements of the final rule to monitor for circumstances that may necessitate the use of fair value, these costs may be less burdensome for larger funds that could spread any such costs across a larger amount of assets under management.

(c) Test Fair Value Methodologies for Appropriateness and Accuracy

The final rule will require that the board or valuation designee, as applicable, test the appropriateness and accuracy of the fair value methodologies that have been selected, including by identifying testing methods to be used and determining the minimum frequency with which such testing methods are used.[537] As discussed above, this practice is common.[538] Some funds may not, however, currently conduct this type of testing or apply these testing methods as the final rule requires with respect to all fund investments. To the extent that funds already engage in such testing, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds may have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements. However, for funds that did not previously conduct such testing or conducted testing in a manner that differs from the requirements of the final rule, the final rule will impose both one-time costs to create practices that conform to the requirements of the final rule as well as ongoing costs associated with testing of fair value methodologies. Likewise, to the extent that funds bear additional costs associated with developing or augmenting practices to conform to the requirements of the final rule to test fair value methodologies for appropriateness and accuracy, these costs may be less burdensome for larger funds that could spread any such costs across a larger amount of assets under management.

One commenter noted specifically that ''requirements around back testing, calibration, transparency and evaluation of inputs may require valuation designees to develop additional data science capabilities to analyze valuation data and perform necessary testing.'' [539] We recognize that, to the extent that the board or valuation designee, as applicable, determines that tests for which the board or valuation designee does not currently have capabilities should be performed, there will be costs attendant to the development or acquisition of these capabilities. However, these costs may be mitigated for a number of reasons. First, not all boards or valuation designees, as applicable, will need to perform such tests. For example, as noted above, while we continue to believe that calibration and back-testing can be particularly useful testing methods, the final rule does not require that calibration and back-testing be performed, nor does it preclude boards or valuation designees, where applicable, from using other appropriate testing methods on fair value methodologies.[540] Second, experience in back-testing, calibration, and evaluation of inputs is common in the industry.[541] Relatedly, special data science capabilities are not required for standard testing techniques that have been common for decades. As such, there is unlikely to be a need to develop additional capabilities for all funds.

(d) Pricing Services

The final rule provides that determining fair value in good faith requires the oversight and evaluation of pricing services, where used. The final rule will require that, where funds or valuation designees engage a pricing service, the fund or valuation designee establish a process for approvals, monitoring, and evaluation of each pricing service.[542] Funds or valuation designees, as applicable, must establish a process for price challenges. As discussed above, it is common practice for funds or valuation designees to evaluate and monitor pricing services and to challenge prices from pricing services.[543] The Commission has previously stated that technical assistance by non-directors must be carefully reviewed by the directors.[544] Valuation designees (including, for example, small advisers) may not, however, currently have the exact processes for monitoring and evaluating pricing services prescribed by the final rule.

To the extent that funds already have a process for the approval, monitoring, and evaluation of pricing services in the precise manner prescribed by the final rule, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds may have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their processes conform to the requirements. Likewise, to the extent that funds bear additional costs associated with developing or augmenting practices to conform to the requirements of the final rule to oversee and evaluate pricing services, these costs may be less burdensome for larger funds that could spread any such costs across a larger amount of assets under management.

The requirement to establish a process for price challenges will impose some burdens on some funds or valuation designees. To the extent that funds already have processes for price challenges, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds will have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements. However, for funds that did not previously establish such processes, the final rule will impose both one-time costs to create practices that conform to the requirements of the final rule as well as ongoing costs, such as implementation of these processes. The final rule will also provide the benefit of oversight of price challenges that should mitigate conflicts of interest between shareholders and valuation designees to the extent that such conflicts exist. For example, the final rule should mitigate conflicts of interest where valuation designees may

[536] *See, e.g.,* ABA Comment Letter; IAA Comment Letter; Scheidt Comment Letter 1 (stating that ''funds are required to adopt policies and procedures that require monitoring for circumstances that may necessitate the use of fair value prices'' under the compliance rule); SIFMA AMG Comment Letter.

[537] *See supra* section II.A.3.

[538] *See supra* section III.B.2.d).

[539] *See* SIFMA AMG Comment Letter.

[540] *See supra* section II.A.2.b) and section II.A.3.

[541] *See supra* section III.B.2.d).

[542] *See supra* section II.A.4.

[543] *See supra* section III.B.2.f).

[544] *See* Proposing Release, *supra* footnote 2, at n.16; ASR 118.

otherwise engage in price challenges that distort determinations of fair value in order to increase their compensation or make their performance appear to be better than it otherwise would.

(e) Fair Value Policies and Procedures

In connection with the final rule, and as discussed above, to comply with the compliance rule, each fund must adopt and implement written policies and procedures that are reasonably designed to prevent violations of the final rule. To comply with the compliance rule, these fair value policies and procedures must be tailored to the final rule's requirements. [545] A fund may rely on an adviser's policies, which should eliminate duplication and mitigate costs. In a change from the proposed rule, the final rule does not have an explicit requirement to adopt written policies and procedures as this is already required by the compliance rule. As discussed above, funds must adopt and implement written policies and procedures for fair value determinations under the compliance rule, so all funds must maintain written fair value policies and procedures.[546] To the extent that funds already maintain written fair value policies and procedures that are aligned with reasonably preventing violations of the requirements of the final rule, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds will have a one-time cost associated with reviewing the requirements of the final rule and conforming their policies and procedures accordingly. Likewise, to the extent that funds bear additional costs associated with changes to policies and procedures to conform to the requirements of the final rule, these costs may be less burdensome for larger funds that could spread any such costs across a larger amount of assets under management.

2. Performance of Fair Value Determinations

As discussed above,[547] the final rule will permit the board to carry out all of the fair value functions required in paragraph (a) of the final rule or to designate the fund's adviser or an officer or officers of the fund to perform fair value determinations relating to any or all fund investments, subject to the board's appropriate oversight. Boards may only designate to these valuation designees, though the trustee or depositor will perform the fair value functions in paragraph (a) of the final rule for UITs, which do not have a board or adviser.

A number of commenters suggested that the costs of rule 2a–5 as proposed would be significant for UITs, particularly for pre-existing ones,[548] as valuations for UITs are generally performed by parties other than trustees. We believe that the universe of existing UITs that will be relying upon this provision will be small, as we believe that (1) the insurance company (acting as depositor) generally provides valuation services for separate accounts formed as UITs, (2) similarly, ETF UITs typically utilize the trustee for valuation services, and generally hold investments that have readily available market quotations, and (3) other UITs often already use a trustee or depositor to perform valuation and, to the extent otherwise, generally have a short, fixed-term existence.

As discussed above, funds commonly engage advisers to assist them in performing fair value determinations, and the Commission has stated that the board need not itself perform each of the specific tasks required to calculate fair value in order to perform its role under section 2(a)(41).[549] To the extent that funds' practices conform precisely to what is required under the final rule, the final rule will not impose any additional ongoing costs or present any additional ongoing benefits; such funds may have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements. However, for boards that did not previously engage valuation designees to assist in performing fair value determinations, the final rule permits a board to leverage the expertise of valuation designees with deeper and more specialized experience to conduct fair value determinations. Doing so will come with a cost, but will also come with the benefit of permitting the fund's board to focus on providing appropriate oversight under the final rule.

Explicitly allowing boards to designate a valuation designee to perform fair value determinations allows boards to allocate the fair value responsibilities to that party, and thus could free board resources tied to valuation and redirect them to oversight or other matters in which board action may be more valuable.[550] The final rule will have larger effects on any boards that choose, under the final rule, to designate a valuation designee.

For a fund whose board designates the fund's adviser to perform fair value determinations, one-time costs associated with reviewing the final rule to ensure that practices conform to requirements of the final rule may be borne by the adviser, the fund, or both, depending on the fund's governing documentation or advisory agreements, and could be ultimately passed through to the fund's shareholders in the form of higher management fees or other expenses in the future.[551] For funds whose boards determine the fair values themselves, these costs will be borne by the fund, and those one-time costs, if any, could be ultimately passed through to the fund's shareholders in the form of higher operating expenses.

Relatedly, to the extent that an adviser to the fund is designated to perform fair value determinations that it is not currently performing, depending on the fund's governing documentation or advisory agreements, such an adviser or the fund may incur ongoing costs to satisfy its new fair value obligations. Similarly, to the extent that an officer of the fund performs the fair value determinations, the fund itself could directly incur higher ongoing costs, if any higher costs occur, though it would also benefit from improved governance of the fair value process. Those costs and benefits will be attributable to adopting and implementing assessment and testing practices, methodologies, reporting, and recordkeeping to ensure compliance with the rules' requirements. The magnitude of those costs and benefits will depend on how funds' or their advisers' current practices compare to the requirements of the rules. To the extent that advisers currently engage in the fair value process as permitted by the final rule and in accordance with its requirements (and thus currently incorporate the costs of doing so in their compensation), additional ongoing costs (including the extent to which any costs are passed on

[545] *See supra* section II.A.5.

[546] *See supra* section III.B.2.

[547] *See supra* section II.B.

[548] *See, e.g.,* AAM Comment Letter; Chapman Comment Letter; First Trust Comment Letter; Hennion & Walsh Comment Letter.

[549] *See supra* section III.B.2.a).

[550] While this benefit will accrue to internally managed funds that will now similarly be permitted to designate to an officer or officer of the fund, it will not accrue to UITs because they do not have boards that may designate. Under the final rule the trustees or depositors of UITs (or other entities designated in the documentation of existing UITs) will carry out the requirements of the final rule. *See* final rule 2a–5(d). However, *see, e.g.,* Capital Group Comment Letter and American Funds Comment Letter, in which commenters characterized the proposed rule as prescriptive, requiring boards to be involved ''in the weeds'' and distracted by ''voluminous reports'' rather than freeing up board resources and effectively focusing the board on oversight. Changes to the rules reduce the prescriptiveness compared to the proposed rule. *See supra* section II.B.2.

[551] *See* Capital Group Comment Letter; Guggenheim Trustees Comment Letter.

to fund investors) and benefits are likely to be limited.

Similarly, to the extent that an officer of the fund currently performs fair value determinations in accordance with the requirements of the final rule and is already compensated for such duties and responsibilities, such an officer is unlikely to demand higher wages. A valuation designee designated by the board to perform fair value determinations relating to any or all fund investments will, as discussed above, also be subject to appropriate oversight, including through board reporting.[552]

We discuss the costs and benefits of this oversight and reporting below. The elements of oversight and reporting constitute an important part of the framework that the final rule establishes and thus contribute to the benefits described in section III.C.3. To the extent that a requirement of the final rule is in line with a fund's current practice, additional costs and benefits are likely to be limited with respect to the fund.

(a) Board Oversight

As discussed above, the final rule, similar to the proposed rule, will require a board to oversee any valuation designee designated to perform fair value determinations.[553] Also, as discussed above, it is a common practice that boards provide oversight of valuation designees engaged to perform fair value determinations.[554] Because boards already provide oversight of valuation designees engaged to perform fair value determinations, the final rule is not likely to impose any additional ongoing costs or present any additional ongoing benefits; such funds will have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements. There may, however, be some boards that, in exercising their oversight obligations, currently undertake to perform more tasks than will be required by the final rule, including, for example, the ratification of specific fund fair values daily or periodically. To the extent that these boards choose to cease these practices, this could result in a reduction in benefits that are associated with a board undertaking these additional duties as well as a reduction in any associated costs. Such a change in oversight practice may reduce the costs of boards' resources spent on such day-to-day involvement and provide the benefit of directing those resources to more productive and critical areas of board oversight of the fair value process or to other oversight obligations that the board has with respect to the fund.

To the extent that certain funds' fair value practices currently are less thorough than those required under the final rule the final rule could decrease the likelihood that fund investments are inappropriately fair valued.[555] This is because, for these funds, the final rule should create a more robust valuation framework to address conflicts of interest of the valuation designee, which could result in less biased determinations of asset valuations. Nevertheless, the final rule's effect on mitigating conflicts of interest and on the accuracy of fair value determinations may be limited, as it is our understanding that many funds currently have in place fair value practices that are similar to the requirements of the final rule and that boards oversee the valuation designee's assistance with fair value calculations, including the role of pricing services in the fair value process.[556]

In addition, under the final rule, if the fund is a UIT, the fund's trustee or depositor must carry out the fair value determinations.[557] Hence, UITs will not bear any costs associated with oversight and reporting. We expect the effects of all other aspects of the final rule to be similar for UITs and other funds.

We believe that funds' incremental ongoing costs associated with this aspect of the final rule will be limited to the extent that boards or funds currently engage in appropriate oversight of a valuation designee's assistance with fair value calculations and that boards currently review periodic and ad-hoc reports related to fair value determinations prepared by the fund's valuation designee in a manner and to an extent consistent with the requirements of the final rule.[558] Commenters stated that boards lack the expertise and resources to perform fair value determinations in good faith[559] and that few boards perform this function themselves.[560] Hence, we believe that incremental ongoing costs on boards and fund investors compared to the ongoing costs under current practices will be limited to the extent that boards are already performing appropriate oversight in a manner and to an extent consistent with the final rule.[561] We acknowledge, however, that to the extent boards' current oversight of valuation designees' fair value calculations and boards' current practices with respect to review of valuation reports are inconsistent with appropriate oversight as discussed above,[562] funds may bear higher additional ongoing costs to comply with the final rule.

(b) Board Reporting

The final rule will require the valuation designee to provide periodic reports and prompt notification of matters that materially affect the fair value of the designated portfolio of investments.[563] For funds whose boards will designate valuation designees to perform fair value determinations, the final rule could impose additional ongoing costs associated with boards' appropriate oversight of the valuation designee's fair value determinations and review of board reports. Some commenters suggested the ongoing costs of reporting would be high, due in part to ''substantially more information'' being provided to boards prompted by the proposed rule, and would provide little or no benefit.[564] In response to these commenters, the final rule contains certain changes to the proposed board reporting requirements designed to, among other things, reduce the chance that boards receive reporting that is too detailed or repetitive.[565] We discuss the costs and benefits of these periodic and prompt reporting requirements below.

(1) Periodic Reporting

The final rule, like the proposed rule, will require that certain reporting be provided to the board on a quarterly basis and certain reporting on an annual

[552] *See supra* section II.B. *See also supra* footnote 141 (discussing the change to permit designation to officers of internally managed funds).

[553] *See supra* section II.B.1.

[554] *See supra* section III.B.2.

[555] *See supra* section III.C.1 for a discussion related to advisers' conflicts of interest.

[556] *See supra* section III.B.2. These costs and benefits are similar for internally managed funds seeking to designate to an officer or officers under the final rule.

[557] *See* final rule 2a–5(d).

[558] As discussed above, the final rule has been made less prescriptive than the proposed rule, thus narrowing the gap between practice and the requirements.

[559] *See, e.g.,* ABA Comment Letter; JPMAM Comment Letter; NYC Bar Comment Letter.

[560] *See, e.g.,* ABA Comment Letter; Baillie Gifford Comment Letter; Fidelity Comment Letter; IAA Comment Letter; MFS Comment Letter.

[561] We do not believe that the final rule will result in cost savings associated with boards' involvement in the determination of fair values because we believe that boards will reallocate time and attention to overseeing the valuation designee's fair value determinations or other activities unrelated to fair valuing fund investments.

[562] *See supra* section II.B.

[563] *See supra* section II.B.2.

[564] *See, e.g.,* American Funds Comment Letter; Capital Group Letter; Dechert Comment Letter; Guggenheim Comment Letter; ICI Comment Letter; SIFMA AMG Comment Letter.

[565] *See supra* text accompanying footnote 229.

basis.[566] As discussed above, periodic reporting to boards on matters of fair value determination is common practice.[567] Currently, the board may not receive quarterly or annual reports, and may receive more or less frequent reporting depending on the type of fund investments and the market conditions.

Funds will have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements. To the extent that boards do not receive periodic reporting that conforms to the requirements of the final rule, the final rule will impose additional ongoing costs to valuation designees, such as providing additional reports or more frequent reports as required by the final rule or reports of different information. Similarly, the boards of these entities will incur ongoing costs related to reviewing such reports. The final rule's requirement to assess the adequacy and effectiveness on an annual basis will, for example, to the extent that a valuation designee does not do so on an annual basis, increase a valuation designee's costs as well as the board's costs of reviewing such reports. Further, the final rule's requirement that quarterly reports include material changes in assessment or management of valuation risks will, to the extent that a valuation designee does not report material changes in assessment or management of valuation risks or does not do so on a quarterly basis, increase a valuation designee's costs as well as the board's costs of reviewing such reports. The final rule's requirement for a summary of testing results and assessment of adequacy of resources on an annual basis will, to the extent that a valuation designee does not report testing results or an assessment of adequacy of resources or does not do so on an annual basis, increase their costs as well as the board's costs of reviewing such reports. In addition, to the extent that these reporting requirements increase the volume of information that boards must review, board members may seek higher fees or may devote less time to other issues, which may impact the general effectiveness of the board. Furthermore, to the extent that the board consults outside counsel or other experts, such as accountants, with respect to such reporting, there may be additional external expenses incurred. These costs could be passed on to investors. However, to the extent that the requirement of the final rule for periodic reporting aligns with a fund's current practice, this requirement of the final rule may impose additional costs or contribute additional benefits of improved board oversight of the fair value process.

Certain funds might put in place reporting procedures to comply with the final rule that are more costly than those funds' current practices, while other funds might set up reporting as a result of the final rule that will result in lower ongoing costs than the costs of current practice. We acknowledge that funds whose reporting is less costly than that required under the final rule will bear additional ongoing costs under the final rule.

(2) Prompt Board Notification

The final rule will require the valuation designee to provide a written notification of the occurrence of material matters, including significant deficiencies or material weaknesses in the design or effectiveness of the valuation designee's fair value determination process or material errors in the calculation of net asset value. This notification must take place within a time period determined by the board, but in no event later than five business days after the valuation designee becomes aware of the material matter. The valuation designee must also provide such timely follow-on reports as the board may reasonably determine are appropriate. As discussed above, it is common practice to require that certain matters be reported promptly to the board, though the content and frequency of current ad hoc reporting to boards may vary depending on the type of fund and fund investments.

To the extent that funds do not already provide boards with prompt reporting on matters as required in the final rule, the final rule will impose additional ongoing costs such as preparing reports more quickly or more often than waiting for routine reporting. Specifically, the final rule requires written notification of the occurrence of material matters in no event later than five business days after the valuation designee becomes aware. This will impose costs on valuation designees, including costs of diverting or expending additional resources, to meet the required timeline. In addition, the final rule's definition of material matters may include matters for which some boards do not currently receive reports, which could impose additional burdens on valuation designees producing additional reports and on boards' time and attention and related external costs. The requirement to provide such timely follow-on reports as the board may reasonably determine are appropriate may impose similar costs to the extent boards do not receive such reporting already. Also, funds and valuation designees may have a one-time cost associated with reviewing the requirements of the final rule and conforming their practices to the requirements.

Overall, as discussed previously, the changes to the reporting requirements of the final rule reduce the burden and cost of required prompt board reporting under the final rule compared to the requirements of the proposed rule. Valuation designees will have relatively reduced reporting burdens and the relatively reduced reporting to the board will permit the board to more effectively and more efficiently focus on its oversight role.

(c) Specification of Functions and Reasonable Segregation From Portfolio Management

The final rule, like the proposed rule, will require that the valuation designee (a) specify the titles of the persons responsible for determining the fair value of designated investments, including by specifying the particular functions for which they are responsible, and (b) reasonably segregate portfolio management from fair value determinations.[568] As discussed above, similar practices are common among advisers performing fair value determinations.[569]

To the extent that funds do not already specify functions as required in the final rule, the final rule will impose additional ongoing costs, such as reviewing and specifying functions in accordance with the final rule. Specifically, the requirement to specify the titles of the persons responsible for determining the fair value of the designated investments, including by particular function and as related to price challenges, may impose costs, including those related to identifying clearly those responsible for price challenges to the extent funds do not do so already. In addition, the final rule's requirement for the valuation designee to segregate fair value determinations from the portfolio management of the fund reasonably will impose costs to the extent that such reasonable segregation results in a decrease in quality or quantity of information provided by portfolio managers or an increase in staffing to ensure compliance with the final rule. Costs will vary, based in part on whether a fund establishes new processes to institute this requirement, which could include independent

[566] *See supra* section II.B.2.a).

[567] *See supra* section III.B.2.g).

[568] *See supra* section II.B.3.

[569] *See supra* section III.B.2.e).

reporting chains, oversight arrangements, or separate monitoring systems and personnel. All funds subject to this requirement may have a one-time cost associated with reviewing the requirements of the final rule and ensuring that their practices conform to the requirements.

Whenever the fund's adviser is designated to perform fair value determinations, the requirement to segregate fair value determinations from portfolio management reasonably may be more costly for smaller advisers, and smaller internally managed funds, with limited resources and personnel, than for larger ones. The reason is that smaller advisers, and smaller internally managed funds, may lack the staff and resources to segregate portfolio management personnel from those making fair value determinations reasonably as efficiently as larger advisers, and internally managed funds, or may only be able to meet this requirement by hiring additional personnel. As such, the reasonable segregation requirement of the final rule allows a fund to make decisions about tradeoffs it faces (*e.g.,* costs, benefits, risks) in the context of the specific facts and circumstances of the fund.

Finally, to the extent that the board designates the valuation designees to perform the fair value determinations relating to any or all of fund investments, the final rule will provide the valuation designee—which has conflicting interests—a greater permissible role in fair value determinations relative to current practices.[570] Nevertheless, we believe that any impact from such conflicts may be mitigated because the final rule contains explicit requirements related to the identification, assessment, and management of any material conflicts of interest of the valuation designee as well as the requirement to reasonably segregate the valuation designee's fair value determinations from portfolio management, and most funds currently have in place policies to manage conflicts of interest of valuation designees that may not be valuation specific.

One commenter stated that the proposed rule lacked clarity as to which individuals are required to be identified and stated that ''little appears to be gained by the mechanical exercise'' of naming individuals and their titles, which may be generic, and identifying with specificity their roles in the valuation function.[571] As discussed more extensively above, we disagree with the commenter because this requirement in the final rule cannot be satisfied by simply listing the generic titles of those involved in valuation.[572] As a result, this requirement may result in costs, as described above, but also benefits resulting from the improved oversight and accountability which would not be provided by listing generic titles.

3. Recordkeeping

Rule 31a–4 will require that a fund or designated adviser maintain appropriate documentation to support fair value determinations.[573] As discussed above, maintenance of such documentation is a common practice.[574] Some funds may not, however, maintain these records for all investments. For example, a fund may not maintain records for which the board relies on pricing services and investments with level 2 inputs as required under rule 31a–4.[575]

Some commenters stated that the recordkeeping requirements associated with rule 2a–5 as proposed would represent a significant change from current practice and would entail additional costs.[576] Funds will have a one-time cost associated with reviewing the requirements of rule 31a–4 and ensuring that their practices conform to the requirements. To the extent that funds do not already maintain documentation to support fair value determinations that conforms to rule 31a–4, it will impose additional ongoing costs, including costs associated with updating documentation as practices change and evolve and maintaining records for six years. Certain funds or advisers might put in place recordkeeping practices to comply with rule 31a–4 that are more costly than the funds' or advisers' current practices, while other funds or advisers might set up recordkeeping practices as a result of rule 31a–4 that will result in lower ongoing costs than the costs of current practice. We continue to believe that funds' or advisers' incremental ongoing costs associated with rule 31a–4 will, however, be limited to the extent that, as discussed in section II.C above, funds or advisers currently have in place recordkeeping practices associated with fair value determinations that are similar to rule 31a–4's requirements.[577]

Some commenters suggested that the time and resources required in order to comply with the recordkeeping requirements would be higher than stated in the proposal, but without providing estimates.[578] While recordkeeping costs may be higher than estimated for some funds, to the extent that a fund's current recordkeeping practices are similar to the requirements of rule 31a–4, a fund will incur minimal additional ongoing costs. Likewise, to the extent that a fund's recordkeeping practices fail to meet the requirements of rule 31a–4, a fund will incur higher ongoing costs.

Maintaining certain documentation to support fair value determinations is an important element of the oversight framework that rule 2a–5 establishes and thus contributes to the benefits described in section III.C.3.[579] To the extent that rule 31a–4's requirements are in line with a fund's current practice, additional costs and benefits are likely to be limited.

4. Readily Available Market Quotations

The final rule defines a market quotation as readily available only when that ''quotation is a quoted price (unadjusted) in active markets for identical investments that the fund can access at the measurement date, provided that a quotation will not be readily available if it is not reliable.'' This definition will apply in all contexts under the Investment Company Act and the rules thereunder, including rule 17a–7.[580]

To the extent that funds currently consider some or all investments valued with level 2 inputs as investments with readily available market quotations, funds will incur costs related to fair valuing these investments. Specifically, if a fund currently treats certain investments valued with level 2 inputs as having readily available market quotations,[581] the fund will likely experience additional costs associated with the application of fair value practices and requirements of the final rule to those investments, as discussed above. For example, if such a fund currently views a level 2 input or the product of level 2 inputs for some

[570] *See supra* section II.B.3 for a discussion related to advisers' conflicts of interest.

[571] *See* Sullivan Comment Letter.

[572] *See supra* footnote 288 and accompanying discussion.

[573] *See supra* section II.C.

[574] *See supra* section III.B.2.h).

[575] *See supra* section III.B.2.h).

[576] *See, e.g.,* Baillie Gifford Comment Letter; Capital Group Comment Letter; ICE Data Comment Letter; ICI Comment Letter; MFS Comment Letter; SSGA Comment Letter; TRC Comment Letter; Vanguard Comment Letter. *See also supra* footnotes 310 and 311 and accompanying discussion.

[577] As discussed above, the final rule has been made less prescriptive than the proposed rule, thus narrowing the gap between practice and the requirements.

[578] *See* John Hancock Comment Letter; SIFMA AMG Comment Letter.

[579] *See supra* section III.C.3.

[580] *See supra* section II.D.

[581] *See, e.g.,* Capital Group Comment Letter; IAA Comment Letter.

securities as readily available market quotations, the fund will need to subject those securities to the fair value process. Depending on the fund's practices, this may merely mean documenting the due diligence it already performs; however, if the fund does not perform due diligence, then it will have to establish procedures to do so and document such due diligence. These costs could be passed on to investors. To the extent that the final rule reflects current industry practice (*e.g.,* properly fair valuing such securities and board reporting), there will be fewer, if any, additional costs or benefits arising from the definition in the final rule. As mentioned above, funds will incur one-time costs of reviewing the final rule and ensuring that practices conform to the final rule.[582]

The final rule's definition of readily available market quotations may also impose costs on funds that currently cross trade securities not captured by the definition. The application of this definition may result in funds that had previously viewed certain securities as having readily available market quotations, and thus eligible for cross trades under rule 17a–7, to re-evaluate practices for trading those securities or change their practices for trading those securities. This re-evaluation will impose costs on those funds and may result in those funds having a more restricted set of securities being available for cross trades than they had previously viewed as being available for cross trades.

Depending on the reasons for trading, cross trading may impact fund investors both positively and negatively. First, cross trading allows both trading funds to avoid commissions or other transaction costs that would otherwise be borne in a market transaction. Second, cross trading can allow a fund facing liquidity constraints to avoid depressed or fire-sale prices when it is selling an asset for which market prices would otherwise be depressed. However, since these transactions are not market transactions and can be affected by conflicts of interest, rule 17a–7 requires securities to have readily available market quotations to serve as an independent basis, and the ''prices'' at which cross trades execute are set internally based on the requirements of rule 17a–7.The final rule, by defining readily available market quotations, further mitigates the risk that one fund will ''subsidize'' another fund through cross trading of assets with more subjective values.[583]

Funds may also bear the cost of going to market for trades that otherwise would have been implemented via a cross trade if the securities in question lack readily available market quotations. Such costs include transaction costs (such as bid-ask spreads or commissions) and search costs for hard-to-find securities. Based on the estimates presented in Table 2, approximately 33% of fund assets are fair valued with level 2 or level 3 inputs. However, we lack detailed data on funds' engagement in cross trading in such securities to estimate what fraction of this subset will be affected by the definition of readily available market quotation.[584] Likewise, we lack detailed data to estimate the transactions and other costs that a fund might incur if forced to go to the market for transactions that otherwise would have been executed with a cross trade. The final rule will have a larger effect on funds for which a larger percentage of their investments does not have readily available market quotations because those funds will be required to determine the fair value of a larger percentage of their investments.

As discussed above, commenters were concerned about requirements in the proposed rule to maintain records of specific methodologies, assumptions, and inputs for determining fair values, in particular for investments valued with level 2 inputs.[585] Commenters stated that the definition of readily available market quotations would effectively prompt funds to treat all investments valued with level 2 inputs as not having readily available market quotations.[586] Many suggested, in particular, that applying the proposed recordkeeping provisions to investments valued with level 2 inputs is not necessary and would impose additional costs.[587] To the extent that some funds currently treat some investments relying on level 2 inputs as having readily available market quotations, those funds will face higher costs associated with determining the fair value of those investments in good faith as required by the final rule. These costs could include compliance costs (*e.g.,* updating procedures for fair value determinations) or devoting greater resources to conduct due diligence of pricing services. As discussed above,[588] commenters described varying recordkeeping practices for investments relying on level 2 inputs, including documenting the due diligence and oversight of pricing services and maintaining prices received from a pricing service. To the extent that a fund's practices with respect to investments relying on level 2 inputs conform to the final rules, a fund will face few, if any, additional ongoing costs.

One commenter also stated that ''challenges associated with the proposed rule's definition of 'readily available market quotations' '' could discourage purchases of certain investments, particularly for smaller firms.[589] Another commenter expressed a similar concern about the definition and the costs of the proposed rule's requirements for establishing methodologies, inputs, and assumptions for prices provided by pricing services.[590] As discussed above, we agree that there will be additional costs for funds that currently treat investments that rely on level 2 inputs as having readily available market quotations. While there is a potential risk that initial purchases of certain investments may be discouraged, the commenter's concern with the ''rigidity of the proposed rule,'' which required the specification of methodologies that would apply to new types of investments in which the fund intended to invest, is mitigated by changes to rule 2a–5, which does not include this requirement. Similarly, the other commenter's concern with the proposed rule's requirement to establish methodologies, inputs, and assumptions for prices provided by pricing services is mitigated by changes to the final rule, which allows the due diligence process

[582] *See supra* section III.D.2.b) and section III.D.3.

[583] *See* Alexander Eisele, Tamara Nefedova, Gianpaolo Parise, & Kim Peijnenburg, *Trading out of sight: An analysis of cross-trading in mutual fund families,* 135 J. Fin. Econ. 359 (2020) (''Eisele et al. 2020''), which provides evidence of strategic reallocation of performance among sibling funds; and Gerald Abdesaken, *Conflicts of interest in multi-fund management,* 20 J. Asset Mgmt. 54 (2019) (''Abdesaken 2019''), which provides evidence of conflicts of interest among asset managers that simultaneously manage multiple mutual funds.

[584] Approximately 28% of funds reported relying on 17a–7 for cross trades, but we cannot determine to what extent reliance on 17a–7 is limited to investments meeting the definition under the final rule of having readily available market quotations. *See supra* section III.B.3.

[585] *See supra* section II.C.

[586] *See, e.g.,* AIMA Comment Letter; American Bankers Association Comment Letter; American Funds Comment Letter; Baillie Gifford Comment Letter; Capital Group Comment Letter; Dechert Comment Letter; Guggenheim Comment Letter; IAA Comment Letter; ICE Data Comment Letter; ICI Comment Letter; IDC Comment Letter; SIFMA AMG Comment Letter; SSGA Comment Letter; TRC Comment Letter; Vanguard Comment Letter.

[587] *See, e.g.,* Capital Group Comment Letter; SIFMA AMG Comment Letter.

[588] *See supra* section II.C and section III.B.2.h).

[589] *See* Guggenheim Comment Letter.

[590] *See* Dechert Comment Letter.

for pricing services to fulfill this requirement.

5. Rescission of Prior Commission Releases and Guidance

The final rule, like the proposed rule, rescinds certain Commission releases and guidance, including ASR 113, ASR 118, and prior guidance on the oversight of pricing services contained in the 2014 Money Market Fund Release.[591] To the extent that funds' interpretations of such Commission releases and guidance have led to funds' adoption of practices that do not conform to the requirements of the final rule, the final rule will impose additional initial and ongoing costs, but come with additional ongoing benefits. Furthermore, as described in the Proposing Release, some parts of the Commission releases and guidance have been superseded or made obsolete.[592] Similarly, one commenter stated that rescinding ASR 113 and ASR 118 will avoid potentially contradictory requirements [593] and other commenters stated that U.S. GAAP and related accounting rules play an informative role in the valuation process.[594] Because U.S. GAAP standards are commonly understood and used in the industry in financial reporting, both the additional one-time and ongoing costs of conforming to these standards and the final rule, rather than relying on Commission releases and guidance, should be limited. Finally, we believe that rescinding the auditing guidance included in ASR 118 will have little or no impact on funds or valuation designees because a fund board or valuation designee could request that its auditor continue current practice to verify 100% of the values of the fund's investments if it determines that this approach is preferable.

The final rule provides a minimum, consistent framework for fair value and standard of baseline practices across funds to help ensure that boards fulfill their oversight roles appropriately, and these will encourage funds to adopt best practices to support more rigorous fair value determinations. The rescission of prior Commission releases and guidance obviates a fund's need to analyze and interpret those releases and guidance, thus reducing compliance costs.[595] As discussed above, some commenters opposed rescission of ASR 113 and ASR 118 stating that certain specific fair values are not covered in the relevant accounting standards and that certain content within those releases should be reissued or restated by the Commission, but we continue to believe that in light of the existing framework in U.S. GAAP, and upon adoption of rule 2a–5 in this document, these specific valuation matters do not require the specific incremental guidance included in the ASRs.[596] Lower costs of compliance for funds resulting from relying on the final rule rather than various guidance ultimately could benefit fund investors to the extent that any cost savings would be passed down to them in the form of lower fund operating expenses.

6. Cost Estimates

Rules 2a–5 and 31a–4 will affect all funds with investments that do not have readily available market quotations, their boards of directors, the advisers of most funds, and the depositors or trustees of UITs, though not all of those funds will have to materially change their practices to comply with the final rule. The effects of these rules depend on the extent to which funds' current practices differ from their requirements. Our staff estimates that the one-time incremental costs necessary to ensure compliance with these rules range from $100,000 to $600,000 per fund, depending on the current fair value practices of the fund.[597] These estimated costs are attributable to the following activities: (i) Reviewing the rules' requirements; (ii) developing new (or modifying existing) fair value policies and procedures,[598] reporting,[599] recordkeeping,[600] valuation risk assessment,[601] fair value methodology,[602] testing,[603] and pricing service oversight [604] practices to align with the requirements of the rules; (iii) implementing those policies and procedures, reporting, recordkeeping, valuation risk assessment, fair value methodology, testing, and pricing oversight practices and integrating them into the rest of the funds' activities; (iv) preparing new training materials and administering training sessions for staff in affected areas; and (v) independent board members consulting their independent counsel on whether the valuation designee should be designated to perform fair value determinations and how to set up appropriate policies and procedures, reporting, and recordkeeping requirements.

Many commenters agreed that the requirements of the proposed rule would impose such costs [605] and some commenters stated that our estimates understated the costs described in the proposed rule.[606] However, such commenters did not provide specific estimates or data to inform more accurate cost estimates. As described above, the requirements of these rules will be less prescriptive and burdensome than the requirements of the proposed rule. Nonetheless, our estimates have not changed because these estimates are for the one-time costs described here. Such costs are unlikely to vary as a result of the differences between the requirements of the proposed rule and those of rules 2a–5 and 31a–4 as adopted. We expect that the one-time incremental cost necessary to ensure compliance with the rules depends on each fund's current fair

[591] *See supra* section II.E.

[592] *See* Proposing Release, *supra* footnote 2, at n.150 and accompanying discussion.

[593] *See* KPMG Comment Letter.

[594] *See* ABA Comment Letter; E&Y Comment Letter.

[595] Academic literature provides evidence consistent with the idea that uncertainty has negative effects on investment and growth. *See, e.g.,* Nicholas Bloom, Stephen Bond, & John Van Reenen, *Uncertainty and Investment Dynamics,* 74 Rev. Econ. Stud. 391 (2007); Nicholas Bloom, *The Impact of Uncertainty Shocks,* 77 Econometrica 623 (2009); Scott R. Baker, Nicholas Bloom, & Steven J. Davis, *Measuring Economic Policy Uncertainty,* 131 Q.J. Econ. 1593 (2016).

[596] *See supra* section II.E.

[597] The one-time cost estimates used in the economic analysis may differ from the cost estimates in section IV below because (i) the cost estimates in the economic analysis capture all costs associated with the final rule, while the cost estimates in section IV capture only costs related to information collection burdens and (ii) the cost estimates in the economic analysis capture incremental costs associated with the final rule, while the cost estimates in section IV capture total costs. Hence, the cost estimates in section IV below serve as an upper bound of costs related to information collection burdens for funds that do not have in place currently any practices that are similar to the final rule's requirements.

[598] The final rule does not specify a requirement for policies and procedures beyond that in the compliance rule, but the final rule may affect the content of policies and procedures required for documentation of fair value determinations under the compliance rule. *See supra* section II.A.5, section III.B.2, and section I.A.1.e.

[599] *See supra* section II.B.2, section III.B.2.g), and section III.D.2.b).

[600] *See supra* section II.C, section III.B.2.h), and section III.D.3.

[601] *See supra* section II.A.1, section III.B.2.b), and section III.D.1.a).

[602] *See supra* section II.A.2, section III.B.2.c), and section III.D.1.b).

[603] *See supra* section II.A.3, section III.B.2.d), and section I.A.1.c.

[604] *See supra* section II.A.4, section III.B.2.f), and section I.A.1.d.

[605] *See, e.g.,* Dechert Comment Letter; Guggenheim Trustees Comment Letter; ICI Comment Letter; IDC Comment Letter; Invesco Comment Letter; John Hancock Comment Letter; NYSSCPA Comment Letter; Scheidt Comment Letter 2; Stradley Comment Letter.

[606] *See, e.g.,* Guggenheim Comment Letter; ICI Comment Letter; John Hancock Comment Letter.

value practices and the amount and valuation complexity of fund investments that must be fair valued. In particular, the one-time costs will be closer to the lower end of the range for funds whose current practices are more similar to the requirements of the rules and funds with fewer and easier-to-value fund investments. Further, the one-time costs will be closer to the lower end of the range for funds that belong to fund complexes because certain aspects of the one-time costs are fixed costs that could be spread across multiple funds in the case of fund complexes.

As discussed above, we estimate that 9,804 funds will be affected by the rules, and thus incur one-time costs associated with the rules.[607] We estimate that 70% of one-time costs are attributable to funds reviewing and updating their current practices and related policies and procedures to comply with the final rule's requirements; 15% of one-time costs are attributable to funds reviewing and updating current recordkeeping processes to align with rule 31a–4's requirements; and the remaining 15% of one-time costs are attributable to funds reviewing and updating the current board reporting processes to comply with the final rule's requirements. Hence, we estimate the aggregate one-time costs of the final rule to range between $980.4 million and $5.9 billion.[608]

Section IV below presents estimates of ''collection of information''-related burdens[609] associated with rule 2a–5's board reporting and rule 31a–4's recordkeeping requirements and with the requirement, to comply with rule 38a–1 after our adoption of rule 2a–5, to adopt and implement written policies and procedures reasonably designed to prevent violations of the requirements of rule 2a–5. Our estimates of one-time costs in the economic analysis above subsume the estimates of initial burdens in section IV, as the former cover costs associated with a broader set of activities, as described above, that do not all relate to the collection of information. In addition, some funds with investments valued using non-level 1 inputs may incur ongoing costs, in addition to the one-time costs described above, associated with the rules' requirements. However, we believe that the level of ongoing costs associated with the requirements of the rules are generally similar to that associated with existing practices of funds with investments valued without readily available market quotations. As a result, the estimate of ongoing industry burdens of $504,973,451 per year[610] in section IV represents an upper bound on the incremental ongoing costs for funds affected by the rules.

7. Other Cost Considerations and Comments on Costs

Many commenters stated that costs would likely be higher than we estimated in the Proposing Release without quantifying those higher costs. In addition, some commenters presented a number of other costs—also without quantification—that were not included in our estimates in the Proposing Release. For example, one commenter stated that the proposed reporting requirements could even lead to increased self-imposed costs becoming industry standards.[611] As discussed above, to the extent that funds' reporting practices already conform to the requirements of the final rule, additional costs will be limited. Likewise, we believe it is unlikely that funds will engage in additional reporting that is not necessary for compliance with the final rule. A few commenters suggested the proposed rule would result in increased liability of funds, boards, and advisers in fulfilling their fair value responsibilities.[612] It is possible funds, boards, and advisers may incur liability in connection with their fair value responsibilities under the final rule, but they already may incur liability in this regard under the law.

E. Effects on Efficiency, Competition, and Capital Formation

Rules 2a–5 and 31a–4 may also have effects on efficiency, competition, and capital formation. Under the final rule, boards may designate a valuation designee to perform fair value determinations and may oversee the valuation designee's fair value determinations instead of determining fair value themselves, which could free board resources tied to valuation and redirect them to oversight or other matters. As a result, to the extent that boards currently determine fair value of investments themselves, the final rule could lead to more efficient use of boards' resources and therefore improve funds' governance of determinations of fair value in good faith for the benefit of investors.[613] Conversely, to the extent that fund boards do not currently determine fair value themselves and instead rely on an adviser to compute fair value in line with the requirements of the final rule, such boards are not likely to benefit from more efficient use of their resources. The final rule also could improve the efficiency of fund operations because it will explicitly allow boards more flexibility to oversee the valuation designees' fair value determination, whether the fund boards currently make fair value determinations themselves or not.

As discussed above, for UITs, a UIT's trustee or depositor must conduct fair value determinations under the final rule.[614] To the extent that the assistance of other parties (such as evaluators) is necessary, trustees or depositors can seek that assistance consistent with the guidance above regarding obtaining the assistance of others. Thus, for UITs, the final rule explicitly places the responsibility on a UIT's trustee or depositor, as specified in the trust indenture of the UIT, to fulfill the requirements of the final rule to ensure appropriate oversight of the fair value determination process.

As discussed above, the final rule mandates oversight of a valuation

[607] *See supra* footnote 509.

[608] $980.4 million = 9,804 affected funds × $100,000. $5.9 billion = 9,804 affected funds × $600,000. *See supra* footnote 509.

[609] *See infra* footnote 637 and associated text.

[610] The ongoing burden associated with board reporting is based on 20 hours × $368 (senior programmer) + 1.5 hours × $4,770 (combined rate for 4 directors) + 0.44 hours × $368 (compliance attorney) + an external burden of $3,180 = $17,859 for each affected fund, implying a total ongoing industry burden of $17,859 × 9,335 affected funds = $166,709,616. *See infra* section IV.B. The ongoing burden associated with recordkeeping is based on 35 hours × $63 (general clerk) + 35 hours × $96 (senior computer operator) + 35 hours × $368 (compliance attorney) = $18,445 for each affected fund, implying a total ongoing industry burden of $18,445 × 9,335 affected funds = $172,184,075. *See infra* section IV.B. The ongoing burden associated with rule 38a–1 is based on 5 hours × $329 (senior manager) + 5 hours × $466 (assistant general counsel) + 2 hours × $530 (chief compliance officer) + 1 hour × $365 (compliance attorney) + 2 hours × $4,770 (Board of Directors as a whole), implying a total ongoing industry burden of $16,940 × 9,804 affected funds = $166,079,760. *See infra* section IV.B. Therefore, the total ongoing industry burden associated with the final rule is $166,709,616 + $172,184,075 + $166,079,760 = $504,973,451.

[611] *See* Dechert Comment Letter.

[612] *See* ICI Comment Letter; American Funds Trustees Comment Letter; Capital Group Comment Letter; SIFMA AMG Comment Letter.

[613] As discussed above, some commenters disagreed that this would free up board resources. *See, e.g.,* Russell Comment Letter; Fidelity Comment Letter; MFS Comment Letter; John Hancock Comment Letter. The final rule does not impose requirements on the board that go beyond its present obligations, but does impose various specific requirements that are not currently expressly required. However, the final rule does provide an express mechanism such that a board is permitted to designate a valuation designee to perform actual determinations of fair value on a daily basis, thus avoiding a board's involvement in the day-to-day activities of fair value determination, while maintaining its critical oversight role.

[614] *See* section II.B. *See also* footnotes 174, 176, and 177 and accompanying discussion.

designee, which could ultimately improve the efficiency and reduce the bias of funds' valuations. Similarly, the requirements for UITs to provide oversight of the fair value determination process could improve the efficiency and reduce the bias of UITs' valuations. The final rule could improve the efficiency of valuations because it may create a more rigorous valuation framework and could help mitigate any conflicts of interest of the valuation designees or, in the case of UITs, the trustee or depositor, which ultimately could result in less biased valuations. A potential increase in asset valuation efficiency could improve boards' monitoring of funds' and of valuation designees' performance and could benefit capital formation because less biased valuations permit the allocation of resources to more efficient use. As mentioned by a commenter, ''[b]etter standards improve the transparency and stability of financial markets, contribute to the growth of stronger economies and lead to improved confidence for investors and users of valuation services.'' [615] Similarly, another commenter noted that ''more accurate and neutral information'' could lead to positive economic consequences and improved decision-making.[616] Nevertheless, we believe that any such effects likely will be limited to the extent that funds currently have in place fair value practices that are generally similar to the requirements of the rules and that boards oversee the valuation designee's and any pricing service's role in fair value calculations. Similarly, we believe that any such effects likely will be small to the extent that UITs currently have in place fair value practices that are generally similar to the requirements of the final rule and that UITs' trustee or depositor oversees the fair value process and any pricing service's role in fair value calculations.

As discussed above, the final rule includes a definition of readily available market quotations and this definition may affect the ability of funds to cross trade certain investments.[617] Any such reduction in cross trades may have some implications for efficiency, competition, and capital formation. Any reduction in the extent of cross trades, to the extent that such trades are executed in the market, may affect market efficiency by contributing to price discovery for such investments that otherwise would not have gone to market. In this regard, transactions that are brought to market rather than being transacted internally will contribute to an increase in more efficient capital allocation and foster capital formation by subjecting more investments to price discovery.

One commenter stated that the requirements of the proposed rule for all investments without readily available market quotations could discourage the purchase of certain securities, particularly for smaller and mid-sized firms and could ''impair the ability of such firms to offer funds that invest in fixed income securities, resulting in fewer investment options for mutual fund investors.'' [618] To the extent that the final rule increases compliance burdens with respect to securities valued with level 2 or level 3 inputs, the final rule could provide incremental disincentives to purchase these securities, particularly by smaller and mid-sized funds. To the extent that these disincentives affect smaller and mid-sized funds more than other funds, the requirements of the final rule may affect the competitive landscape (*e.g.,* by resulting in fewer investment options for investors). However, it is our understanding that the requirements of the final rule align with current practice of fair value determinations of investments without readily available market quotations.

Overall, we do not believe that the rules will have any material effects on competition because the effects of the rules likely will be limited to the extent that the rules are similar to current practices. Even though costs could be more burdensome for smaller fund complexes, we believe that these costs will not significantly affect competition in the fund industry because few funds will incur costs at the higher end of the cost range estimate (*i.e.,* between $100,000 and $600,000). Furthermore, the extent to which the costs of the requirements of the final rule are relatively more burdensome for a fund is likely to be correlated to the fund's current lack of appropriate oversight of the fair value process. As the requirements of the final rule establish a framework for appropriate oversight of the fair value process, this may improve the competitive landscape in the fund industry. Any decrease in the ability of certain funds' engagement in cross trades due to the definition of readily available market quotations and the requirement to fair value all investments that are valued using level 2 inputs should affect all such funds and not result in any change in the competitive landscape in this regard; at most it would level the playing field among funds and thus contribute to a fairer competitive landscape. Thus, we continue to believe that the rules will not negatively affect competition in the fund industry, though it may have unfavorable effects on funds and valuation designees currently lacking an effective framework for appropriate oversight of their fair value processes.

In addition, the requirement of the final rule reasonably to segregate fair value determinations from portfolio management likely will more significantly affect those smaller valuation designees or funds that lack the staff and resources necessary to effect such segregation as efficiently as larger advisers or larger funds. For example, such funds or valuation designees that lack the staff or resources to effect such segregation may hire additional personnel to ensure (or to assure a board) that they can reasonably segregate the fair value process from portfolio management. Similarly, the requirement to segregate determinations of fair value from portfolio management may present a barrier to entry to smaller advisers. This barrier may be realized through boards' unwillingness to hire advisers that cannot ensure such segregation to the boards' satisfaction. To the extent that boards may be unwilling to hire advisers who cannot reasonably segregate these functions, small advisers without the resources to provide such segregation will face a competitive disadvantage. Nevertheless, we do not believe that this requirement of the final rule will have a material effect on competition in the fund adviser industry because many smaller advisers to funds and internally managed funds currently have in place processes to address the potential conflicts of interest whenever portfolio management personnel provide input to valuation. To the extent that boards currently consider such risks and the need to segregate such functions in their selection of advisers—including small advisers—as we understand is current practice, the requirement is unlikely to affect competition in the fund adviser industry.

Another commenter suggested that one of the valuation risk factors discussed above—''reliance on service providers that have more limited expertise in relevant asset classes''—could ''deter competition in the market for pricing services.'' [619] We do not believe evaluation of valuation risks will prevent funds from engaging a pricing service with limited experience,

[615] *See* IVSC Comment Letter.

[616] *See* Davidson Comment Letter.

[617] *See supra* section III.D.4.

[618] *See* Guggenheim Comment Letter. The commenter's concern was focused on investments that rely on prices provided by pricing services, particularly those which ''frequently use Level 2 inputs.''

[619] *See* IHS Markit Comment Letter.

but rather funds will assess the risks associated with such an engagement and manage them accordingly (for example, through more frequent backtesting of such pricing service's valuation information until it gains more experience).

As described above, the requirements of rule 2a–5 are similar to current practices [620] and establish a certain minimum, consistent framework for determinations of fair value in good faith under the final rule.[621] Likewise, rule 31a–4 is based upon current practices and is designed to help implement this framework. Rule 2a–5's framework includes elements providing for effective oversight. Effective corporate governance is a key piece of investor protection [622] at the same that it can provide for increased efficiency, competition, and capital formation. Boards practicing good governance can mitigate the agency problem that exists between the ''agents'' (*e.g.,* advisers) and the ''principals'' (*e.g.,* funds). In the area of fair value determinations in good faith, governance can reduce the information asymmetry that exists between fund advisers or portfolio managers and investors.

As described above,[623] we expect that the requirements of the rules will contribute to less biased valuations, which has benefits for fund managers and investors alike. Fund managers are better able to manage their portfolios to tailor their portfolios to specific risk-reward profiles or benchmarks as described in their investment policy statement [624] and to ensure that their portfolios comply with the fund's risk appetite statement. However, advisers may have an incentive to ''improperly value fund assets in order to increase fees, improve or smooth returns, or comply with the fund's investment policies and restrictions,'' [625] and fund boards are ''uniquely positioned to engage in oversight of the affiliated service provider generally and with respect to the conflicts of interest potentially arising in connection with the fair valuation process.'' [626] Improper and biased valuations may also distort other behavior.[627] The requirements of the final rule are designed to mitigate any such distortions.

Properly valuing a fund's investments is also a critical component of the accounting and financial reporting for investment companies. Appropriate and unbiased valuations should thus provide investors with greater confidence in the accuracy of the value of fund investments, the performance of funds, and the level of risk of fund investments. This should allow investors to evaluate more effectively how a given fund fits their investment objectives, risk appetite, and ability to bear risk.

Taken together, appropriate and unbiased valuation fosters price discovery. Price discovery, in turn, ensures that investments and resources are directed to their most efficient use, both by investors and funds themselves. Efficiency and improved accounting and financial reporting resulting from appropriate and unbiased valuation should promote capital formation by increasing the quality and reliability of information in capital markets.[628] Similarly, appropriate and unbiased valuation induces greater competition as the performance of funds and their advisers becomes more reliably assessable. While appropriate and unbiased valuation contribute to investor protection, efficiency, competition, and capital formation, the extent to which the requirements of the rules will increase these contributions may be limited by the extent to which funds' current practices are similar to the rules. As discussed above, the costs of the rules will likewise be limited to the extent to which funds' current practices are similar to the rules.

F. Reasonable Alternatives

1. Designation to Officers of Internally Managed Fund Not Permitted

We considered not permitting internally managed funds to designate officers to perform the fair value functions required by the final rule, but allowing such funds to seek individual exemptive applications to allow designation of their officers. This would give the Commission the opportunity to design protections that are more tailored to the kinds and magnitude of conflicts involved in internally managed funds and the kinds of assets in which those funds invest. We believe, however, that the costs to these funds involved in applying for individual exemptive relief could be passed on to investors in these funds. Furthermore, officers of internally managed funds do, in fact, have a fiduciary duty, and play a similar or the same role as other valuation designees. Thus, treating officers of internally managed funds differently or preferentially would be inconsistent with the goal of ensuring appropriate oversight and governance of the fair value process (regardless of the parties involved) that the final rule seeks. Further, we believe that the final rule's oversight and other requirements provide minimum and baseline standards that we believe should be part of any good faith fair value determination for internally managed funds. We do not believe that individually-granted exemptive relief would provide funds or their shareholders substantially more protections in the fair value process, as compared to those included in the final rule, to justify the costs of requiring exemptive applications. For these reasons, we are not adopting this alternative.

2. Safe Harbor

Some commenters suggested that the proposed rule be formulated as a safe harbor.[629] These commenters perceived the proposed rule as prescriptive and indicated that such rules are more appropriate for a safe harbor. Commenters argued that for those not availing themselves of the safe harbor, practices would evolve and adapt in response to market developments and permit heterogeneity of practices that are appropriate for the idiosyncrasies of market participants. However, for those funds that choose not to use the safe harbor, the guidelines would be less clear, and perhaps only as clear the current regulatory framework. Any lack of certainty would likely entail higher compliance costs and possible investor protection costs. Funds not relying on the safe harbor would likely have to divert more resources to ensuring compliance and may fall short of

[620] *See supra* section III.B.2.

[621] *See supra* section III.C.3 and sections III.D.1 to III.D.4.

[622] *See, e.g.,* Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Schleifer, & Robert Vishny, *Investor Protection and Corporate Governance,* 58 J. Fin. Econ. 3 (2000).

[623] *See supra* footnote 510 and accompanying discussion.

[624] *See Elements of an Investment Policy Statement for Institutional Investors,* CFA Institute (2010).

[625] *See* Proposing Release, *supra* footnote 2, at n.911 and accompanying text.

[626] Russell Comment Letter; *see also* Better Markets Comment Letter; CFA Institute Comment Letter; SIFMA AMG Comment Letter.

[627] *See, e.g.,* CFA Institute Comment Letter; Fidelity Comment Letter; JPMAM Comment Letter; MFS Comment Letter; SIFMA AMG Comment Letter; Stradley Comment Letter.

[628] *See, e.g.,* Andrea Polo, *Fair Value and Corporate Governance,* 6 Corp. Ownership & Control 382 (2008).

[629] *See supra* section II; *see also* American Bankers Association Comment Letter; American Funds Trustees Comment Letter; Dechert Comment Letter; Fidelity Trustees Comment Letter; Guggenheim Comment Letter; ICI Comment Letter; Stradley Comment Letter; Vanguard Comment Letter; Comment Letter of Mark Loughridge, Lead Independent Director, Board of Trustees of the Vanguard Funds (July 21, 2020).

providing appropriate oversight and governance of the fair value process as compared to the final rule. Recasting rule 2a–5 as a safe harbor would not provide a minimum baseline framework, as boards that chose not to avail themselves of the safe harbor might take an approach to the process of making fair value determinations that does not result in investors receiving as rigorous valuations as under the final rule. Valuation is a core responsibility of the board under the Act and critical for investor protection. Consequently, we believe not defining minimum and baseline standards could harm investors if funds took approaches that lacked consistency or certain aspects of these basic standards.

3. Three-Tiered Approach

Some commenters suggested that instead of a binary approach where securities that are valued based on level 2 and level 3 inputs are subject to fair value determinations, we instead adopt a three-tier approach similar to U.S. GAAP's level 1, level 2, and level 3 input classifications and have rules 2a–5 and 31a–4 further distinguish the fair value determination process between securities in level 2 or between level 2 and level 3.[630] We are not adopting this alternative because, as discussed previously, we believe that the Act establishes a binary framework with securities either being valued based on their readily available market quotations, or for all other investments, being fair valued in good faith. However, the final rule establishes a framework that allows boards or valuation designees to tailor their fair value determination process to the investments held by the fund, and allows for a variety of different methodologies to be applied. As described above, the requirements of rule 31a–4 for investments fair valued with level 2 inputs does allow for different levels of recordkeeping that correspond with the risk and nature of the investments that are being fair valued. The recordkeeping and reporting requirements of rules 2a–5 and 31a–4 are designed to be flexible, and thus funds may distinguish between level 2 and level 3 securities as part of their recordkeeping and reporting processes. Accordingly, we believe that the final rule permits boards and valuation designees sufficient flexibility to design their fair value determination process as appropriate for the investments held by the fund.

[630] *See, e.g.,* SSGA Comment Letter.

4. More Principles-Based Approach

The final rule mandates the performance of certain prescribed functions to determine the fair value of fund investments in good faith. As suggested by many commenters, we considered an alternative with a more principles-based approach that would not specify the types of fair value functions that must be performed, but instead would only state that funds should have in place practices, policies and procedures, reporting, and recordkeeping that would allow fair values to be determined in good faith by the board of directors or the valuation designee. For example, funds would have greater discretion to apply more or less rigorous valuation requirements on fair value determinations of investments that rely on level 2 inputs, including treating certain such investments as having readily available market quotations, depending on what the fund deemed to be appropriate.[631]

The benefits of such an approach would be that funds would have more flexibility in what their policies and procedures, reporting, and recordkeeping cover. To the extent this alternative would reduce certainty for funds, it could increase compliance costs to the detriment of fund investors. Further, a less prescriptive approach would not adequately ensure that the board provides sufficient oversight over the valuation designee's fair value determinations.[632] In addition, if certain funds within a fund complex were to use the additional flexibility afforded by a more principles-based approach to set up practices, policies and procedures, reporting, and recordkeeping arrangements that are different from one another, such flexibility could increase the cost of board oversight. This could occur because a board that is shared across funds within a fund complex may not be able to apply a similar framework across the various funds it oversees or because a board believes that the principles-based requirements could be satisfied with respect to a particular fund only using different practices, policies and procedures, reporting, and recordkeeping arrangements. However, such flexibility would provide funds and boards themselves the option to evaluate the tradeoffs among, for example, non-uniform arrangements across funds, more tailored and effective reporting, corresponding increased costs of board oversight, and corresponding increased costs of compliance. Thus each fund could make a choice that is more aligned with its goals and constraints, including regulatory constraints, than under a less principles-based arrangement.

A more principles-based approach would not mandate a minimum, consistent framework for fair value and standard of baseline practices across funds, which we believe is inherent in any good faith fair value determination process. For these reasons, we are not adopting this alternative.

[631] *See supra* section III.B.2.c) and section III.F.3.

[632] We acknowledge that under the final rule, funds could face some uncertainty regarding how to comply with the final rule's requirements. Nevertheless, we believe that a more principles-based approach than the final rule would increase further any uncertainty regarding how to comply with the requirements of section 2(a)(41) of the Act without any additional benefit of ensuring appropriate oversight of the fair value process.

5. Designation of the Performance of Fair Value Determinations to Service Providers Other Than Advisers, Officers, Trustees, or Depositors

Under the final rule, the board may designate the adviser of the fund, or an officer or officers of an internally managed fund, to perform fair value determinations. For UITs, trustees or depositors of a UIT or other entities appointed by existing UITs will perform fair value determinations. The valuation designee carries out all of the functions required under the final rule. As an alternative, we considered allowing the board to designate sub-advisers or service providers other than the adviser or an officer or officers, and providing for parties other than trustees or depositors of a UIT, such as a pricing service, to perform fair value determinations. Such an approach would provide additional flexibility to the board. As noted by commenters, pricing service providers currently provide evaluated prices extensively to funds, many of which use these prices as fair values for the purposes of the Act.[633] This could also help in a situation where the adviser's conflicts and a pricing service's comparative expertise make designation of the adviser less desirable and designation of the pricing service more beneficial. Likewise, the board might also choose to designate to a party such as a pricing service because the board assesses that the conflicts of interest with the pricing service are less extensive, less problematic, or more feasibly managed than those with an adviser or officers of the fund.

Nevertheless, such an approach potentially could limit a board's ability to oversee effectively the service provider that performs the fair value

[633] *See supra* footnote 417 and accompanying discussion.

determinations to the extent that the board does not have the same level of visibility, access to information, and control over the actions of service providers other than the valuation designee as provided in the final rule. Further, even though service providers may have a contractual obligation to perform valuation services for the fund, those service providers may not owe the same fiduciary duty to the fund that an adviser would, and thus their obligation to serve the fund's best interests may be more limited than the adviser's. We also believe, as discussed above, that it is important for the valuation designee to have a direct relationship with the fund's board and have comprehensive and direct knowledge of the fund.[634] Although the final rule allows some persons besides advisers to perform fair value determinations (*e.g.,* officers of internally managed funds and trustees and depositors of UITs) who also generally have a fiduciary duty, we believe that retaining responsibility with a more closely associated person is more likely to increase accountability than a third-party service provider. Hence, such an alternative approach could compromise the integrity of the fair values by increasing the likelihood of conflicts with the adviser.

While some pricing services are also registered investment advisers, such pricing services would not necessarily owe the same fiduciary duties to a fund if they are not the investment adviser for the fund, and may have conflicts of interest that are more difficult to mitigate to the extent that the role of fair value determination and portfolio management are integrated. Further, in cases where a single pricing service cannot perform fair value determinations for all assets, the process and oversight could become extremely burdensome for funds and their boards. Finally, nothing in the final rule prevents other service providers, such as pricing services, from continuing to provide significant input and assistance, much as they do today, on fair value determinations. However, retaining direct responsibility with an adviser or more closely affiliated designee is more likely to increase accountability and oversight over these other service providers.

6. Not Permit Boards To Designate a Valuation Designee

As discussed in more detail above, unlike the current regulatory framework, the final rule permits fund boards to designate the performance of fair value determinations to a valuation designee. In addition, relative to the current regulatory framework, rules 2a–5 and 31a–4 will mandate more specific fair value practices, reporting, and recordkeeping. As an alternative to these rule, we considered not permitting fund boards to designate a valuation designee to perform fair value determinations for the fund but instead only requiring funds to adopt the practices, reporting, and recordkeeping as described in the final rule. We also considered requiring boards periodically to ratify the fair value determinations calculated by the fund's valuation designee using a methodology determined by the board. Such an approach could prescribe minimum requirements with respect to valuation practices, reporting, and recordkeeping. Nevertheless, such an approach would not allow funds the flexibility to leverage the fair value expertise of the valuation designee and assign a role to the fund's board that is more in line with the board's experience and expertise. Consequently, we believe that such an approach would not result in more efficient use of boards' time and more efficient fund operations, and would not result in improvements in fund governance, nor would it ultimately benefit fund investors.

IV. Paperwork Reduction Act

A. Introduction

Certain provisions of rules 2a–5 and 31a–4 contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[635] We are submitting the collections of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA.[636] The title for the existing collection of information is ''Investment Company Act Rule 38a–1, 17 CFR 270.38a–1, Compliance procedures and practices of registered investment companies'' (OMB Control No. 3235–0586). We are also submitting a new collection of information for rules 2a–5 and 31a–4. The titles for the new collections of information will be ''Rule 2a–5 under the Investment Company Act of 1940, Fair Value'' and ''Rule 31a–4 under the Investment Company Act of 1940, Records of Fair Value Determinations.'' An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

We discuss below the collection of information burdens associated with new rules 2a–5, 31a–4, and their impact on the burdens of rule 38a–1.[637] Rule 2a–5 will provide requirements for determining fair value in good faith for purposes of section 2(a)(41) and rule 2a–4 thereunder and rule 31a–4 will provide the recordkeeping requirements associated with this rule.

B. Rule 2a–5

Rule 2a–5 will provide requirements for determining fair value in good faith for purposes of section 2(a)(41) and rule 2a–4 thereunder. This determination will involve assessing and managing material risks associated with fair value determinations; selecting, applying, and testing fair value methodologies; and evaluating any pricing services used. The final rule will permit a fund's board of directors to designate the performance of fair value determinations relating to any or all fund investments to a valuation designee, which will carry out all of these requirements, subject to board oversight and certain reporting and other requirements designed to facilitate the board's ability effectively to oversee the valuation designee's fair value determinations. As relevant here, the final rule will require, if the board designates performance of fair value determinations to a valuation designee, that the valuation designee report to the board in both periodic and as needed reports on a per-fund basis.[638]

The respondents to rule 2a–5 will be registered investment companies and BDCs.[639] We estimate that 9,804 funds will be affected by rule 2a–5, of which 9,335 are not UITs.[640] Compliance with rule 2a–5 will be mandatory for any fund that will need to determine fair value under the Act. To the extent that records will be required to be created and maintained under the final rule are provided to the Commission in connection with examinations or investigations, such information will be

[634] *See supra* footnotes 157–158 and accompanying text.

[635] 44 U.S.C. 3501 through 3520.

[636] 44 U.S.C. 3507(d); 5 CFR 1320.11.

[637] The Commission's estimates of the relevant wage rates in the tables below are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013. The estimated wage figures are modified by Commission staff to account for an 1,800-hour work-year and inflation, and multiplied by 5.35 for professional staff and 2.93 for clerical staff to account for bonuses, firm size, employee benefits, overhead, and adjusted to account for the effects of inflation. *See* Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2013 (''SIFMA Report'').

[638] Rule 2a–5(b).

[639] *See* Rule 2a–5(e)(1) (defining ''fund'').

[640] *See supra* footnotes 508–509 and accompanying text.

kept confidential subject to the provisions of applicable law.

Table 3 below summarizes the PRA initial and ongoing burden estimates associated with the board reporting requirements under the final rule, as well as the proposed burden estimates. Some commenters argued that the burden estimates as proposed for this requirement were too low, arguing in particular that the cost to produce the items that would have been required on a quarterly basis as part of the proposed periodic reporting requirements would be in excess of what we had assumed due to burdens of both creating these reports and of reviewing them on the part of the board.[641] While we have clarified that certain reporting that commenters thought was suggested in the proposed rule will not be required in the final rule and made other changes to address these concerns,[642] we are nonetheless increasing our estimates for the final rule in consideration of these comments. We also have corrected certain estimates, specifically to include an initial burden as we believe the final rule will impose some start-up burdens and to update the wage rates for relevant personnel. We have also updated the estimated number of respondents based upon updated data.[643] Lastly, we increased the estimated amount of external cost burden to include costs relating to both legal and accounting services as the proposed estimate only estimated external costs relating to legal expenses.

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[641] *See* Sullivan Comment Letter; TRP Comment Letter; SIFMA AMG Comment Letter; American Trustees Comment Letter; *see also* Capital Group Comment Letter; Guggenheim Trustees Comment Letter.

[642] *See supra* section II.B.2.

[643] *See supra* footnotes 508–509 and accompanying text.

Table 3: Rule 2a-5 PRA Estimates

	Initial internal burden hours	Internal annual burden hours[1]		Wage rate[2]	Internal time costs	Initial external cost burden	Annual external cost burden
PROPOSED ESTIMATES							
Adviser written reports	0 hours	8 hours	×	$329 (senior manager)	$2,632	$2,000	$2,000
	0 hours	1 hour	×	$17,860 (combined rate for 4 directors)	$17,860		
	0 hours	1 hour	×	$365 (compliance attorney)	$365		
Total annual burden per fund		**10 hours**			**$20,857**	$2,000	$2,000
Number of funds		× 9,501			× 9,501	× 9,501	× 9,501
Total proposed burden		**95,010 hours**			**$198,162,357**	**$19,002,000**	**$19,002,000**
FINAL ESTIMATES							
Valuation designee written reports	**12 hours**	**24 hours**	**×**	$368 (senior operations manager)	**$8,832**	**$3,180**	**$3,180**
	1.5 hours	**2 hours**	**×**	$4,770 (directors)[3]	**$9,540**		
	6 hours	**8 hours**	**×**	$368 (compliance attorney)	**$2,944**		
Total annual burden per fund		**34 hours**			**$21,316**	**$3,180**	**$3,180**
Number of funds		× 9,335			× 9,335	× 9,335	× 9,335
Total final burden		**317,390 hours**			**$198,984,860**	**$29,685,300**	**$29,685,300**
TOTAL ESTIMATED BURDENS FOR BOARD REPORTING							
Proposed burden estimates		**95,010 hours**			**$198,162,357**	**$19,002,000**	**$19,002,000**
Proposed total respondents		**9,501**					
Revised burden estimates		**317,390 hours**			**$198,984,860**	**$29,685,300**	**$29,685,300**
Revised total respondents		**9,335**					

Notes:

1. These estimates include initial burden estimates annualized over three years.
2. *See* SIFMA Report, *supra* footnote 639.
3. This wage rate is not from the SIFMA Report but is a staff estimate. It is a combined cost for the entire board (not a per board member cost). This estimate assumes an average of 9 board members per board.
4. This estimated burden is based on the estimated wage rate of $489/hour, for 4 hours, for outside legal services and of $306/hour, for 4 hours, for outside accounting services. *See supra* footnote 639.

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C. Rule 31a–4

Rule 31a–4 contains the recordkeeping requirements associated with rule 2a–5. Specifically, registered investment companies and BDCs, or their advisers, will be required to maintain appropriate documentation to support fair value determinations made pursuant to rule 2a–5.[644] Further, if the board of the fund designates performance of fair value determinations to a valuation designee under the final rule, the fund or adviser will need to maintain certain additional records relating to that designation.[645] The respondents to rule 31a–4 will be registered investment companies and BDCs.[646] We estimate that 9,804 funds will be affected by rule 31a–4.[647] Compliance with rule 31a–4 will be mandatory for any fund that will need to determine fair value under the Act. To the extent that records that will be required to be created and maintained under this rule are provided to the Commission in connection with examinations or investigations, such information will be kept confidential subject to the provisions of applicable law.

Table 4 below summarizes the PRA initial and ongoing burden estimates associated with the rule, as well as the proposed burden estimates. Some commenters argued that the burden estimates as proposed for this requirement were too low.[648] Specifically, these commenters stated that the proposed requirement to maintain documentation to support fair value determinations, including information regarding the specific methodologies applied and the assumptions and inputs considered when making fair value determinations, would result in the valuation designee needing to obtain significant amounts of data that it would not otherwise obtain and retain it when it utilizes a pricing service,[649] and would require funds or valuation designees to hire additional personnel to be able to comply.[650] While we have clarified that certain recordkeeping that commenters thought was suggested in the proposed rule will not be required in rule 31a–4 as adopted and made other changes to address these concerns,[651] we are nonetheless significantly increasing our estimates for this rule in consideration of these comments. We have also updated the estimated number of respondents based upon updated data.[652] We also further revised certain estimates, specifically to include the likely involvement of a compliance attorney in the formulation of policies and procedures relating to this requirement and to update the wage rates for relevant personnel.

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[644] Rule 31a–4(a).

[645] Rule 31a–4(b).

[646] *See* Rule 2a–5(e)(1) (defining ''fund'').

[647] *See supra* footnotes 508–509 and accompanying text.

[648] *See, e.g.,* ICI Comment Letter; Fidelity Comment Letter; Vanguard Comment Letter; Guggenheim Comment Letter; Guggenheim Trustees Comment Letter. *But see* Davidson Comment Letter (suggesting that the Commission provided ample reason to believe that the costs of compliance would be on the smaller side).

[649] *See, e.g.,* ICI Comment Letter; IDC Comment Letter; SSGA Comment Letter; Fidelity Comment Letter; TRP Comment Letter; John Hancock Comment Letter; ICE Data Comment Letter (noting that pricing services would need to increase fees to compensate for the demands for records under the proposed regime).

[650] *See* Guggenheim Trustees Letter; Guggenheim Comment Letter.

[651] *See supra* section II.C.

[652] *See supra* footnotes 508–509 and accompanying text.

Table 4: Rule 31a-4 PRA Estimates

	Initial internal burden hours	Internal annual burden hours[1]		Wage rate[2]	Internal time costs	Initial external cost burden	Annual external cost burden
PROPOSED ESTIMATES							
Establishing recordkeeping policies and procedures	1.5 hours	0.5 hours	×	$62 (general clerk)	$62	$1,800	$600
	1.5 hours	0.5 hours	×	$95 (senior computer operator)	$95		
Recordkeeping	0 hours	2 hours	×	$62 (general clerk)	$124	$0	$0
	0 hours	2 hours	×	$95 (senior computer operator)	$190		
Total annual burden per fund		**5 hours**			**$471**	**$1,800**	**$600**
Number of funds		× 9,986			× 9,986	x 9,986	x 9,986
Total proposed annual burden		**49,930 hours**			**$4,703,406[3]**	**$17,974,800[4]**	**$5,991,600**
FINAL ESTIMATES							
Establishing recordkeeping policies and procedures[5]	**0 hours**	0 hours	×	N/A	$0	$0	$0
Recordkeeping	**6 hours**	18 hours	×	$63 (general clerk)	$1,134	$0	$0
	6 hours	18 hours	×	$96 (senior computer operator)	$1,728		
	6 hours	18 hours	×	$368 (compliance attorney)	$6,624		
Total annual burden per fund		**54 hours**			**$9,486**	**$0**	**$0**
Number of funds		× 9,804			× 9,804		
Total final annual burden		**529,416 hours**			**$93,000,744**	**$0**	**$0**
TOTAL ESTIMATED BURDENS FOR BOARD REPORTING							
Proposed burden estimates		**49,930 hours**			**$4,703,406**	**$17,974,800**	**$5,991,600**
Proposed total respondents		**9,986**					
Revised burden estimates		**529,416 hours**			**$93,000,744**	**$0**	**$0**
Revised total respondents		**9,804**					

Notes:

1. These estimates include initial burden estimates annualized over a three-year period.
2. *See* SIFMA Report, *supra* footnote 639.
3. Due to a math error, these costs were erroneously reported as $1,567,802 in the Proposing Release.
4. The total initial external cost burden was not calculated in the Proposing Release.
5. We are now accounting for the burdens associated with the policies and procedures aspect of this rule as part of our burden estimates relating to rule 38a-1. *See supra* section IV.D.

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D. Rule 38a–1

As discussed above, after our adoption of rules 2a–5 and 31a–4, rule 38a–1 will require the adoption and implementation of written policies and procedures reasonably designed to prevent violations of the requirements of the rules.[653] To comply with rule 38a–1, these policies and procedures must be tailored to rules 2a–5 and 31a–4's requirements to ensure that a board or valuation designee, as applicable, determines the fair value of fund investments in compliance with the rules. In our most recent PRA submission for rule 38a–1, we estimated for rule 38a–1 a total hour burden of 235,720 hours, at a time cost of $86,784,720, and no external burdens.[654]

The table below summarizes the PRA initial and ongoing burden estimates associated with the new fair value policies and procedures.

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[653] *See supra* section II.A.5.

[654] This estimate is based on the last time the rule's information collection was submitted for PRA renewal in 2020.

Table 5: Rule 38a-1 PRA Estimates

	Internal initial burden hours	Internal annual burden hours		Wage rate[1]	Internal time costs	Initial external cost burden	Annual external cost burden
FINAL ESTIMATES							
Establishing and implementing new 38a-1 fair value policies and procedures	6 hours	4 hours[2]	x	$329 (senior manager)	$1,316.00	$3,000.00	$1,000.00
	6 hours	4 hours[2]	x	$466 (ass't general counsel)	$1,864.00		
	3 hours	2 hours[3]	x	$530 (chief compliance officer)	$1,060.00		
	3 hours	2 hours[3]	x	$365 (compliance attorney)	$730.00		
	3 hours	2 hours[3]		$4,770 (Board of Directors as a whole)[4]	$9,540		
Reviewing and updating policies and procedures		3 hours	x	$329 (senior manager)	$987.00		$1,000.00
		3 hour	x	$466 (ass't general counsel)	$1,398.00		
		1 hour	x	$530 (chief compliance officer)	$530.00		
		1 hour	X	$4,770 (Board of Directors as a whole)[4]	$4,770.00		
Total annual burden per fund		22 hours			$22,195.00		$2,000.00
Number of affected funds		× 9,804			× 9,804	× **9,804**	× 9,804
Total annual burden		**215,688 hours**			**$217,599,780**	**$29,412,000**	**$19,608,000**
TOTAL ESTIMATED BURDENS FOR RULE 38a-1							
Current burden estimates		**235,720 hours**			**$86,784,720**	**$0**	**$0**
Revised burden estimates		**451,408 hours**			**$304,384,500**	**$29,412,000**	**$19,608,000**

Notes:
1. Wage rates are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association's Office Salaries in the Securities Industry 2013 ("SIFMA Report"), modified by Commission staff to account for an 1800-hour work year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.
2. Includes initial burden estimates annualized over a three-year period, plus 2 hours of ongoing annual burden hours.
3. Includes initial burden estimates annualized over a three-year period, plus 1 hour of ongoing annual burden hours.
4. The estimate for the cost of board time as a whole is derived from estimates made by the staff regarding typical board size and compensation, based on information received from fund representatives and publicly available sources.

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V. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA'') in accordance with section 604 of the Regulatory Flexibility Act (''RFA'').[655] It relates to new rules 2a–5 and 31a–4. An Initial Regulatory Flexibility Analysis (''IRFA'') was prepared in accordance with the RFA and included in the Proposing Release.[656]

[655] 5 U.S.C. 604.

[656] *See* Proposing Release, *supra* footnote 2, at section V.

A. Need for the Rules

The Commission is adopting new rule 2a–5 in order to address practices and the role of the board of directors with respect to the fair value of the investments of the fund. The Commission is also adopting rule 31a–4 to address the recordkeeping requirements associated with rule 2a–5. Under section 2(a)(41), the board must determine in good faith the fair value of fund assets for which no market quotations are readily available. Rule 2a–5 is designed to specify how a board or valuation designee, as applicable, must make good faith determinations of fair value as well as when the board can designate the performance of these determinations to a valuation designee, while still ensuring that fund investments are valued in a way consistent with the Investment Company Act.[657]

Rule 2a–5 will provide requirements for determining fair value in good faith for purposes of section 2(a)(41) of the Act and rule 2a–4 thereunder. This determination will be required to involve: Assessing and managing material risks associated with fair value determinations; selecting, applying, and testing fair value methodologies; evaluating any pricing services used; and maintaining certain records required by rule 31a–4.[658] The rules will permit a fund's board of directors to designate the performance of these requirements to a valuation designee for some or all of the fund's investments, subject to board oversight and certain reporting, recordkeeping, and other requirements designed to facilitate the board's ability effectively to oversee the valuation designee's fair value determinations.[659] Rule 2a–5 will also define when market quotations are readily available under section 2(a)(41) of the Act. Lastly, rule 2a–5 will have the trustee or depositor of a UIT (or in the case of existing UITs another entity designated to do so in the UIT's documentation) carry out the requirements of the rules. The requirements of rule 2a–5 associated with the fair value as determined in good faith and readily available market quotations are designed to create a minimum, consistent framework for fair value and standard of baseline practices across funds, and reflects our understanding of current market practices.[660] The requirements of rule 2a–5 associated with the designation of the performance of responsibilities to a valuation designee are designed to ensure that the board effectively oversees such valuation designee, including receiving sufficient information to do so.[661] The recordkeeping requirements of rule 31a–4 are designed to help ensure compliance with the other requirements.[662]

All of these requirements are discussed in detail in section II of this release. The costs and burdens of these requirements on small funds are discussed below as well as above in our Economic Analysis and Paperwork Reduction Act Analysis, which discuss the applicable costs and burdens on all funds.[663]

B. Significant Issues Raised by Public Comments

In the Proposing Release, we requested comment on every aspect of the IRFA, including the number of small entities that would be affected by the proposed rule, the existence or nature of the potential impact of the proposal on small entities discussed in the analysis, and how to quantify the impact of the proposed rule. We also requested comment on the proposed compliance burdens and the effect these burdens would have on smaller entities.

Although we did not receive comments specifically addressing the IRFA, some commenters noted the impact of certain aspects of proposed rule 2a–5 on smaller funds. For example, one commenter suggested that we allow funds to assign fair value determinations to entities other than the adviser, such as the fund's administrator, to make it easier for smaller funds to comply with the proposed rule.[664] Another commenter argued that we should adopt a more principles-based approach that would be less burdensome on smaller funds.[665] Additionally, a few commenters stated that the proposed quarterly reporting requirement would be unnecessarily burdensome, including for smaller funds, because many of the valuation issues described in the Proposing Release are unlikely to change on a quarterly basis.[666] Furthermore, with regard to the requirement that certain valuation issues be reported promptly to the fund's board, one commenter suggested that we allow one of the independent directors on the board to receive these reports to make the requirement less burdensome for small funds.[667] Finally, one commenter suggested that the recordkeeping requirements of the proposed rule 2a–5 was duplicative with the section 31 rules.[668] After considering the comments we received, we are adopting the rules, with certain modifications from the proposal intended to address many of the challenges commenters identified.

As discussed above, we believe that it is important to establish a minimum and consistent framework for fair value practices across funds, including for small funds.[669] Therefore, rule 2a–5 establishes requirements for engaging in fair value determinations that are broadly applicable to all funds, including small funds, and that we believe should be part of any good faith fair value determination. However, we have made certain modifications to the requirements of the proposed rule to enhance flexibility and ease certain unnecessary burdens. For example, we have made certain changes to the proposed quarterly reporting requirements designed to enhance flexibility of reporting to match boards' needs better and to minimize the chance that boards receive reporting that is too detailed or repetitive to facilitate appropriate oversight.[670] Additionally, in a change from the proposal, which would have permitted boards to assign only to an adviser of the fund, rule 2a–5 will permit boards to designate the fund's adviser to perform fair value determinations or, if the fund is internally managed, an officer of the fund. Furthermore, rule 2a–5 clarifies, in response to commenters,[671] that the board or the valuation designee can seek the assistance of other parties that provide services that are essential for fair value determination, such as a pricing service or the fund

[657] Under the final rule, the valuation designee must be a fund's adviser or, if the fund is internally managed, an officer of the fund. The trustee or depositor of a UIT (or in the case of existing UITs another entity designated to do so in the UIT's documentation), which does not have a board, will perform fair value determinations.

[658] As a result of the adoption of rule 2a–5, under rule 38a–1 funds or the adviser must adopt and implement policies and procedures reasonably designed to comply with rule 2a–5.

[659] For internally managed funds, the board may designate an officer or officers of the fund to perform fair value determinations.

[660] *See supra* sections I, II.A, and II.D.

[661] *See supra* section II.B.

[662] *See supra* sections II.A.5 II.C.

[663] *See supra* section III and IV. These sections also discuss the professional skills that we believe compliance with the rules will entail.

[664] IDC Comment Letter.

[665] ABA Comment Letter.

[666] Sullivan Comment Letter. *See also* ICI Comment Letter.

[667] Murphy Comment Letter.

[668] NYC Bar Comment Letter.

[669] *See supra* text accompanying footnote 13.

[670] *See supra* section II.B.2 (noting that the final rule will require a quarterly summary or description of material fair value matters that occurred in the prior quarter while the annual report will include an assessment of the adequacy and effectiveness of the valuation designee's process for determining the fair value of designated investments).

[671] Sullivan Comment Letter.

administrator, among others. Finally, new rule 31a–4 contains the recordkeeping requirements associated with rule 2a–5. We believe that these modifications will make it less burdensome for small funds to comply with the rules, while still maintaining the integrity of the fair value process across all funds.

C. Small Entities Subject to the Rule

For purposes of Commission rulemaking in connection with the Regulatory Flexibility Act, an investment company is a small entity if, together with other investment companies in the same group of related investment companies, it has net assets of $50 million or less as of the end of its most recent fiscal year (a ''small fund'').[672] Commission staff estimates that, as of June 2020, approximately 40 registered open-end mutual funds,[673] 8 registered ETFs, 26 registered closed-end funds,[674] 2 UITs, and 12 BDCs[675] (collectively, 88 funds) are small entities.[676]

D. Projected Reporting, Recordkeeping, and Other Compliance Requirements

The rules will require fair value determinations under the Act to be made according to a specific process for affected funds, including those that are small entities. This process will include a requirement to maintain certain records to support fair value determinations.[677] The rules will permit fund boards to designate the valuation designee to perform fair value determinations if the valuation designee, in addition to the above, makes certain reports to the fund's board regarding the fair value process in writing. Funds will also be required to keep certain additional records in such circumstances. We therefore believe that there are two principal reporting, recordkeeping, or other compliance requirements associated with the rules: (1) Recordkeeping requirements and (2) board reporting requirements.

1. Recordkeeping

The recordkeeping requirements of rule 31a–4 are designed to help ensure compliance with rule 2a–5's requirements and aid in oversight. Rule 31a–4 will require the fund to keep appropriate documentation to support fair value determinations for at least six years from the time the determination was made, the first two years in an easily accessible place.[678] Further, should the board designate the valuation designee to perform fair value determinations, the fund must keep, in addition to the records above, copies of the reports and other information provided to the board for at least six years after the end of the fiscal year in which the documents were made, the first two years in an easily accessible place and a specified list of the investments or investment types whose fair value determination has been designated to the valuation designee, in each case for at least six years after the end of the fiscal year in which the determinations were provided to the board or the investments or investment types were designated to the valuation designee, the first two years in an accessible place.[679]

These requirements will impose burdens on all funds, including those that are small entities. The specifics of these burdens are discussed in the Economic Analysis and Paperwork Reduction Act sections above.[680] There are different factors that would affect whether a smaller fund incurs costs relating to this requirement that are on the higher or lower end of the estimated range. For example, we would expect that smaller funds—and more specifically, smaller funds that are not part of a fund complex—may not have recordkeeping systems that meet all the elements that are required under this rule. Also, while larger funds or funds that are part of a large fund complex may incur higher costs related to these requirements in absolute terms relative to a smaller fund or a fund that is part of a smaller fund complex, a smaller fund may find it more costly, per dollar managed, to comply with the requirements because it will not be able to benefit from a larger fund complex's economies of scale.[681]

2. Board Reporting

The requirement for board reporting by the valuation designee is designed to ensure that the board can exercise sufficient oversight over the fair value process. The final rule will require two general types of reports, periodic reports and prompt reports. Periodic reports rule will require the valuation designee to make both annual and quarterly written reports to the board. The quarterly reports must include any specific reports or materials boards request related to the fair value of designated investments or the valuation designee's process for fair valuing fund investments. In addition, the final rule requires a quarterly summary or description of material fair value matters that occurred in the prior quarter, including some specific summaries and descriptions. The final rule will also require an annual assessment of the adequacy and effectiveness of the valuation designee's process for determining the fair value of designated investments. The prompt reporting requirement will require the valuation designee to provide a written notification of the occurrence of matters associated with the valuation designee's process that materially affect the fair value of the designated portfolio of investments (defined as ''material matters'') within a time period determined by the board, but in no event later than five business days after the valuation designee becomes aware of the material matter. Material matters in this instance include an assessment of a significant deficiency or material weakness in the design or effectiveness of the valuation designee's fair value determination process or of material errors in the calculation of net asset value. The valuation designee must also provide such timely follow-on reports as the board may reasonably determine appropriate.[682]

These requirements will impose burdens on all funds, including those that are small entities. The specifics of these burdens are discussed in the Economic Analysis and Paperwork Reduction Act sections above.[683] There are different factors that will affect whether a smaller fund incurs costs related to this requirement that are on the higher or lower end of the estimated range. For example, smaller funds—and more specifically, smaller funds that are not part of a fund complex—may not have an advisory agreement that has a reporting mechanism that meets all the elements that will be required under the

[672] *See* 17 CFR 270.0–10(a) [rule 0–10(a) under the Investment Company Act].

[673] None of these registered open-end funds are internally managed.

[674] 7 of these registered closed-end funds are internally managed.

[675] 3 of these BDCs are internally managed.

[676] This estimate is derived an analysis of data obtained from Morningstar Direct as well as data reported to the Commission for the period ending June 2020.

[677] As discussed above, after our adoption of rule 2a–5, pursuant to rule 38a–1 funds should adopt and implement written fair value policies and procedures reasonably designed to prevent violations of rule 2a–5. *See supra* section II.A.5.

[678] Rule 31a–4(a). Rule 38a–1 also will require funds to keep a copy of the fair value policies and procedures that are in effect, or were in effect at any time within the past five years, in an easily accessible place.

[679] Rule 31a–4(b).

[680] *See supra* section III.C.3. This section and section IV also discuss the professional skills that we believe compliance with this aspect of the proposal would entail.

[681] *See supra* section III.E.

[682] *See supra* section II.B.2.

[683] *See supra* section III.C.3 and section IV.

final rule. Also, while larger funds or funds that are part of a large fund complex may incur higher costs, via increased advisory fees for valuation designees to take on this responsibility on behalf of such funds, related to this requirement in absolute terms relative to a smaller fund or a fund that is part of a smaller fund complex, a smaller fund may find it more costly, per dollar managed, to comply with the final requirement because it will not be able to benefit from a larger fund complex's economies of scale.[684]

E. Agency Action To Minimize Effect on Small Entities

The RFA directs the Commission to consider significant alternatives that would accomplish our stated objective, while minimizing any significant economic impact on small entities. We considered the following alternatives for small entities in relation to our proposal: (1) Exempting funds that are small entities from the proposed reporting, recordkeeping, and other compliance requirements, to account for resources available to small entities; (2) establishing different reporting, recordkeeping, and other compliance requirements or frequency, to account for resources available to small entities; (3) clarifying, consolidating, or simplifying the requirements under the proposal for small entities; and (4) using performance rather than design standards.

We do not believe that exempting small funds from the provisions in the rules would permit us to achieve our stated objectives, principally to protect investors from improper valuations. Further, the board reporting and additional recordkeeping provisions of the rules only affect fund boards that designate a valuation designee to perform fair value determinations, and, therefore, the rules will require funds to comply with these specific requirements only if the boards designated responsibilities to a valuation designee. However, we expect that most funds holding securities that must be fair valued will do so. Therefore, if a board to a small entity does not do this and instead performs its statutory function directly, then the small entity would not be subject to these provisions of the rules.

We estimate that 72% of all funds will be subject to the rules in making fair value determinations.[685] This estimate indicates that some funds, including some small funds, will be unaffected by the rules. However, for small funds that are affected by the rules, providing an exemption for them could subject investors in small funds to a higher degree of risk than investors in large funds that will be required to comply with the elements of the rules.

As discussed throughout this release, we believe that the rules will result in investor protection benefits, and these benefits should apply to investors in smaller funds as well as investors in larger funds. We therefore do not believe it would be appropriate to exempt small funds from the rules' requirements, or to establish different requirements applicable to funds of different sizes under these provisions to account for resources available to small entities. We believe that all of the elements of the rules should work together to produce the anticipated investor protection benefits, and therefore do not believe it is appropriate to except smaller funds because we believe this would limit the benefits to investors in such funds.

We also do not believe that it would be appropriate to subject small funds to different reporting, recordkeeping, and other compliance requirements or frequency. Similar to the concerns discussed above, if the rules included different requirements for small funds, it could raise investor protection concerns for investors in small funds in that small funds face the same conflicts of interest that can lead to mispricing and otherwise harm investors that larger funds do.

We do not believe that clarifying, consolidating, or simplifying the requirements under the rules for small funds, beyond that already adopted for all funds, would permit us to achieve our stated objectives. Again, this approach would raise investor protection concerns for investors in small funds. We believe, as outlined above in the discussion of the rules and the guidance contained in this release, that the requirements of the rules are, to some extent, current industry practice under existing rules, with some changes from current practice. As a result, we think that the rules could result in a reduction in the current burdens experienced by small entities to the extent that they are subject to the rules.

The costs associated with rules 2a–5 and 31a–4 will vary depending on a fund's particular circumstances, and thus the rules could result in different burdens on funds' resources. In particular, we expect that a fund that does not have reporting or recordkeeping practices similar to those that will required by the rules would need to modify those practices. Thus, to the extent a fund that is a small entity already has a fair value process that is consistent with the requirements of the rules, we believe it will incur relatively low costs to comply with it. However, we believe that it is appropriate to correlate the costs associated with the rules with the fund's actual fair value process, and not necessarily with the fund's size in light of our investor protection objectives.

Finally, with respect to the use of performance rather than design standards, the rules generally use design standards for all funds subject to the rules, regardless of size. We believe that providing funds with the flexibility permitted in the rules with respect to designing specific fair value process is appropriate because of the fact-specific nature of making fair value determinations.

VI. Update to Codification of Financial Reporting Policies

The Commission amends the ''Codification of Financial Reporting Policies'' announced in Financial Reporting Release No. 1 (April 15, 1982) [47 FR 21028 (May 17, 1982]) as follows:

1. By removing and reserving Section 404.03.

2. By removing and reserving Section 404.04.

3. By amending Section 404.05.c.2. as follows:

a. By removing the last paragraph under the subject heading ''Fair Value for Thinly Traded Securities.''

b. By removing the subject heading ''Use of Pricing Services'' and the paragraphs included below that subject heading.

The Codification is a separate publication of the Commission. It will not be published in the **Federal Register** or Code of Federal Regulations. For more information on the Codification of Financial Reporting Policies, contact the Commission's Public Reference Room at (202) 551–5450.

Statutory Authority

The Commission is adopting rules 2a–5 and 31a–4 under the authority set forth in sections 2(a), 6(c), 31(a), 31(c), 38(a), 59, and 64(a) of the Investment Company Act of 1940 [15 U.S.C. 80a–2(a), 80a–6(c), 80a–30(a), 80a–31(c), 80a–37(a), 80a–58, and 80a–63(a)].

List of Subjects

17 CFR Part 210

Accountants, Accounting, Banks, Banking, Employee benefit plans, Holding companies, Insurance companies, Investment companies, Oil and gas exploration, Reporting and

[684] *See supra* section III.C.1.

[685] *See supra* footnote 508 and accompanying text.

recordkeeping requirements, Securities, Utilities.

17 CFR Part 270

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of Rule Amendments

For the reasons set out in the preamble, we are amending title 17, chapter II of the Code of Federal Regulation as follows:

PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77nn(25), 77nn(26), 78c, 78j–1, 78l, 78m, 78n, 78o(d), 78q, 78u–5, 78w, 78ll, 78mm, 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, and sec. 102(c), Pub. L. 112–106, 126 Stat. 310 (2012), unless otherwise noted.

■ 2. Amend § 210.6–03 by revising paragraph (d) to read as follows:

§ 210.6–03 Special rules of general application to registered investment companies and business development companies.

* * * * *

(d) *Valuation of investments.* The balance sheets of registered investment companies, other than issuers of face-amount certificates, and business development companies, shall reflect all investments at value, with the aggregate cost of each category of investment reported under § 210.6–04 subsection 1, 2, 3, and 9 or the aggregate cost of each category of investment reported under § 210.6–05 subsection 1 shown parenthetically. State in a note the methods used in determining the value of investments. As required by section 28(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–28(b)), qualified assets of face-amount certificate companies shall be valued in accordance with certain provisions of the Code of the District of Columbia.

* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 3. The general authority citation for part 270 continues to read as follows:

Authority: 15 U.S.C. 80a–1 *et seq.,* 80a–34(d), 80a–37, 80a–39, and Pub. L. 111–203, sec. 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 4. Add § 270.2a–5 to read as follows:

§ 270.2a–5 Fair value determination and readily available market quotations.

(a) *Fair value determination.* For purposes of section 2(a)(41) of the Act (15 U.S.C. 80a–2(a)(41)) and § 270.2a–4, determining fair value in good faith with respect to a fund requires:

(1) *Assess and manage risks.* Periodically assessing any material risks associated with the determination of the fair value of fund investments (''valuation risks''), including material conflicts of interest, and managing those identified valuation risks;

(2) *Establish and apply fair value methodologies.* Performing each of the following, taking into account the fund's valuation risks:

(i) Selecting and applying in a consistent manner an appropriate methodology or methodologies for determining (and calculating) the fair value of fund investments, provided that a selected methodology may be changed if a different methodology is equally or more representative of the fair value of fund investments, including specifying the key inputs and assumptions specific to each asset class or portfolio holding;

(ii) Periodically reviewing the appropriateness and accuracy of the methodologies selected and making any necessary changes or adjustments thereto; and

(iii) Monitoring for circumstances that may necessitate the use of fair value;

(3) *Test fair value methodologies.* Testing the appropriateness and accuracy of the fair value methodologies that have been selected, including identifying the testing methods to be used and the minimum frequency with which such testing methods are to be used; and

(4) *Evaluate pricing services.* Overseeing pricing service providers, if used, including establishing the process for approving, monitoring, and evaluating each pricing service provider and initiating price challenges as appropriate.

(b) *Performance of fair value determinations.* The board of the fund must determine fair value in good faith for any or all fund investments by carrying out the functions required in paragraph (a) of this section. The board may choose to designate the valuation designee to perform the fair value determination relating to any or all fund investments, which shall carry out all of the functions required in paragraph (a) of this section, subject to the requirements of this paragraph (b).

(1) *Oversight and reporting.* The board oversees the valuation designee, and the valuation designee reports to the fund's board, in writing, including such information as may be reasonably necessary for the board to evaluate the matters covered in the report, as follows:

(i) *Periodic reporting.* (A) At least quarterly:

(*1*) Any reports or materials requested by the board related to the fair value of designated investments or the valuation designee's process for fair valuing fund investments; and

(*2*) A summary or description of material fair value matters that occurred in the prior quarter, including:

(*i*) Any material changes in the assessment and management of valuation risks required under paragraph (a)(1) of this section, including any material changes in conflicts of interest of the valuation designee (and any other service provider);

(*ii*) Any material changes to, or material deviations from, the fair value methodologies established under paragraph (a)(2) of this section; and

(*iii*) Any material changes to the valuation designee's process for selecting and overseeing pricing services, as well as any material events related to the valuation designee's oversight of pricing services; and

(B) At least annually, an assessment of the adequacy and effectiveness of the valuation designee's process for determining the fair value of the designated portfolio of investments, including, at a minimum:

(*1*) A summary of the results of the testing of fair value methodologies required under paragraph (a)(3) of this section; and

(*2*) An assessment of the adequacy of resources allocated to the process for determining the fair value of designated investments, including any material changes to the roles or functions of the persons responsible for determining fair value under paragraph (b)(2) of this section; and

(ii) *Prompt board notification and reporting.* The valuation designee notifies the board of the occurrence of matters that materially affect the fair value of the designated portfolio of investments, including a significant deficiency or material weakness in the design or effectiveness of the valuation designee's fair value determination process, or material errors in the calculation of net asset value, (any such matter or error, a ''material matter'') within a time period determined by the

board (but in no event later than five business days after the valuation designee becomes aware of the material matter), with such timely follow-on reporting as the board may determine appropriate; and

(2) *Specify responsibilities.* The valuation designee specifies the titles of the persons responsible for determining the fair value of the designated investments, including by specifying the particular functions for which they are responsible, and reasonably segregates fair value determinations from the portfolio management of the fund such that the portfolio manager(s) may not determine, or effectively determine by exerting substantial influence on, the fair values ascribed to portfolio investments.

(c) *Readily available market quotations.* For purposes of section 2(a)(41) of the Act (15 U.S.C. 80a–2(a)(41)), a market quotation is readily available only when that quotation is a quoted price (unadjusted) in active markets for identical investments that the fund can access at the measurement date, provided that a quotation will not be readily available if it is not reliable.

(d) *Unit investment trusts.* If the fund is a unit investment trust, and the initial deposit of portfolio securities into the unit investment trust occurs *after* March 8, 2021, the fund's trustee or depositor must carry out the requirements of paragraph (a) of this section. If the initial deposit of portfolio securities into the unit investment trust occurred *before* March 8, 2021, and an entity other than the fund's trustee or depositor has been designated to carry out the fair value determination, that entity must carry out the requirements of paragraph (a) of this section.

(e) *Definitions.* For purposes of this section:

(1) *Fund* means a registered investment company or business development company.

(2) *Fair value* means the value of a portfolio investment for which market quotations are not readily available under paragraph (c) of this section.

(3) *Board* means either the fund's entire board of directors or a designated committee of such board composed of a majority of directors who are not interested persons of the fund.

(4) *Valuation designee* means the investment adviser, other than a sub-adviser, of a fund or, if the fund does not have an investment adviser, an officer or officers of the fund.

■ 5. Add § 270.31a–4 to read as follows:

§ 270.31a–4 Records to be maintained and preserved by registered investment companies relating to fair value determinations.

(a) *Appropriate documentation.* Every registered investment company shall maintain appropriate documentation to support fair value determinations made pursuant to § 270.2a–5 for at least six years from the time that the determination was made, the first two years in an easily accessible place.

(b) *Records when designating.* If the board of a registered investment company has designated performance of fair value determinations to a valuation designee under § 270.2a–5(b), in addition to the records required in paragraph (a) of this section, the registered investment company must maintain copies of:

(1) The reports and other information provided to the board as required under § 270.2a–5(b)(1) for at least six years after the end of the fiscal year in which the documents were provided to the board, the first two years in an easily accessible place; and

(2) A specified list of the investments or investment types whose fair value determination has been designated to the valuation designee to perform pursuant to § 270.2a–5(b) for a period beginning with the designation and ending at least six years after the end of the fiscal year in which the designation was terminated, in an easily accessible place until two years after such termination.

(c) *Party to maintain.* If the board of a registered investment company has designated performance of fair value determinations to its investment adviser under § 270.2a–5(b), such investment adviser shall maintain the records required by this section. If the investment adviser is not so designated, the fund shall maintain such records.

By the Commission.

Dated: December 3, 2020.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2020–26971 Filed 1–5–21; 8:45 am]

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Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Taxable Year of Income Inclusion Under an Accrual Method of Accounting and Advance Payments for Goods, Services, and Other Items; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9941]

RIN 1545–BO68 and 1545–BO78

Taxable Year of Income Inclusion Under an Accrual Method of Accounting and Advance Payments for Goods, Services, and Other Items

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations regarding the timing of income inclusion under an accrual method of accounting, including the treatment of advance payments for goods, services, and certain other items. The regulations reflect changes made by the Tax Cuts and Jobs Act and affect taxpayers that use an accrual method of accounting and have an applicable financial statement. These final regulations also affect taxpayers that use an accrual method of accounting and receive advance payments.

DATES:

Effective Date: The regulations are effective on December 30, 2021.

Applicability Dates: For dates of applicability, see §§ 1.451–3(m), 1.451–8(h), and 1.1275–2(l)(2).

FOR FURTHER INFORMATION CONTACT: Concerning any provisions in § 1.451–3 within the jurisdiction of the Associate Chief Counsel (Income Tax & Accounting), Jo Lynn Ricks, (202) 317–4615, Sean Dwyer, (202) 317–4853, or Doug Kim, (202) 317–4794, and concerning any provisions in § 1.451–8 within the jurisdiction of the Associate Chief Counsel (Income Tax & Accounting), Jo Lynn Ricks, (202) 317–4615, or David Christensen, (202) 317–4861; concerning any provisions in § 1.451–3 or § 1.451–8 within the jurisdiction of the Associate Chief Counsel (Financial Institutions & Products), Deepan Patel, (202) 317–3423, or Charles Culmer, (202) 317–4528 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 451(b) and (c) of the Internal Revenue Code (Code).

On December 22, 2017, section 451(b) and (c) were amended by section 13221 of Public Law 115–97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act (TCJA). Section 451(b) was amended to provide that, for a taxpayer using an accrual method of accounting (accrual method taxpayer), the all events test for an item of gross income, or portion thereof, is met no later than when the item, or portion thereof, is included in revenue for financial accounting purposes on an applicable financial statement (AFS). Section 451(c) was amended to provide that an accrual method taxpayer may use the deferral method of accounting provided in section 451(c) for advance payments. Unless otherwise indicated, all references to section 451(b) and section 451(c) hereinafter are references to section 451(b) and section 451(c), as amended by the TCJA.

I. Section 451(b)

In general, section 451(a) provides that the amount of any item of gross income is included in gross income for the taxable year in which it is received by the taxpayer, unless, under the method of accounting used in computing taxable income, the amount is to be properly accounted for as of a different period. Under § 1.451–1(a), accrual method taxpayers generally include items of income in gross income in the taxable year when all the events occur that fix the right to receive the income and the amount of the income can be determined with reasonable accuracy (all events test). All the events that fix the right to receive income occur when (1) the required performance takes place, (2) payment is due, or (3) payment is made, whichever happens first. Revenue Ruling 2003–10, 2003–1 C.B. 288; Revenue Ruling 84–31, 1984–1 C.B. 127; Revenue Ruling 80–308, 1980–2 C.B. 162.

Section 451(b)(1)(A) provides that, for an accrual method taxpayer, the all events test for an item of gross income, or portion thereof, is met no later than when the item, or portion thereof, is included as revenue in an AFS (AFS Income Inclusion Rule).

Section 451(b)(1)(B) lists exceptions to the AFS Income Inclusion Rule. The AFS Income Inclusion Rule does not apply to taxpayers that do not have an AFS for a taxable year or to any item of gross income from a mortgage servicing contract.

Section 451(b)(1)(C) codifies the all events test, stating that the all events test is met for any item of gross income if all the events have occurred which fix the right to receive such income and the amount of such income can be determined with reasonable accuracy.

Section 451(b)(2) provides that the AFS Income Inclusion Rule does not apply for any item of gross income the recognition of which is determined using a special method of accounting, ''other than any provision of part V of subchapter P (except as provided in clause (ii) of paragraph (1)(B)).''

Section 451(b)(3) defines an AFS, as referenced in section 451(b)(1)(A)(i), by providing a hierarchical list of financial statements.

Section 451(b)(4) provides that for purposes of section 451(b), in the case of a contract which contains multiple performance obligations, the allocation of the transaction price to each performance obligation is equal to the amount allocated to each performance obligation for purposes of including such item in revenue in the taxpayer's AFS.

Section 451(b)(5) provides that, if the financial results of a taxpayer are reported on the AFS for a group of entities, the group's financial statement shall be treated as the AFS of the taxpayer.

II. Section 451(c)

Section 451(c) provides special rules for the treatment of advance payments. Section 451(c)(1)(A) provides the general rule requiring an accrual method taxpayer to include an advance payment in gross income in the taxable year of receipt. However, section 451(c)(1)(B) permits a taxpayer to elect to include any portion of the advance payment in gross income in the taxable year following the year of receipt to the extent income is not included in revenue in the AFS in the year of receipt. Section 451(c)(1)(B) generally codifies Revenue Procedure 2004–34, 2004–22 I.R.B. 991, which provided for a similar deferral period.

Section 451(c)(2)(A) provides the Secretary of the Treasury or his delegate (Secretary) with the authority to provide the time, form and manner for making the election under section 451(c)(1)(B), and the categories of advance payments for which an election can be made. Under section 451(c)(2)(B), the election is effective for the taxable year that it is first made and for all subsequent taxable years, unless the taxpayer receives the consent of the Secretary to revoke the election. Section 451(c)(3) provides that the deferral election does not apply to advance payments received in the taxable year that the taxpayer ceases to exist.

Section 451(c)(4)(A) defines advance payment for purposes of section 451(c). Under section 451(c)(4)(A), the term advance payment means any payment that meets the following three requirements: (1) The full inclusion of the payment in gross income in the year of receipt is a permissible method of accounting; (2) any portion of the

advance payment is included in revenue in an AFS for a subsequent tax year; and (3) the advance payment is for goods, services, or such other items that the Secretary has identified. Section 451(c)(4)(B) lists certain payments that are excluded from the definition of advance payment and gives the Secretary the authority to identify other payments to be excluded from the definition. Section 451(c)(4)(C) provides a special definition of the term ''receipt'' for purposes of the definition of advance payment, and section 451(c)(4)(D) states that rules similar to those for allocating the transaction price among performance obligations in section 451(b)(4) also apply for purposes of section 451(c).

III. Prior Guidance

On April 12, 2018, the Department of the Treasury (Treasury Department) and the IRS issued Notice 2018–35, 2018–18 I.R.B. 520, providing interim guidance on the treatment of advance payments and requesting suggestions for future guidance under section 451(b) and section 451(c). On September 27, 2018, the Treasury Department and the IRS issued Notice 2018–80, 2018–42 I.R.B. 609, announcing that the Treasury Department and the IRS intend to issue proposed regulations providing that accrued market discount is not includible in income under section 451(b).

On September 9, 2019, the Treasury Department and the IRS published proposed regulations under section 451(b) (REG–104870–18, 84 FR 47191) (proposed section 451(b) regulations) and proposed regulations under section 451(c) (REG–104554–18, 84 FR 47175) (proposed section 451(c) regulations), referred to collectively hereinafter as the ''proposed regulations.'' The notices of proposed rulemaking for section 451(b) and (c) reflect consideration of the comments received in response to Notice 2018–35.

A public hearing on the proposed regulations was held on December 10, 2019, at which two speakers provided testimony. The Treasury Department and the IRS received approximately ten written comments responding to the proposed regulations.

After the comment period for the proposed regulations closed, the Treasury Department and the IRS received a comment letter regarding the allocation of transaction price for contracts that include both income subject to section 451 and income subject to a special method of accounting provision, specifically, section 460. In response to these comments, in the Explanation of Provisions of a notice of proposed rulemaking (REG–132766–18) that was published on August 5, 2020 (85 FR 47508), the Treasury Department and the IRS suggested allocation rules and requested comments regarding the application of section 451(b)(2) and (4) to contracts with income that is accounted for in part under proposed § 1.451–3 and in part under a special method of accounting. No formal comments were received regarding these suggested rules.

Comments received before these regulations were substantially developed, including all comments received on or before the deadline for comments on November 8, 2019, were carefully considered in developing these 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 and the testimony at the public hearing, this Treasury decision adopts the proposed regulations as revised in response to such comments and testimony. The 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 and some of the informal commentary, both in writing and at public events, addressing the proposed regulations. Comments merely summarizing or interpreting the proposed regulations or recommending statutory revisions generally are not discussed in this preamble. Similarly, comments outside the scope of this rulemaking generally are not addressed in this Summary of Comments and Explanation of Revisions section.

II. Comments and Explanation of Revisions Regarding the Proposed Section 451(b) Regulations

A. Realization and Recognition

As noted in the preamble to the proposed section 451(b) regulations, footnote 872 of the Conference Report to the TCJA states that section 451(b) was not intended to revise the rules associated with when an item is realized for Federal income tax purposes and does not require the recognition of income in situations where the Federal income tax realization event has not taken place. See H.R. Rep. No. 115–466, at 428 fn. 872 (2017) (Conf. Rep.). As also noted in the preamble to the proposed section 451(b) regulations, footnote 874 of the Conference Report provides, by way of example, that the timing rules of section 451(b) apply to unbilled receivables for partially performed services. *Id.* at 428 fn. 874.

Commenters provided little commentary on footnote 874, except to state that it is contrary to footnote 872. Instead, the commenters presented two views. First, some commenters highlighted footnote 872 and cited case law to support the claim that a realization event is, and has always been, a prerequisite for income recognition. These commenters acknowledged, however, that the case law frames the issue not in terms of ''realization'' but rather in terms of whether a seller has a fixed right to income under the all events test.

Second, some commenters suggested definitions of realization. However, these recommended definitions differ, particularly as to whether realization applies to the provision of services. For example, some commenters described realization as applying to both contracts for the provision of services and contracts for the sale of goods, and stated that realization occurs when the taxpayer has a ''fixed and unconditional right to payment'' under the contract. One commenter reasoned that existing judicial precedents require realization without distinguishing between whether the income is for the performance of services or the sale of property. Another commenter asserted that realization means there has been a sale or disposition under section 1001(a), suggesting that realization applies only to the sale of property. In sum, these commenters suggested that the proposed section 451(b) regulations do not give effect to footnote 872 in the Conference Report and ask that the final regulations either explicitly define realization or clarify when realization occurs in certain circumstances, such as where a taxpayer produces goods for customers or where a taxpayer provides non-severable services to customers.

The Treasury Department and the IRS have considered these comments and decline to define the term realization in the final regulations. Congress did not explicitly define realization in the Conference Report. Some of the suggested definitions of realization, particularly the ones equating realization with the all events test, would nullify the AFS Income Inclusion Rule entirely, which is clearly contrary to Congress' intent. Accordingly, it is reasonable to conclude that Congress intended a different concept of realization that would give full effect to

the statute. Further, the final regulations do not clarify when realization occurs in specific circumstances. Realization is a factual determination that, while closely aligned with the all events test, has different meanings in different contexts.

Section 451 is a timing provision and the amendments to section 451(b)(1)(A) by TCJA were intended to modify the timing of income to require an accrual method taxpayer with an AFS to treat the right to income as fixed, under the all events test, no later than the time at which the item (or portion thereof) is taken into account in its AFS. The statute thus reflects Congress' intent to incorporate timing concepts from the financial reporting rules in the tax timing rules for including items in gross income. It does not seek to answer whether the AFS income inclusion has been realized. Accordingly, the focus of the final regulations is on the appropriate taxable year of AFS income inclusion.

B. Scope of AFS Income Inclusion Rule

1. Proposed § 1.451–3(b): General Rule

The general AFS Income Inclusion Rule in the proposed section 451(b) regulations provides that, if a taxpayer includes an item of gross income, or portion thereof, in revenue in the taxpayer's AFS, the taxpayer must include the item in gross income under section 451(b). In addition to commenting that the general rule in the proposed section 451(b) regulations potentially overrides the realization requirement, contrary to footnote 872 of the Conference Report, commenters suggested that the rule is overbroad and could cause taxpayers to incur a tax liability without having the money to pay the liability.

The Treasury Department and the IRS note that the potential to incur a tax liability without having the money to pay the liability is inherent in the accrual method. However, the Treasury Department and the IRS acknowledge that the proposed AFS Income Inclusion Rule could exacerbate this situation and that the proposed rule could result in inclusions that would be inconsistent with footnote 872 of the Conference Report. Accordingly, the final regulations provide that, under the AFS Income Inclusion Rule, the all events test under § 1.451–1(a) for any item of gross income, or portion thereof, is met no later than when that item, or portion thereof, is ''taken into account as AFS revenue.'' In determining when an item of gross income is ''taken into account as AFS revenue,'' AFS revenue is reduced by amounts that the taxpayer does not have an enforceable right to recover if the customer were to terminate the contract on the last day of the taxable year. The determination of whether the taxpayer has an enforceable right to recover amounts of AFS revenue is governed by the terms of the contract and applicable Federal, state, or international law, and includes amounts recoverable in equity and liquidated damages.

The revised rule is designed to reconcile the intended preservation of the realization concept, consistent with footnote 872 of the Conference Report, with the intended scope of section 451(b), as illustrated in footnote 874 of the Conference Report. The revised rule is also consistent with concepts illustrated in Example 4 in the Joint Committee on Taxation, General Explanation of Public Law 115–97 (JCS–1–18) at 163 (Dec. 20, 2018) (Blue Book). In the example, the taxpayer enters into a contract with a customer for a customized piece of machinery. Under the contract, the taxpayer will not invoice the customer until the item is delivered to the customer, the customer accepts the machinery, and title to the machinery has transferred to the customer. The contract specifically provides that, if the customer withdraws from the agreement, the taxpayer has an enforceable right to payment as the work is performed, even if the contract is not completed. The taxpayer does not complete the machinery in year one but includes an amount in revenue in its AFS in year one. Example 4 concludes that, under the AFS Income Inclusion Rule, the taxpayer is required to recognize the amount in year one. The revised AFS Income Inclusion Rule in the final regulations incorporates the key elements reflected in Example 4.

To reduce any additional compliance burdens, the final regulations provide an alternative method to determine when an item of gross income is treated as ''taken into account as AFS revenue'' under the AFS Income Inclusion Rule. Under the ''alternative AFS revenue method'', the taxpayer does not reduce AFS revenue by amounts that the taxpayer lacks an enforceable right to recover if the customer were to terminate the contract on the last day of the taxable year. The alternative AFS revenue method is a method of accounting that applies to all items of gross income in the trade or business that are subject to the AFS income inclusion rule. Taxpayers using the alternative AFS revenue method may also use the AFS cost offset method provided in the final regulations.

Under the final regulations two additional adjustments to AFS revenue are made in determining whether an item of gross income is treated as ''taken into account as AFS revenue.'' These adjustments apply both under the AFS Income Inclusion Rule and under the alternative AFS revenue method. First, if the transaction price, as defined in § 1.451–3(a)(14), was increased because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS, then any AFS revenue attributable to such increase is disregarded. In such situations, total AFS revenue taken into account over the term of the contract exceeds the stated consideration in the contract and such excess is, for AFS purposes, offset by a corresponding interest expense. Because such excess is generally not imputed income for Federal income tax purposes and a deduction for the AFS interest expense is generally not imputed for Federal income tax purposes, it is necessary to adjust AFS revenue to prevent the improper acceleration, or overreporting, of gross income. If situations arise in which imputed income and imputed deductions are also required for Federal income tax purposes, an adjustment to AFS revenue is still appropriate as the amount and timing of the imputed income would be outside the scope of section 451 and the regulations thereunder. Second, to the extent that AFS revenue reflects a reduction for (1) amounts that are cost of goods sold or liabilities that are required to be accounted for under other provisions of the Code, such as section 461, including liabilities for allowances, rebates, chargebacks, rewards issued in credit card and other transactions and other reward programs, and refunds (for example, estimated returns based on historic practice), regardless of when any such amount is incurred (Liability Amounts); or (2) amounts anticipated to be in dispute or anticipated to be uncollectable, the taxpayer must increase AFS revenue by such amounts. The Treasury Department and the IRS have determined that adjustments for such amounts are necessary to prevent the taxpayer from effectively taking such amounts into account for Federal income tax purposes in a taxable year prior to the taxable year in which they are otherwise permitted to be taken into account under other provisions of the Code. Additionally, if AFS revenue is not adjusted for Liability Amounts in the taxable year that such amounts are otherwise permitted to be taken into account, then a taxpayer may obtain an improper double benefit by taking such amounts into account to reduce taxable income under another provision of the Code while also deferring an equal

amount of gross income to a later year under § 1.451–3. The AFS revenue adjustments in the final regulations do not preclude a taxpayer from accounting for trading stamps and premium coupons under § 1.451–4. However, the Treasury Department and the IRS are still evaluating whether the rules in § 1.451–4 should be modified or clarified in light of certain financial reporting changes under ASC 606.

On a separate issue relating to the scope of the AFS Income Inclusion Rule, taxpayers questioned, in light of the realization discussion in footnote 872, whether the AFS Income Inclusion Rule applies to the sale of goods. Since Example 4 of the Blue Book involves the sale of goods, it is reasonable to conclude that Congress intended for the AFS Income Inclusion Rule, as revised, to extend to contracts for the sale of goods. Accordingly, as with the proposed section 451(b) regulations, the final regulations provide that the AFS Income Inclusion Rule applies to contracts for the sale of goods.

2. Proposed § 1.451–3(b): Cost Offset for AFS Income Inclusions

Proposed § 1.451–3(b) does not provide for a cost offset when an amount is included under the AFS Income Inclusion Rule. The preamble to the proposed section 451(b) regulations discusses reasons for not providing a cost offset, including the potential for income distortions and Congressional intent that a cost offset not be provided. The preamble to the proposed section 451(b) regulations requests comments on this issue.

Multiple commenters proposed allowing an offset for the cost of goods sold (COGS) when income is included under the AFS Income Inclusion Rule. Commenters pointed out that the term ''item of gross income'' generally means total sales net of COGS. See, for example, § 1.61–3(a). Commenters also described situations where income might be distorted by inclusions in early years of a multi-year contract with the costs being allowed in later years without income to offset. Commenters expressed concern that, in these situations, or more generally, the AFS Income Inclusion Rule might operate as a tax on gross receipts.

One commenter suggested that the statute uses the AFS as a backstop to timing recognition of revenue because the AFS provides a good standard by which to determine when a taxpayer receives an economic benefit. The commenter acknowledged that there has been a policy interest in achieving greater book-tax conformity in a variety of areas. The commenter recommended that, if the final regulations use the AFS to measure the receipt of an economic benefit, then the final regulations also should reflect the AFS standards that require certain items of income be reported ''net'' of offsetting items.

Commenters also noted that, for AFS purposes, credit card issuers generally report interchange fees net of estimated reward costs and report credit card late fees net of estimated uncollectable amounts. Commenters explained that reward costs and uncollectable credit card late fees ''are so closely aligned with the realization of income that AFS standards require those items to be presented separately in the revenue section of the income statement but concurrently as to timing.'' One commenter expressed concern that not reducing interchange fees by estimated reward costs and credit card late fees by estimated uncollectable amounts in determining the amount of income recognized under the AFS Income Inclusion Rule would result in the inclusion of more income for Federal income tax purposes than was reported on the AFS.

Accordingly, commenters recommended that the final regulations provide that the all events test and the economic performance requirement under section 461 should be deemed to be met for items that are ''closely aligned'' with income amounts recognized under the AFS Income Inclusion Rule. Commenters explained that section 461 should be deemed to be met for items such as estimated reward costs and estimated uncollectable late fees to the extent these items are reported on the revenue section of the AFS as a reduction to amounts subject to the AFS Income Inclusion Rule. One commenter further explained that this treatment would be consistent with the clear reflection of income doctrine of section 446. Alternatively, one commenter recommended modifying the definition of transaction price under proposed § 1.451–3(c)(6) to reduce interchange fees by the amount of reward costs that satisfy section 461 and credit card late fees by amounts that are considered uncollectable for AFS purposes.

The Treasury Department and the IRS have considered these comments and have determined that a cost offset based on estimates of future costs would be inappropriate. As discussed in the preamble to the proposed section 451(b) regulations, allowing a cost offset based on estimated costs would be inconsistent with sections 461, 263A, and 471, and the regulations under those sections of the Code. In addition, a cost offset based on estimated costs would increase the possibility of income distortions as the costs of goods would effectively be recovered, through income deferral, prior to the taxable year in which the cost was actually incurred.

However, the Treasury Department and the IRS agree with comments suggesting that taxpayers should be afforded the flexibility of applying an offset for costs incurred against AFS income inclusions from the future sale of inventory, the ''AFS cost offset method.'' Accordingly, a taxpayer that uses the AFS cost offset method determines the amount of gross income includible for a year prior to the year in which ownership of inventory transfers to the customer by reducing the amount of revenue it would otherwise be required to include under the AFS Income Inclusion Rule for the taxable year (AFS inventory inclusion amount) by the cost of goods related to the item of inventory for the taxable year, the ''cost of goods in progress offset.'' The net result is the amount that is required to be included in gross income for that year under the AFS Income Inclusion Rule. The deferred revenue, that is, the revenue that was reduced by the cost of goods in progress offset for a taxable year prior to the taxable year that ownership of the item of inventory is transferred to the customer, is generally taken into account in the taxable year in which ownership of the item of inventory is transferred to the customer.

The final regulations provide that the cost of goods in progress offset for each item of inventory for the taxable year is calculated as (1) the cost of goods incurred through the last day of the taxable year, (2) reduced by the cumulative cost of goods in progress offset amounts attributable to the items of inventory that were taken into account in prior taxable years, if any. However, the cost of goods in progress offset cannot reduce the AFS inventory inclusion amount for the item of inventory below zero. Further, the cost of goods in progress offset attributable to one item of inventory cannot reduce the AFS inventory inclusion amount attributable to a separate item of inventory. Any cost of goods that were not used to offset AFS inventory inclusion amounts because they were subject to limitation are considered when the taxpayer determines the cost of goods in progress offset for that item of inventory in a subsequent taxable year.

The cost of goods in progress offset is determined by reference to the costs and expenditures related to each item of inventory produced or acquired for resale, which costs have been incurred

under section 461 and have been capitalized and included in inventory under sections 471 and 263A or any other applicable provision of the Code at the end of the year. However, the cost of goods in progress offset does not reduce the costs that are capitalized to the item of inventory produced or acquired for resale by the taxpayer under the contract. That is, while the cost of goods in progress offset reduces the AFS inventory inclusion amount, it does not affect how and when costs are capitalized to inventory under sections 471 and 263A or any other applicable provision of the Code or when those capitalized costs will be recovered. Instead, the cost of goods in progress offset serves only to reduce or ''offset'' any AFS income inclusion amounts for the item of inventory and defer such amounts to the taxable year in which ownership of the item of inventory is transferred to the customer.

The costs of goods comprising the cost of goods in progress offset must be determined by applying the inventory accounting methods used by the taxpayer for Federal income tax purposes. A taxpayer must calculate its cost of goods in progress offset by reference to all costs that the taxpayer has permissibly capitalized and allocated to items of inventory under its inventory method, but may not consider costs that are not properly capitalized under such method.

In the taxable year in which ownership of the item of inventory is transferred to the customer, any revenue deferred by way of a prior year cost offset is included in gross income in the year of the transfer along with any additional revenue that is otherwise required to be included in gross income under the AFS Income Inclusion Rule for such year. Although no cost offset is permitted in such year, the taxpayer would recover costs capitalized and allocated to the item of inventory transferred as cost of goods sold in such year in accordance with sections 471 and 263A or any other applicable provision of the Code. However, if in a taxable year prior to the taxable year in which ownership of the item of inventory is transferred to the customer, either (A) the taxpayer dies or ceases to exist in a transaction other than a transaction to which section 381(a) applies, or (B) the taxpayer's obligation to the customer with respect to the item of inventory ends other than in a transaction to which 381(a) applies or certain section 351(a) transactions between members of the same consolidated group, then all payments received for the item of inventory that were not previously included in gross income as a result of the application of the cost offset rules are required to be included in gross income in such year.

The Treasury Department and the IRS adopted this approach in the final regulations because the AFS cost offset method provides options for taxpayers. All taxpayers that are required to account for income from the sale of inventory under the AFS income inclusion rule and that report AFS revenue in a taxable year prior to the taxable year in which ownership of the item of inventory is transferred to the customer will generally be required to accelerate income inclusions under such rule. However, taxpayers have the option of using the AFS cost offset method to reduce the amount of income they are required to accelerate under such rule. The AFS cost offset allows taxpayers to reasonably match income inclusions and incurred cost of goods, and more clearly reflects income.

The final regulations adopt a cost of goods sold offset based on incurred costs because the approach is consistent with § 1.61–3 and more objective than a cost of goods sold offset based on projected future costs. In addition, the AFS cost offset method provides a degree of parity for sellers of goods with service providers who deduct costs as incurred without capitalizing the costs to inventory. A cost offset based on projected future cost of goods sold was rejected because it is inconsistent with sections 461(h), 263A and 471, and the regulations under those sections of the Code. Further, Congress rejected the deferral method for advance payments in former § 1.451–5(c), which contained a cost of goods sold offset for estimated future costs. See Conf. Rep. at 429 fn. 880.

The AFS cost offset method is a method of accounting that applies to all items of income eligible for the AFS cost offset method in the trade or business. The method applies to items at the trade or business level so that taxpayers can choose to apply the method only to trades or businesses where the burden of determining costs incurred relative to the related reduction in AFS income inclusion amount warrants the adoption of the method. If a taxpayer uses the AFS cost offset method for a trade or business it must use the method for all eligible items in that trade or business. Further, if a taxpayer uses the AFS cost offset method, it must also use the advance payment cost offset method in § 1.451–8(e). The advance payment cost offset method is discussed later in this preamble. Special coordination rules exist for taxpayers that use the AFS cost offset method and the advance payment cost offset method and that have income from the sale of an item of inventory that is required to be accounted for under both §§ 1.451–3 and 1.451–8 because certain payments received for such item meet the definition of an advance payment under § 1.451–8(a)(1). See § 1.451–3(c)(1) for such coordination rules.

The AFS cost offset method reduces the amount of income from the sale of an item of inventory that is required to be accelerated under the AFS Income Inclusion Rule by an amount of incurred cost of goods related to the item. However, the offsets to interchange fees and credit card late fees recommended by the commenters are based on estimated reward costs and uncollectable late fees rather than incurred costs of goods. Accordingly, the final regulations do not allow a cost offset for interchange fees, credit card late fees, and similar items of revenue that are subject to the AFS Income Inclusion Rule and reported net of estimated future amounts for AFS purposes.

3. Proposed § 1.451–3(c)(4) and (c)(6)(ii): Revenue, Transaction Price and Increases in Consideration

Proposed § 1.451–3(c)(4) provides that, for the AFS Income Inclusion Rule, revenue means all transaction price amounts includible in gross income under section 61 of the Code. Proposed § 1.451–3(c)(6) provides that the transaction price is the gross amount of consideration to which a taxpayer expects to be entitled for AFS purposes in exchange for transferring goods, services, or other property, but not including, among other things, ''increases in consideration'' to which a taxpayer's entitlement is contingent on the occurrence or nonoccurrence of a future event for the period in which the amount is contingent.

Commenters expressed confusion about the phrase ''increases in consideration'' because the definition of transaction price otherwise refers to ''amounts'' and does not distinguish between increases and decreases. Commenters asserted that there is no reason to treat ''increases'' in consideration different from other consideration because all consideration is not realized until the taxpayer has a fixed right to payment. Commenters concluded that any portion of the contract price subject to a contractual contingency, for example, a future performance, is excluded from the transaction price until the contingency is satisfied. In addition, one commenter noted that it is unclear when there is a contingent ''increase'' in consideration,

and taxpayers could revise the contract terms to meet this requirement.

The Treasury Department and the IRS agree with these comments. The term ''increases in consideration'' was meant to signal income items that are subject to a condition precedent, such as bonus payments that require complete performance before the taxpayer is entitled to the bonus payment. The final regulations have been revised to remove the reference to ''increases in consideration'' entirely. The concept is now subsumed by the general rule that, to determine when an item of gross income is ''taken into account as AFS revenue'' under the AFS Income Inclusion Rule, AFS revenue is reduced by amounts that the taxpayer does not have an enforceable right to recover if the customer were to terminate the contract at the end of the taxable year. If an amount is contingent due to a condition precedent, such as with some bonus payments, and the taxpayer would not have an enforceable right to recover such amount if the customer were to terminate the contract at the end of the taxable year, the AFS Income Inclusion Rule does not require the taxpayer to include such amount in gross income in the current year.

4. Proposed § 1.451–3(c)(6)(ii): Rebuttable Presumption

Proposed § 1.451–3(c)(6)(ii) provides a rebuttable presumption that amounts included in revenue in an AFS are presumed to not be contingent on the occurrence or nonoccurrence of a future event unless, upon examination of all the facts and circumstances existing at the end of the taxable year, it can be established to the satisfaction of the Commissioner that the amount is contingent on the occurrence or nonoccurrence of a future event.

Commenters requested that the final regulations remove the rebuttable presumption regarding contingent consideration. Commenters reasoned that the rebuttable presumption imposes a higher standard of proof upon taxpayers than is ordinarily required to establish that consideration is contingent. Additionally, commenters noted that basing the presumption on the treatment of the consideration for financial reporting purposes is not sensible because the financial accounting rules do not make the conclusion dependent on whether the consideration is or is not contingent on the occurrence or non-occurrence of a future event. Rather, under the Financial Accounting Standards Board (FASB) and International Accounting Standards Board, Accounting Standards Codification (ASC) Topic 606 and International Financial Reporting Standards (IFRS) 15, *Revenue from Contracts with Customers* (collectively, ASC 606), the recognition of contingent consideration is based on a determination of the likely outcome of the contingency. Accordingly, commenters recommended that the final regulations eliminate the presumption in favor of noncontingency.

As noted earlier, the final regulations have been revised to remove the reference to ''contingent consideration'' entirely. The concept is now subsumed by the general rule that, to determine when an item of gross income is ''taken into account as AFS revenue'' under the AFS Income Inclusion Rule, AFS revenue is reduced by amounts that the taxpayer does not have an enforceable right to recover if the customer terminates the contract at the end of the taxable year. Given this change, the final regulations remove the rebuttable presumption that a taxpayer has an enforceable right to amounts included in AFS revenue.

5. Proposed § 1.451–3(c)(6)(ii): Enforceable Right to Payment

Commenters requested that the final regulations clarify or remove the rule in proposed § 1.451–3(c)(6)(ii) that treats amounts for which the taxpayer has an ''enforceable right to payment'' for performance completed to date as not contingent on the occurrence or nonoccurrence of a future event. First, commenters reasoned that the rule is ambiguous, resulting in controversies with exam. Second, commenters asserted that, assuming the phrase ''enforceable right to payment'' is based on the financial statement rules in ASC 606, this standard effectively overrides the tax realization requirement requiring a fixed, unconditional right to payment. Further, commenters reasoned that the rule is inconsistent with the exception for increases in consideration to which a taxpayer's entitlement is contingent on the occurrence or nonoccurrence of a future event.

The Treasury Department and the IRS agree with these comments. As discussed earlier, the final regulations modify the general AFS Income Inclusion Rule by reducing the AFS revenue that is accelerated and included in gross income. Under the AFS Income Inclusion Rule, to determine when the item of gross income is ''taken into account as AFS revenue,'' AFS revenue is reduced by amounts that the taxpayer does not have an ''enforceable right'' to recover if the customer were to terminate the contract on the last day of the taxable year. The term ''enforceable right'' is specifically defined in § 1.451–3(a)(9) as any right that a taxpayer has under the terms of a contract or under applicable federal, state, or international law, including rights to amounts recoverable in equity or liquidated damages.

6. Proposed § 1.451–3(c)(6)(iii): Reductions for Amounts Subject to Section 461 and Disputed Income

Proposed § 1.451–3(c)(6)(iii) provides that the ''transaction price'' does not include reductions for amounts subject to section 461, including amounts anticipated to be in dispute, returns, and rewards issued in credit card transactions. One commenter recommended that the final regulations clarify that rewards issued in credit card transactions are subject to section 461 and do not reduce original issue discount (OID) income in any circumstance, regardless of the structure of the credit card program. The commenter requested this clarification because taxpayers have taken different positions on the treatment of these rewards while the IRS has taken the position that rewards do not reduce OID income. The commenter stated that the better approach is to treat these rewards as liabilities under section 461. The commenter further explained that treating these rewards as amounts subject to section 461 in all circumstances would create uniformity among credit card issuers, reduce controversy between taxpayers and the IRS, and ease the compliance burden on taxpayers by eliminating the need for a facts and circumstances analysis of each credit card program. The Treasury Department and the IRS agree with the commenter and have modified the final regulations in § 1.451–3(b)(2)(i)(A)(*1*) to clarify that rewards issued in a credit card transaction are items subject to section 461.

Commenters also questioned whether the AFS Income Inclusion Rule modifies the treatment of income amounts subject to an actual dispute or a clerical error (disputed income amounts). The AFS Income Inclusion Rule does not modify the treatment of disputed income amounts. The principles set forth in Revenue Ruling 2003–10, 2003–1 C.B. 288, continue to apply. For example, an accrual method taxpayer does not accrue gross income in the taxable year of sale if, during the year of sale, the customer disputes its liability to the taxpayer. In addition, if an accrual method taxpayer overbills a customer due to a clerical mistake, and the customer disputes the liability in the subsequent taxable year, the taxpayer must accrue gross income in the taxable year of sale for the correct amount.

Lastly, if a taxpayer ships excess quantities of goods and the customer does not dispute the shipment and agrees to pay for the excess quantities of goods, the taxpayer accrues gross income in the amount of the agreed payment in the taxable year of the sale.

In response to these comments, the final regulations clarify that, under the AFS Income Inclusion Rule, to the extent that AFS revenue was reduced for amounts anticipated to be in dispute or anticipated to be uncollectable, AFS revenue is increased by such amounts. Accordingly, although ASC 606 reduces the transaction price for anticipated disputes to determine the amount of revenue to include on an AFS, see ASC 606–10–32–6, AFS revenue is increased for amounts anticipated to be in dispute or anticipated to be uncollectable, because those amounts are included in gross income until they are actually disputed.

C. Proposed § 1.451–3(c)(5): Special Method of Accounting

Proposed § 1.451–3(c)(5) provides a non-exhaustive list of examples of special methods of accounting to which the AFS Income Inclusion Rule generally does not apply. Commenters requested that the final regulations include the methods of accounting for notional principal contracts under § 1.446–3 and the timing rules for stripped bonds under section 1286 as examples of special methods of accounting. The Treasury Department and the IRS adopt these comments in the final regulations and have added additional special methods for clarification purposes. The list of special methods of accounting remains non-exhaustive.

D. Proposed § 1.451–3(d): Exceptions to the AFS Income Inclusion Rule

Proposed § 1.451–3(d) describes the exceptions to the AFS Income Inclusion Rule. The proposed rule clarifies that the AFS Income Inclusion Rule does not apply unless all of the taxpayer's entire taxable year is covered by an AFS. In addition, the AFS Income Inclusion Rule does not cover items of income in connection with a mortgage servicing contract. A commenter requested that an exception be added for any amount that has not yet been realized for Federal income tax purposes. As discussed earlier, the Treasury Department and the IRS decline to adopt this suggestion because providing rules on realization is beyond the scope of these final regulations.

E. Proposed § 1.451–3(g): Contracts With Multiple Performance Obligations

1. Proposed § 1.451–3(g): Allocation of Transaction Price to Contracts With Multiple Performance Obligations Subject to Section 451(b)

Proposed § 1.451–3(g) provides that if a taxpayer's contract with a customer has multiple performance obligations subject to section 451(b), transaction price is allocated to performance obligations as transaction price is allocated to performance obligations in the taxpayer's AFS.

The final regulations clarify that each performance obligation yields an item of gross income that must be accounted for separately under the AFS Income Inclusion Rule. When a contract contains multiple performance obligations, to determine the amount of gross income allocated to each performance obligation, the transaction price determined under the taxpayer's applicable accounting principles, is allocated to each corresponding item of gross income in accordance with how the transaction price is allocated to each performance obligation for AFS purposes. If the accounting standards used to prepare the AFS identify a single performance obligation that yields more than one corresponding item of gross income, the portion of the transaction price amount that is allocated to the single performance obligation for AFS purposes must be further allocated among the corresponding items of gross income using any reasonable method.

The final regulations simplify the definition of transaction price. The final regulations define the term transaction price to mean the total amount of consideration to which a taxpayer is, or expects to be, entitled from all performance obligations under a contract. The transaction price is determined under the standards the taxpayer uses to prepare its AFS. Accordingly, adjustments to the transaction price that were reflected in the transaction price definition in the proposed regulations have, to the extent relevant under these final regulations, been moved to operative rules to ensure clarity. See § 1.451–3(b)(2) and (d)(3).

In addition, the final regulations clarify how the transaction price should be allocated to the extent the transaction price includes a reduction for liabilities, amounts anticipated to be in dispute or anticipated to be uncollectable, or a significant financing component that is deemed to exist under the standards the taxpayer uses to prepare its AFS. The final regulations clarify that the taxpayer must determine the specific performance obligation to which such reduction relates and increase the transaction price allocable to the corresponding item of gross income by the amount of the reduction (specific identification approach). If it is impracticable from the taxpayer's records to use the specific identification approach, the final regulations allow taxpayers to use any reasonable method to allocate the amount to the items of gross income in the contract. The final regulations also provide that a pro-rata allocation of this amount across all items of gross income under the contract based on the relative transaction price amounts allocated to the items for AFS purposes is a reasonable method.

Similarly, the final regulations clarify how the transaction price should be allocated if the transaction price was increased because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS. In this situation, the taxpayer must determine the specific performance obligation to which such amount relates and decrease the transaction price amount allocable to the corresponding item of gross income by such amount (the ''specific identification approach''). If it is impracticable from the taxpayer's records to use the specific identification approach, the taxpayer may use any reasonable method to allocate such amount to the items of gross income in the contract. The final regulations provide that a pro-rata allocation of such amount across all items of gross income under the contract based on the relative transaction price amounts allocated to the items for AFS purposes is a reasonable method.

2. Proposed § 1.451–3(g): Contracts With Income Subject to § 1.451–3 and Income Subject to a Special Method of Accounting

In the proposed regulations, the Treasury Department and the IRS requested comments on the allocation of the transaction price for contracts that include both income subject to section 451 and income subject to a special method of accounting provision, specifically, section 460. A commenter to the proposed regulations suggested that the allocation provisions under section 460 and the regulations thereunder, and not section 451(b)(4), should control the amount of gross income from a long-term contract that is accounted for under section 460. The commenter noted that using this approach is appropriate in light of section 451(b)(2), which reflects Congress's intent to not disturb the treatment of amounts for which the

taxpayer uses a special method of accounting.

The Treasury Department and the IRS believe that a rule is necessary to address the application of section 451(b)(2) and (4) to contracts with income that is accounted for in part under § 1.451–3 and in part under a special method of accounting and suggested rules for public comment in the preamble of a separate notice of proposed rulemaking published in the **Federal Register** on August 5, 2020 (85 FR 47508). The suggested rules provided that if an accrual method taxpayer with an AFS has a contract with a customer that includes one or more items of gross income subject to a special method of accounting (as defined in proposed § 1.451–3(c)(5)) and one or more items of gross income subject to section 451, the allocation rules under section 451(b)(4) do not apply to determine the amount of each item of gross income that is accounted for under the special method of accounting provision. Rather, the taxpayer first allocates the transaction price to the item(s) of gross income subject to a special method of accounting (as determined under the special method of accounting). The remainder of the transaction price, the ''residual amount'', is then allocated to the items of gross income that are subject to § 1.451–3. To the extent the contract contains more than one item of gross income that is subject to section 451, the residual amount would be allocated to each such item in proportion to the amounts allocated to the corresponding performance obligations for AFS purposes. The Treasury Department and the IRS requested comments on these suggested allocation rules. However, no formal comments were received regarding these suggested rules.

The final regulations largely adopt the rules suggested in the preamble to the separate notice of proposed rulemaking published in the **Federal Register** on August 5, 2020 (85 FR 47508). Accordingly, the final regulations provide that the transaction price allocation rule in § 1.451–3(d)(1) does not apply to determine the amount of each item of gross income that is subject to a special method of accounting. Rather, the final regulations provide that the transaction price is first allocated to items of gross income subject to a special method of accounting, as determined under the special method of accounting. For this purpose, a special method of accounting has the meaning set forth in § 1.451–3(a)(13), except as otherwise provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d)).

To determine the transaction price allocated to items of gross income subject to a special method of accounting, the taxpayer must first adjust the AFS transaction price by the amounts described in the final paragraph of part II.B.1 of this Summary of Comments and Explanation of Revisions. Accordingly, if the AFS transaction price includes a reduction for cost of goods sold, liabilities, amounts expected to be in dispute or anticipated to be uncollectible, or a significant financing component that exists under the standards the taxpayer uses to prepare its AFS, the taxpayer must increase the transaction price amount by the amount of such reduction. If the AFS transaction price has been increased because a significant financing component exists under the standards the taxpayer uses to prepare its AFS, the taxpayer must decrease the transaction price amount by the amount of such increase.

After the taxpayer makes the adjustments to the transaction price described earlier, the taxpayer first allocates such amount to the item(s) of gross income subject to a special method of accounting, and then allocates the remainder (residual amount) to the item(s) of gross income that are subject to § 1.451–3. If the contract, contains more than one item of gross income that is subject to § 1.451–3, the taxpayer allocates the residual amount to these items in proportion to the amounts allocated to the corresponding performance obligations for AFS purposes or as otherwise provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d)).

F. Proposed § 1.451–3(i): Special Ordering Rule for Certain Items of Income for Debt Instruments

Under proposed § 1.451–3(i), if a fee is not treated by a taxpayer as discount or as an adjustment to the yield of a debt instrument over the life of the instrument (such as points) in its AFS, and the fee otherwise would be treated as creating or increasing OID for Federal income tax purposes (specified fee), then the rules in the proposed regulations under section 451(b) apply before the rules in sections 1271 through 1275 and the corresponding regulations. Proposed § 1.451–3(i)(2) provides three examples of specified fees: Credit card late fees, credit card cash advance fees, and interchange fees (specified credit card fees). Interchange fees are sometimes labeled merchant discount in certain private label credit card transactions.

Commenters requested that the final regulations provide that promotional discount, which also is sometimes labeled merchant discount, is not a specified fee. Promotional discount arises when a credit card issuer charges a fee to a merchant as compensation for accepting a below market interest rate on a credit card balance during a promotional period. Commenters explained that promotional discount is generally included in income over a promotional or similar period on a taxpayer's AFS and, despite possible alternative labeling, is, in substance, an adjustment to the yield of a debt instrument for AFS purposes. The Treasury Department and the IRS agree that any fee that adjusts the yield of a debt instrument for AFS purposes over the life of the instrument or another period should not be a specified fee. Therefore, the final regulations do not include the phrase ''over the life of the instrument'' in the definition of a specified fee but add the phrase ''spread over a period of time'' to clarify the definition. Thus, a fee that adjusts the yield of a debt instrument over a promotional or similar period for AFS purposes, such as promotional discount, is not a specified fee under the final regulations.

One commenter agreed that section 451(b) was not intended to affect the application of the general OID timing rules to OID other than for certain fees that are not treated as discount for AFS purposes, including the specified credit card fees. Accordingly, the commenter agreed with the rules in proposed § 1.451–3(i) and the inclusion of the general OID timing rules as a special method of accounting. Except as provided in the preceding paragraph, the definition of specified fees in the proposed regulations is adopted in the final regulations.

G. Proposed § 1.451–3(k): Cumulative Rule for Multi-Year Contracts

The proposed regulations provide that for a multi-year contract, a taxpayer must take into account the cumulative amounts included in income in prior taxable years on the contract in order to determine the amount to be included for the taxable years remaining in the contract. The proposed regulations contain two examples that illustrate this rule.

The final regulations clarify that if the item of gross income from a multi-year contract is from the sale of an item of inventory and the taxpayer uses the AFS cost offset method, the taxpayer must first determine the ''AFS inventory

inclusion amount'' for the taxable year. The taxpayer determines the AFS inventory inclusion amount for the taxable year by first taking the greater of: (1) The cumulative amount of revenue from the item of inventory that satisfies the all events test under § 1.451–1(a) through the last day of the taxable year, less the portion of any advance payment received that is deferred to a subsequent taxable year under § 1.451–8, if applicable, or (2) the cumulative amount of revenue from the item of inventory that is treated as taken into account as AFS revenue through the last day of the taxable year and identifies the larger of the two amounts or if the two amounts are equal, the equal amount. The taxpayer then reduces such amount by the prior year AFS inventory inclusion amount for that item of inventory, if any, to determine the AFS inventory inclusion amount for the current taxable year. Lastly, the taxpayer reduces the AFS inventory inclusion amount for the taxable year by the cost of goods in progress offset for the taxable year (which generally equals the costs of goods in progress for the item of inventory as of the end of the year less the portion of such costs that were taken into account as a cost of goods in progress offset for a prior taxable year). This net amount is the amount required to be included in gross income in the taxable year. However, in the taxable year in which ownership of the item of inventory is transferred to the customer, the taxpayer performs the same ''greater of'' computation noted earlier, but rather than subtract the prior year AFS inventory inclusion amount for the item of inventory (which is gross of cost offsets) from the result of the ''greater of'' computation, the taxpayer subtracts all prior year gross income inclusions for the item of inventory from the result of the ''greater of'' computation. This net amount is the amount required to be included in gross income in the taxable year of ownership transfer. The effect of this computation is that any revenue reduced by a cost offset in a prior year is included in gross in the taxable year in which ownership of the item of inventory is transferred to the customer. Although no cost offset is permitted in such year, the taxpayer would recover costs capitalized and allocated to the item of inventory transferred as cost of goods sold in such year in accordance with sections 471 and 263A or any other applicable provision of the Code.

In the case of any other item of gross income from a multi-year contract, the taxpayer first compares the cumulative amount of the item of gross income that satisfies the all events test under § 1.451–1(a) through the last day of the taxable year with the cumulative amount of revenue from the item of gross income that is treated as taken into account as AFS revenue through the last day of the taxable year and identifies the larger of the two amounts (or, if the two amounts are equal, the equal amount). The taxpayer then reduces such amount by all prior year inclusion amounts attributable to the item of gross income, if any, to determine the amount required to be included in gross income in the current taxable year. Special coordination rules for applying § 1.451–8 are also provided to the extent certain payments received under a multi-year contract are advance payments. The analysis in the examples is updated to reflect the clarifications to the rule.

H. Proposed § 1.1275–2(l): OID Rule for Income Item Subject to Section 451(b)

Under proposed § 1.1275–2(l), notwithstanding any other rule in sections 1271 through 1275 and §§ 1.1271–1 through 1.1275–7, if, and to the extent, a taxpayer's item of income for a debt instrument is subject to the timing rules in proposed § 1.451–3(i) (including credit card late fees, credit card cash advance fees, or interchange fees), then the taxpayer does not take the item into account to determine whether the debt instrument has any OID. As a result, the taxpayer does not treat the item as creating or increasing any OID on the debt instrument. Commenters agree with these rules and note that these rules confirm that the current treatment of items other than specified fees will not be affected by section 451(b). The commenters also note that removing specified fees, including specified credit card fees, from the calculation of OID will permit taxpayers to apply only the rules of section 451(b) to these fees, without also having to apply the OID rules, thereby reducing taxpayer compliance burdens. Accordingly, the Treasury Department and the IRS adopt the rules in proposed § 1.1275–2(l) in the final regulations.

I. Other Comments

1. Burial Plots and Interment Rights

Commenters request clarification on the treatment of income from contracts with customers for the sale of burial plots or interment rights, on a pre-need basis (pre-need contracts). The terms of the pre-need contracts typically require the customer to make an initial down payment and pay the balance of the sales price over several years. If the purchaser cancels or fails to perform under the contract before the entire purchase price is paid, commenters represent that, under every state law, the taxpayer's sole remedy is to keep all or a portion of the installment payments previously received from the customer as liquidated damages. Commenters highlighted that there may be an extended period of time between the date the pre-need contract is executed and the date the taxpayer collects the full sales price from the customer.

Commenters represented that ASC 606 requires the entire transaction price from a pre-need contract, net of costs, to be included in revenue in the year in which the parties execute the contract. However, for Federal income tax purposes, commenters requested that the final regulations clarify that taxpayers with pre-need contracts should not include the unpaid balance of the transaction price in income in the taxable year the contract is executed under the AFS Income Inclusion Rule. In commenters' view, the sale of a burial plot should not be treated as a completed sale for tax purposes until the entire sales price of the burial plot is paid by the customer and ownership rights in the burial plot are transferred. Further, the taxpayer does not have an enforceable right to payment for the entire transaction price of the plot if the customer cancels or fails to perform under the contract.

Commenters concluded that these taxpayers should be entitled to recover any allocable cost basis in the burial plot before including in gross income any of the installment payments received from the customer. Commenters viewed the sale of a burial plot as the sale of an interest in real property and assert that the basis recovery rules of sections 1016 and 1001 apply to prepayments for burial plots. Under this approach, prepayments for the purchase price of a burial plot before the sale of the plot first decrease the taxpayer's basis in the burial plot. See § 1.1016–2(a). When the prepayments exceed the taxpayer's basis in the burial plot, the taxpayer recognizes the excess amount as gain. See § 1.1001–1(c)(1). Accordingly, commenters requested that the final regulations clarify the application of sections 1001 and 1016 to the sale of pre-need burial plots.

Commenters also requested clarification on the income recognition treatment of pre-need contracts with customers for the sale of interment rights. Commenters noted that the ASC 606 treatment for pre-need contracts for the sale of interment rights resemble the treatment for pre-need contracts for the sale of burial rights. Commenters viewed the receipt of any installment payments prior to the transfer of those rights and prior to the payment of the

entire transaction price to be controlled by sections 1001 and 1016, rather than by sections 451 and 471. Under this rationale, a taxpayer's treatment of the down payment and the installment payments from pre-need contracts in its AFS should not determine the timing of income for tax purposes. Instead, commenters suggested that the amounts received before the transfer of the interment rights should be viewed as a return of capital and a reduction in the taxpayer's basis in the interment space.

The IRS and the Treasury Department agree that the sale of burial plots and interment rights are governed by sections 1001 and 1016 but consider the determination of whether a sale has occurred to be a factual issue. If a sale has occurred under the facts and circumstances, any income resulting from the sale is realized under section 1001 and the right to the income is fixed, therefore the AFS Income Inclusion Rule does not result in the acceleration of AFS revenue. If the sale has not occurred, and the right to the future payments is extinguished if the customer cancels the contract, the AFS Income Inclusion Rule does not require acceleration because there is no enforceable right to the future payments if the contract is cancelled by the customer provided that the taxpayer is not using the alternative AFS revenue method in § 1.451–3(b)(2)(ii).

2. Book Percentage-of-Completion Method (Book PCM)

One commenter expressed interest in a Book PCM option as a special method of accounting that taxpayers with contracts accounted for using an over-time method of accounting for revenue under ASC 606 could elect to include the full amount of revenue reported on its AFS without regard to any offset or exception provided in these regulations, but with an offset for the allocable costs reported on its AFS, with some potential tax adjustments. Under ASC 606, the over-time method, where taxpayers recognize revenue over time (as opposed to at a point in time) is used for the following contracts where control over promised goods or services is transferred over time: (1) Where the customer controls the asset as it is created or enhanced by the entity's performance under the contract; (2) where the customer receives and consumes the benefits of the entity's performance as it performs under the contract; or (3) where the entity's performance creates or enhances an asset that has no alternative use to the entity, and the entity has the right to receive payment for work performed to date and expects to fulfill the contract as promised. An entity using an ''over-time method'' recognizes revenue using either: (1) An output method, which measures the value of the goods and services transferred to date to the customer (for example, units produced); or (2) an input method, which recognizes revenue based on the entity's efforts or inputs (for example, labor hours expended, costs incurred) as compared to the expected total costs to satisfy the performance obligation.

Other commenters expressed concern about allowing a Book PCM option. Some commenters suggested that limiting a Book PCM option to only taxpayers that must report revenue on a particular over-time basis, such as an input cost-incurred method, could create more complexity, not less. Other commenters suggested that, while a Book PCM option might achieve some book-tax conformity, they would still want the opportunity to take advantage of tax rules that provide more beneficial timing than available under Book PCM, such as additional first year depreciation. The Treasury Department and the IRS will continue studying the feasibility and efficacy of an optional Book PCM approach. At this time, however, the Treasury Department and the IRS decline to adopt the Book PCM option set forth by commenters because of the concerns raised regarding the complexity and the desire by some taxpayers to obtain more beneficial timing under tax rules when using a Book PCM method.

3. AFS Issues

No formal comments were received regarding the definition of AFS in proposed § 1.451–3(c)(1). Accordingly, the definition of AFS remains largely unchanged in these final regulations. See § 1.451–3(a)(5). One commenter questioned the statutory language in section 451(b) regarding financial statements prepared using international financial reporting standards (IFRS). Specifically, section 451(b)(3)(B) provides that a financial statement made on the basis of IFRS is an AFS for section 451(b) if the financial statement is filed with a foreign government agency that is equivalent to the United States Securities and Exchange Commission (SEC) and has financial reporting standards not less stringent than the standards imposed by the SEC. Proposed § 1.451–3(c)(1)(iii)(A) and the final regulations § 1.451–3(a)(5)(ii)(A) mirror the statutory language. The commenter questioned whether the requirement in section 451(b)(3)(B) that the financial reporting standards of a foreign agency or government be not less stringent than the standards required by the SEC, refers solely to reporting standards related to revenue or if it also refers to reporting standards for other items that are not related to revenue. The statutory language does not distinguish the reporting standards between revenue and other items that are not related to revenue. Additionally, Revenue Procedure 2004–34, which was the model for the definition of AFS in section 451(b)(3), did not have similar language. Accordingly, based on the plain language of the statute, if the financial reporting standard for any item is less stringent than SEC reporting standards, even if that standard does not relate to revenue reporting, the statement will not be an AFS under proposed § 1.451–3(c)(1)(iii)(A) or § 1.451–3(a)(5)(ii)(A) of the final regulations. However, the financial reporting standards relativity requirement does not prevent the IFRS financial statements from qualifying as an AFS under proposed § 1.451–3(c)(1)(iii)(B) or (C) or § 1.451–3(a)(5)(ii)(B) or (C) of the final regulations.

No formal comments were received regarding the AFS issues addressed in proposed § 1.451–3(h)(1). Accordingly, the rules regarding an AFS that covers a group of entities (consolidated AFS rules) and mismatched reporting periods remain largely unchanged in these final regulations. However, the Treasury Department and the IRS are aware of questions regarding the application of certain aspects of the consolidated AFS rules. Under proposed § 1.451–3(h)(1)(i), if a taxpayer's results are reported on the AFS for a group of entities, the taxpayer's AFS is the group's AFS. Proposed § 1.451–3(h)(3) provides that if a group's AFS does not separately state items, the portion of the revenue allocable to the taxpayer is determined by relying on the source documents that were used to create the group's AFS.

Under the proposed regulations, it was unclear whether the portion of the AFS revenue allocable to the taxpayer includes amounts that are subsequently eliminated in the group's AFS (consolidated AFS). Accordingly, the final regulations clarify that, if the consolidated AFS does not separately state items, the portion of the AFS revenue allocable to the taxpayer is determined by relying on the taxpayer's separate source documents used to create the consolidated AFS and includes amounts that are subsequently eliminated in the consolidated AFS.

III. Comments and Revisions Regarding § 1.451–8

A. Proposed § 1.451–8(b)(1)(i): Definition of Advance Payment

1. Prepayments for Pre-Need Burial Plots

Under section 451(c)(4)(A), the term advance payment means any payment that meets the following three requirements: (1) The full inclusion of the payment in gross income in the year of receipt is a permissible method of accounting; (2) any portion of the advance payment is included in revenue in an AFS for a subsequent tax year; and (3) the advance payment is for goods, services, or such other items that the Secretary has identified. Proposed § 1.451–8(b)(1)(i) largely mirrors the definition of an advance payment in section 4.01 of Revenue Procedure 2004–34, which expands upon the goods, services, and other items for which a payment can qualify as an advance payment.

One commenter requested that the Secretary exercise the authority to broaden the definition of advance payment to include prepayments for the sale of an interest in real property, including pre-need burial plots. If the comment is adopted, prepayments for pre-need burial plots would be eligible for the one-year deferral of income.

Commenters agreed that taxpayers in the death care industry uniformly treat the entire amount of the sales price for pre-need burial plots as income on an AFS in the year the pre-need contract is executed. To qualify as an advance payment, a portion of the prepayment must be included in revenue by the taxpayer in an AFS for a subsequent taxable year. Section 451(c)(4)(A)(ii). Since prepayments for pre-need burial plots cannot meet this requirement, these prepayments cannot qualify as advance payments. For this reason, the Treasury Department and the IRS decline to adopt this comment in the final regulations.

No other requests were received to expand the definition of advance payment. Accordingly, the list of items that are included in the definition of advance payment under proposed § 1.451–8(b)(1)(i) is unchanged.

2. Amount of Payment Included in AFS Revenue in a Subsequent Year

Under section 451(c)(4)(A) and proposed § 1.451–8(a)(1)(i), for a payment to qualify as an advance payment, a portion of the payment must be included in revenue in an AFS for a subsequent tax year. The final regulations clarify that to determine the amount of the payment that is taken into account as AFS revenue, the taxpayer must adjust AFS revenue for any amounts described in § 1.451–3(b)(2)(i)(A), (C), and (D). As a result, to the extent that AFS revenue in the taxable year of receipt reflects, for example, a reduction for liabilities that are required to be accounted for under provisions such as section 461 or amounts anticipated to be in dispute, AFS revenue in the taxable year of receipt must be increased by such amounts.

The final regulations make similar clarifying changes to the deferral method for taxpayers with an AFS in § 1.451–8(c). Under § 1.451–8(c), a taxpayer that uses the deferral method must include all or a portion of the advance payment in gross income in the taxable year of receipt to the extent ''taken into account as AFS revenue'' as of the end of the taxable year of receipt, and include the remaining portion of the advance payment in gross income in the following taxable year. To determine the extent that an advance payment is treated as ''taken into account as AFS revenue'' as of the end of the taxable year of receipt, the taxpayer must adjust AFS revenue by the amounts described in § 1.451–3(b)(2)(i)(A), (C), and (D). Accordingly, to the extent that AFS revenue reflects a reduction for liabilities that are accounted for under other provisions of the Code such as section 461 or amounts anticipated to be in dispute, AFS revenue is increased by such amounts. Further, if the transaction price, as defined in § 1.451–3(a)(14), was increased because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS, then any AFS revenue attributable to such increase is disregarded.

B. Proposed § 1.451–8(b)(1)(ii)(H): Specified Good Exception

Proposed § 1.451–8(b)(1)(ii) lists exceptions to the definition of an advance payment. Specifically, proposed § 1.451–8(b)(1)(ii)(H) provides that an advance payment does not include a payment received in a taxable year earlier than the taxable year immediately preceding the taxable year of the contractual delivery date for a specified good. Proposed § 1.451–8(b)(8) defines the ''contractual delivery date'' as the month and year of delivery listed in the written contract to the transaction. A ''specified good'' is defined in proposed § 1.451–8(b)(9) as a good for which: (1) The taxpayer does not have the goods of a substantially similar kind and in a sufficient quantity at the end of the taxable year the upfront payment is received; and (2) the taxpayer recognizes all of the revenue from the sale of the good in its AFS in the year of delivery. If the prepayment satisfies the specified good exception, the prepayment is analyzed under section 451(b) and § 1.451–1.

1. Contractual Delivery Date Requirement

Some commenters generally requested that the Treasury Department and the IRS re-examine the contractual delivery date requirement. One commenter requested that the definition of contractual delivery date be broadened to include contracts where the delivery date can be reasonably determined based on all the facts and circumstances as provided in the contract. Another commenter requested that the exception be modified to cover any contract for the sale or production of goods where, based on all of the facts and circumstances, it is reasonably certain that the taxpayer's performance to which the advance payment relates will in fact take place. The same commenter also suggested that if the definition of the contractual delivery date was broadened, the requirement regarding the period of time between when an advance payment is received and the delivery date for a specified good could be modified to require that the expected delivery date occur more than 24 months after the advance payment is received.

The Treasury Department and the IRS decline to adopt the comments to broaden the definition of contractual delivery date in the final regulations because the suggested approaches would decrease administrability and increase uncertainty for taxpayers and the potential for litigation. Therefore, the definition of contractual delivery date in the final regulations continues to be limited to situations where the written contract provides the month and year of delivery for the goods.

In addition, because the Treasury Department and the IRS are not broadening the definition of contractual delivery date, it is not necessary to limit the specified good exception to situations where there is more than 24 months between the date the advance payment is received and the contractual delivery date. The recommended rule is more restrictive than the rule in the proposed regulation which requires the payment to be received in a taxable year earlier than the taxable year immediately preceding the taxable year of the contractual delivery date. Accordingly, the Treasury Department and the IRS decline to adopt this recommendation.

2. Requirement That AFS Revenue Must Be Recognized in the Year of Delivery

One commenter questioned why the specified good exception in the proposed section 451(c) regulations is restricted to situations where all the revenue from the sale of the good is recognized in the taxpayer's AFS in the year of delivery. The commenter requested that the exception be expanded to include situations where the taxpayer recognizes the revenue for Federal income tax purposes no later than the time when the revenue related to the production of the goods is recognized for financial accounting purposes. As a result, taxpayers using the over-time method to report revenue under ASC 606 could be eligible for the exception.

Payments that qualify for the specified good exception are subject to the general accrual method of accounting rules under section 451(a) and (b), including the all events test under section 451(b)(1)(C) and § 1.451–1(a) and the existing case law that addresses the all events test. The specified good exception was narrowly crafted to allow a taxpayer meeting the requirements to evaluate its treatment of qualifying payments under the all events test under section 451(b)(1)(C) and § 1.451–1(a) and the existing case law that addresses the all events test. Taxpayers that meet the specified good exception criteria, unlike those taxpayers that use the over-time method to report revenue from the sale of goods under ASC 606, are generally not required to test the payment for inclusion under the AFS income inclusion rule in section 451(b)(1)(A), as the payment is not taken into account as AFS revenue until the specified good is delivered to the customer, and is only required to analyze the payment for inclusion under the all events test in section 451(b)(1)(C). Additionally, taxpayers that use the over-time method under ASC 606 generally incur production costs as AFS revenue is recognized and can therefore benefit from the advance payment cost offset method under § 1.451–8(e). However, taxpayers that use the point-in-time method to report revenue from the sale of goods under ASC 606 and that meet the rest of the specified good exception criteria generally don't incur production costs until closer to the delivery date and may not be able to benefit from the advance payment cost offset method under § 1.451–8(e). For these reasons, the Treasury Department and the IRS decline to expand the specified good exception to situations where taxpayers are using the over-time method to report revenue under ASC 606.

For this reason, the Treasury Department and the IRS do not adopt this comment. Therefore, the definition of specified good in the final regulations retains the requirement that the taxpayer recognizes all of the revenue from the sale of the good in its AFS in the year of delivery.

3. Integral Services

A commenter requested that the definition of ''specified good'' in proposed § 1.451–8(b)(8) be expanded to include ''integral services'' furnished for the good. However, the commenter provided no definition of integral services, a term which could be broadly construed resulting in audit controversies. Moreover, the Conference Report expresses Congress' intent for section 451(c) to override former § 1.451–5, which defined an advance payment to include prepayments for services that were integral to the sale or disposition of goods. See H.R. Rep. No. 115–466, at 429 fn. 880 (2017) (Conf. Rep.). For these reasons, the Treasury Department and the IRS decline to accept this comment.

4. Reasonable Estimate of Unused Net Operating Loss (NOL)

One commenter requested that, if certain proposed changes to the specified good exception are not adopted, the Treasury Department and the IRS should include an exclusion to the definition of ''advance payment'' for prepayments where the taxpayer reasonably estimates, based on the facts at the time the agreement is entered into, that it will have a NOL that remains unused for the 5-year period after the year the prepayments received are included in the taxpayer's taxable income. The requested rule would be difficult to administer because it requires a taxpayer to estimate that it will have an NOL that remains unused for a 5-year period after the advance payments are included in gross income. Accordingly, the Treasury Department and the IRS decline to adopt this comment in the final regulations.

5. Tax Consequences of Meeting the Specified Good Exception

Several commenters provided examples in which payments that qualify for the specified good exception in proposed § 1.451–8(a)(1)(ii)(H) are deferred and included in gross income when the payment is recognized as revenue in the taxpayer's AFS in the year the good is delivered. As mentioned in part III.B.2 of this Summary of Comments and Explanation of Revisions and for additional clarification, payments that qualify for the specified good exception are subject to the general accrual method of accounting rules under section 451(a) and (b), including the all events test under section 451(b)(1)(C) and § 1.451–1 and the existing case law that addresses the all events test.

6. Method To Treat Prepayments Satisfying the Specified Good Exception as Advance Payments

One commenter asked that the specified good exception be made optional, particularly if meeting the specified good exception does not result in deferral of the prepayment to match the book timing of the payment. The commenter noted that some taxpayers may prefer the section 451(c) regime, especially if there is some uncertainty whether the contract meets the specified good exception. Further, some taxpayers that had the choice of a longer deferral under § 1.451–5 or a one-year deferral under Revenue Procedure 2004–34 still chose the 1-year deferral.

The Treasury Department and the IRS agree with this comment. Accordingly, the final regulations allow taxpayers to treat all prepayments that satisfy the specified good exception as advance payments subject to section 451(c), the ''specified good section 451(c) method.'' See § 1.451–8(f). The requested election provides flexibility for taxpayers. If the taxpayer does not use the specified good section 451(c) method, payments satisfying the specified good exception are not eligible for the deferral method provided in section 451(c) and § 1.451–8 but are subject to section 451(b) and § 1.451–1(a). If the taxpayer uses the specified good section 451(c) method, the prepayment is generally deferred for one year; however, if a taxpayer also uses the advance payment cost offset method under § 1.451–8(e) to account for such prepayments, a portion of the prepayment may be deferred until the year in which ownership of the good is transferred to the customer.

The specified good section 451(c) method is a method of accounting. The method applies to all payments that satisfy the specified good exception that are received by each trade or business that uses the method. The use of this method results in the adoption of, or a change in, a method of accounting under section 446. See § 1.451–8(g).

C. Proposed § 1.451–8(c)(2)(i)(B): Acceleration of Advance Payments

Under proposed § 1.451–8(c)(2)(i)(B), a taxpayer that uses the deferral method generally includes an advance payment in gross income when it satisfies its

obligation for the advance payment. Example 11 of proposed § 1.451–8(c)(8)(xi) provides an example of a travel agent that received commission income when it purchased and delivered the ticket to the customer but did not include the commission in revenue in its AFS until the following year. The example concludes that the commission is not an advance payment because it was not earned by the taxpayer in a subsequent taxable year.

Example 11 incorrectly concludes that the payment for the commission is not an advance payment. The payment for the commission income is an advance payment because it meets the definition of an advance payment under section 451(c)(4), including the requirement that a portion of the payment is included in the taxpayer's revenue in an AFS for a subsequent taxable year. However, the commission income is included in income in the year of receipt because the taxpayer's obligation with respect to the advance payment was satisfied in that year. Accordingly, in the final regulations, this example has been moved and revised into an example of the rules on the acceleration of advance payments. In addition, the analysis has been changed to clarify that (1) the commission income is an advance payment, and (2) the taxpayer's satisfaction of its obligation for the advance payment caused the commission to be included in income in the year of receipt.

D. Proposed § 1.451–8(c)(5): Contracts With Multiple Performance Obligations

Section 451(c)(4) provides that for purposes of the rules for advance payments, rules similar to the rules in section 451(b)(4), which allocate transaction price among multiple performance obligations, apply. Proposed § 1.451–8(c)(5) provides rules for taxpayers with an AFS for allocating the transaction price when there is more than one performance obligation in a contract. Specifically, those taxpayers allocate the transaction price based on the method in proposed § 1.451–3(g), namely, using the allocation in the taxpayer's AFS. No formal comments were received on this provision.

Under the proposed regulations it was not clear whether the taxpayer was required to allocate the payment to multiple performance obligations based on their relative transaction price or based on the payment allocation used for AFS purposes. Accordingly, the final regulations clarify that advance payments received under a contract with multiple performance obligations are allocated to the corresponding item of gross income in the same manner that the payments are allocated to the performance obligations in the taxpayer's AFS. This rule is consistent with the requirement in section 451(c)(4)(D) that ''rules similar to the rules in [section 451](b)(4) shall apply,'' because it follows the manner in which the taxpayer allocates the payment for AFS purposes.

The rule for taxpayers without an AFS remains unchanged. See § 1.451–8(d)(4).

2. Proposed § 1.451–8(c)(6): Contracts With Advance Payments That Include Items Subject to a Special Method of Accounting

The proposed regulations requested comments on the allocation of a payment when the contract includes income subject to section 451(c) and income subject to section 460, but no comments were received.

Consistent with the objective criteria standard under Section 5.02(4) of Rev. Proc. 2004–34, the final regulations provide that if (1) a contract with a customer includes item(s) of gross income subject to a special method of accounting and item(s) of gross income described in § 1.451–8(a)(1)(i)(C), and (2) the taxpayer receives an allocable payment, then the taxpayer must determine the portion of the payment allocable to the items of gross income described in § 1.451–8(a)(1)(i)(C) based on objective criteria. The taxpayer is deemed to satisfy the objective criteria standard when it allocates the payment to each item of gross income in proportion to the amounts determined in § 1.451–3(d)(5) or as otherwise provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d)).

This rule is consistent with the requirement in section 451(c)(4)(D) that ''rules similar to the rules in [section 451](b)(4) shall apply.'' The final regulations also provide a similar allocation rule for taxpayers using the non-AFS deferral method.

E. Cost Offset for Advance Payments

The proposed regulations do not provide for a cost offset. The preamble to the proposed regulations explains the rationale for rejecting a cost offset and requests comments on this issue.

As they did with respect to the proposed section 451(b) regulations, commenters requested that the final regulations under section 451(c) provide a cost offset, such as a COGS offset for expected future costs against advance payments for the sale of goods. Commenters asserted that a COGS offset is supported by the definition of ''receipt'' in section 451(c)(4)(C), which refers to an ''item of gross income.'' Under section 61 and § 1.61–3(a), for the sale of goods, an item of gross income generally means total sales revenue minus the cost of goods sold. Commenters cited *Hagen Advertising Displays, Inc.* v. *Commissioner,* 407 F.2d 1105 (6th Cir. 1969), as support for this position. In *Hagen Advertising,* the Sixth Circuit Court of Appeals acknowledged that, to determine the proper amount of gross income for advance payments for the sale of goods to be delivered in the future, it would be appropriate for a taxpayer to reduce the amount of the advance payment by the estimated cost of the goods to be delivered. Otherwise, denying an offset for related COGS would tax the return of capital. *Id.* at 1110. Accordingly, commenters asserted that denying a COGS offset could result in an impermissible tax on gross receipts.

Commenters also asserted that not allowing a cost offset could result in a mismatch of revenue and costs and fails to clearly reflect income. According to commenters, a taxpayer would be required to report the full amount of an advance payment in income, in excess of the expected profit associated with that portion of the total contract price being reported. When the costs are actually incurred in subsequent years, the taxpayer would report losses with no associated revenue, which, in extreme cases where the losses cannot be used, could result in a permanent loss of the tax benefit of the cost. For a limited-life business, the acceleration of revenue recognition may result in NOLs that are permanently lost, as expenses trail income throughout the life cycle of the business. The commenters pointed out that this mismatch of income and associated costs does not reflect the reality of the overall amount of gross income realized by the taxpayer on the contract as a whole.

Further, commenters reasoned that allowing a cost offset under section 451(c) will not violate the economic performance requirement of section 461(h). Since the acceleration of advance payments under section 451(c) is a departure from accrual method accounting, the costs related to the payments should also depart from accrual method concepts. Commenters pointed out that the allowance of a cost offset for expected future COGS against substantial advance payments under former § 1.451–5(c), based on *Hagen Advertising,* coexisted with section 461(h) for over 33 years. In addition, the purpose of section 461(h) was not to eliminate an offset for estimated COGS for inventory to be delivered in the near future, but to defer a deduction for costs where the obligation was fixed but was

going to be performed many years in the future. Here, commenters asserted that a COGS offset would help to determine the proper amount of gross income to be accelerated, which is not what the economic performance requirement was intended to prevent.

Commenters also reasoned that section 451(c) was not meant to codify all aspects of Revenue Procedure 2004–34, including the lack of a cost offset in Revenue Procedure 2004–34. Announcement 2004–48, 2004–1 C.B. 998, explains that a COGS offset was not permitted in Revenue Procedure 2004–34 because it was inconsistent with the simplification that the revenue procedure was meant to achieve, and taxpayers could still qualify for a COGS offset under former § 1.451–5(c). Commenters also found it significant that the term ''receipt'' in section 451(c) uses the specific term ''an item of gross income,'' while the definition of received in Revenue Procedure 2004–34 uses the general term ''income.''

The Treasury Department and the IRS have considered these comments and have determined that a cost offset based on estimates of future costs would be inappropriate. As discussed in the preamble to the proposed section 451(c) regulations, allowing a cost offset based on estimated costs would be inconsistent with sections 461, 263A, and 471, and the regulations under those sections of the Code and difficult for the IRS to administer. Additionally, allowing a cost offset based on estimated costs is inconsistent with Congress' intent to override former § 1.451–5(c). Former § 1.451–5(c) permitted a cost offset for both incurred and estimated costs against certain advance payments that were required to be included in gross income in a taxable year prior to the year in which ownership of the item of inventory was transferred to the customer, and was recently withdrawn in final regulations published in the **Federal Register** on July 15, 2019. See H.R. Rep. No. 115–466, at 429 fn. 880 (2017) (Conf. Rep.); see also, 84 FR 33691 (July 15, 2019). However, the Treasury Department and the IRS agree with comments suggesting that taxpayers should be afforded the flexibility of applying an offset for costs incurred against advance payments for the future sale of inventory. In this case, the final regulations provide that a taxpayer determines the amount of the advance payment that is included in gross income for the taxable year by reducing the amount that would otherwise be included in gross income for such taxable year under the taxpayer's full inclusion method or deferral method, as applicable (advance payment inventory inclusion amount) by the cost of goods related to the item of inventory, the ''cost of goods in progress offset.'' The method allows taxpayers to offset advance payments included in income under either the full inclusion method or under the deferral method. The portion of any advance payment that is offset by a cost of goods in progress offset for a taxable year is deferred and generally included in gross income in the taxable year in which ownership of the item of inventory is transferred to the customer.

Specifically, the final regulations provide that the cost of goods in progress offset for an item of inventory for each taxable year is calculated as the cost of goods incurred for such item through the last day of the taxable year, reduced by the cumulative cost of goods in progress offset amounts in prior taxable years, if any. However, the cost of goods in progress offset cannot reduce the advance payment inventory inclusion amount for the taxable year below zero. Further, the cost of goods in progress offset attributable to one item of inventory cannot reduce the advance payment inventory inclusion amount attributable to a separate item of inventory. Any incurred costs that were not used to offset the advance payment for the item of inventory because they were subject to limitation are considered when the taxpayer determines the cost of goods in progress offset in a subsequent taxable year. In addition, the cost of goods in progress offset does not apply to the advance payment inventory inclusion amount that is included in gross income as a result of the acceleration rules in § 1.451–8(c)(4), and any advance payments previously deferred by way of a cost of goods in progress offset in a prior year are accelerated under such rule.

The cost of goods in progress offset is determined by reference to the costs and expenditures related to items of inventory produced or acquired for resale, which costs have been incurred under section 461 and have been capitalized and included in inventory under sections 471 and 263A or any other applicable provision of the Code as of the end of the year. The taxpayer must be able to demonstrate that the costs are properly capitalizable under the Code to the items of inventory produced or acquired for resale under the contract to which the taxpayer is applying the cost of goods in progress offset. For a sale of a gift card or customer reward program points, this requirement cannot be met, and no cost of goods in progress offset is permitted. However, the cost of goods in progress offset does not reduce the costs that are capitalized to the items of inventory produced or acquired for resale by the taxpayer under the contract. That is, while the cost of goods in progress offset reduces the amount of the advance payment included in income, it does not affect how and when costs are capitalized to inventory under sections 471 and 263A or any other applicable provision of the Code or when those capitalized costs will be recovered.

The costs of goods comprising the cost of goods in progress offset must be determined by applying the taxpayer's inventory accounting methods. A taxpayer must calculate its cost of goods in progress offset by reference to all costs that the taxpayer has permissibly capitalized and allocated to items of inventory under its method of accounting for inventories for federal income tax purposes, but may not consider costs that are not properly capitalized under such method.

The Treasury Department and the IRS provided this cost offset method in the final regulations because it provides a reasonable matching of income from advance payments and incurred cost of goods, and more clearly reflects income. The advance payment cost offset method is a method of accounting that applies to all advance payments received by a trade or business for items of inventory that satisfy the criteria in § 1.451–8(e). If a taxpayer chooses to use the advance payment cost offset method for a trade or business, it must also use the AFS cost offset method in § 1.451–3(c) for that trade or business. See prior discussion regarding coordination between the AFS cost offset method and the advance payment cost offset method. Additional guidance on the cost offset method for advance payments may be provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d)).

F. Continued Application of Revenue Procedure 2004–32 and Revenue Procedure 79–38

Commenters requested clarification of whether Revenue Procedure 2004–32, 2004–1 C.B. 988, and Revenue Procedure 79–38, 1997–2 C.B. 501, remain in effect after the enactment of section 451(c). Revenue Procedure 2004–32 allows an accrual method taxpayer to account for income from credit card annual fees ratably over the period covered by the fees, as described in section 4 of Revenue Procedure 2004–32. Revenue Procedure 79–38 generally allows accrual method manufacturers, wholesalers, and retailers of motor vehicles or other durable goods to include a portion of an

advance payment related to the sale of a multi-year service warranty contract in gross income over the life of the service warranty obligation. Revenue Procedure 2004–32 and Revenue Procedure 79–38 remain effective after the enactment of section 451(c) and may be relied upon after these regulations are finalized.

Effect on Other Documents

The preamble to proposed § 1.451–3 requested comments on the proposed obsolescence of Revenue Procedure 2004–33, 2004–1 C.B. 989 (relating to credit card late fees), Revenue Procedure 2005–47, 2005–2 C.B. 269 (relating to credit card cash advance fees), Revenue Procedure 2013–26, 2013–22 I.R.B. 1160 (relating to a safe harbor method of accounting for OID on a pool of credit card receivables), and Chief Counsel Notice CC–2010–018 (relating to interchange). Instead of obsoleting Revenue Procedure 2013–26, commenters recommended limiting the scope of Revenue Procedure 2013–26 to OID that is not subject to the timing rules in proposed § 1.451–3(i) and thus, not excluded from the OID rules under proposed § 1.1275–2(l). Commenters explained that retaining Revenue Procedure 2013–26 would allow taxpayers to continue to use the proportional method described in the revenue procedure as a safe harbor method of accounting for certain amounts that are not OID under section 1272, such as bond premium and market discount, as well as certain kinds of OID such as promotional discount. See discussion of promotional discount in part II.F. of the Summary of Comments and Explanation of Revisions. The Treasury Department and the IRS agree with the recommendations not to obsolete Revenue Procedure 2013–26. In addition, the Treasury Department and the IRS intend to modify Revenue Procedure 2013–26 to make clear that the safe harbor method does not apply to any specified fees, including the specified credit card fees. However, based on section 451(b) and the final regulations, Revenue Procedure 2004–33, Revenue Procedure 2005–47, and Chief Counsel Notice CC–2010–018 no longer provide current guidance on the treatment of the specified credit card fees. Accordingly, these items are obsolete as of January 1, 2021.

In addition, Revenue Procedure 2004–34, Revenue Procedure 2011–18, Revenue Procedure 2013–29 and Notice 2018–35 are obsolete for taxable years beginning on or after January 1, 2021. Taxpayers that relied on the now obsoleted guidance should determine whether a change in method of accounting occurs once they cease to use the obsoleted guidance.

Applicability Dates

In general, the rules in §§ 1.451–3 and 1.451–8 apply for taxable years beginning on or after January 1, 2021. However, the rules in § 1.451–3(j) for specified fees that are not specified credit card fees apply for taxable years beginning on or after January 6, 2022. Also, for a specified credit card fee as defined in § 1.451–3(j)(2), § 1.1275–2(l)(1) applies for taxable years beginning on or after January 1, 2021, and, for a specified fee that is not a specified credit card fee, § 1.1275–2(l)(1) applies for taxable years beginning on or after January 6, 2022.

However, pursuant to section 7805(b)(7), taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), may apply the rules in these final regulations, in their entirety and in a consistent manner, to a taxable year beginning after December 31, 2017, and before January 1, 2021, provided that, once applied to such a taxable year, such rules are applied in their entirety and in a consistent manner to all subsequent taxable years. Notwithstanding the preceding sentence, pursuant to section 7805(b)(7), taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), may apply the rules in these final regulations that apply to specified credit card fees in their entirety and in a consistent manner, to a taxable year beginning after December 31, 2018, and before January 1, 2021, provided that, once applied to such a taxable year, such rules are applied in their entirety and in a consistent manner to all subsequent taxable years. Taxpayers that choose to apply the rules in the final regulations to a taxable year beginning before January 1, 2021 must follow the rules for changes in method of accounting under section 446 and the applicable procedural guidance.

Alternatively, a taxpayer may rely on the proposed regulations for taxable years beginning after December 31, 2017 (or December 31, 2018, in the case of specified credit card fees) and before January 1, 2021.

In the case of a specified fee that is not a specified credit card fee, a taxpayer may neither choose to apply the final regulations to, nor rely on the proposed regulations for, a taxable year beginning after December 31, 2018, and before January 6, 2022.

Statement of Availability of IRS Documents

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

Special Analyses

I. Regulatory Planning and Review—Economic Analysis

Executive Orders 12866, 13563, and 13771 direct agencies to assess 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. For purposes of E.O. 13771 this rule is regulatory.

These regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these regulations as economically significant under section 1(c) of the MOA. Accordingly, the OMB has reviewed these regulations.

A. Need for the Final Regulations

The Tax Cuts and Jobs Act (TCJA) substantially modified the statutory rules of section 451, which generally governs when income is recognized for Federal tax purposes. As a result of those changes, the Treasury Department and the IRS recognized that questions were likely to arise regarding the definitions and rules that taxpayers are required to apply in calculating a business's gross income. To provide greater specificity, the Treasury Department and the IRS previously issued separate proposed regulations related to section 451(b) and 451(c) on September 9, 2019.

The proposed regulations regarding section 451(b): (1) Clarify how section 451(b) applies to multi-year contracts; (2) provide rules for taxpayers whose financial results are included on an Applicable Financial Statement (AFS) covering a group of entities; (3) describe and clarify the definition of transaction price and revenue; (4) specify the allocation of a transaction price in the

case of a contract which contains multiple performance obligations; and (5) specify rules for certain debt instruments.

The proposed regulations for section 451(c) describe the deferral rules for advance payments for taxpayers with and without an AFS; (2) provide acceleration rules for taxpayers that cease to exist; (3) clarify the treatment of financial statement adjustments for taxpayers with deferred advance payments; (4) provide rules relating to the treatment of short taxable years for taxpayers deferring advance payments; and (5) define and clarify the treatment of performance obligations. They also list items excluded from the definition of an advance payment. In response to taxpayer comments received during the development of the proposed regulations, that list includes goods for which (1) the taxpayer does not have goods of a substantially similar kind and in a sufficient quantity at the end of the taxable year the upfront payment is received; and (2) the taxpayer recognizes all of the revenue from the sale of the good in its AFS in the year of delivery.

Comments were received on the proposed regulations for 451(b) and 451(c) requesting further clarification of or changes to those regulations. Based on these comments, the Treasury Department and the IRS determined that final regulations are needed to bring clarity to instances where the statute may be subject to multiple interpretations in the absence of further guidance and to respond to comments received on the proposed regulations. Among other benefits, the final regulations provide greater certainty and consistency in the application of section 451 by taxpayers and the IRS.

B. Background and Overview of Final Regulations

Under section 451(a) of the Code, income is ''recognized'' (that is, included in gross income for tax purposes) in the year in which it is received by the taxpayer unless it is properly accounted for in a different period under the taxpayer's method of accounting. Because of this latter condition, the tax treatment of certain items of income depends on the method of accounting a taxpayer is using. For taxpayers using the accrual method of accounting, income is generally recognized in the year in which all events have occurred that fix the right to receive that income and the amount of income can be determined with reasonable accuracy (all events test).

The timing of income recognition on a firm's financial statement may deviate from these principles. Both the U.S. generally accepted accounting principles (GAAP) and the international financial reporting standards (IFRS) provide income recognition rules that differ from tax reporting rules under certain circumstances. For example, financial accounting rules may require revenue to be recognized when the costs of providing goods or services pursuant to a contract are incurred, while the all-events test may not be satisfied until the contract obligation is fulfilled. New accounting standards released by the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB) in 2014 further accelerated the timing of income recognition for financial reporting purposes, widening the gap between financial and tax reporting.

The timing of income recognition for tax purposes may also deviate from the all-events test in certain circumstances. For instance, receipt of payment by the business satisfies the all events test. However, recognition of certain payments for goods or services not yet provided may be deferred to the year following receipt of payment, to the extent that recognition is also deferred on the taxpayer's AFS. Such payments are referred to as ''advance payments.''

Prior to the enactment of TCJA on December 22, 2017, taxpayers were generally permitted to defer the tax on these advance payments; in other words, advance payments could be recognized in a later taxable year. Under prior law, the period over which an advance payment was deferred varied depending on the alternative regulatory treatment chosen (Revenue Procedure 2004–34 or § 1.451–5) and, within § 1.451–5, the type of good for which an advance payment was accepted (inventoriable goods versus non-inventoriable goods).

Under Revenue Procedure 2004–34, a taxpayer who receives an advance payment includes the advance payment in taxable income in the year of receipt to the extent that the payment is earned (if the taxpayer does not have an AFS) or, if the taxpayer has an AFS, to the extent that the payment is included in revenues in the AFS. The taxpayer includes the remaining amount of the advance payment in taxable income in the next taxable year, unless the next taxable year is a short year of 92 days or less. In the event of such a short year, the taxpayer includes in taxable income the part of the advance payment included in revenue in the AFS for the short tax year or, in the case of a taxpayer that does not have an AFS, the part of the advance payment which is earned in the short tax year. The remaining balance of the advance payment is included in income for the taxable year following the short tax year. Revenue Procedure 2004–34 applies to numerous types of advance payments beyond advance payments for the provision of services and sales of goods. For example, it applies to advance payments for the use of intellectual property and software, the occupancy or use of property if the occupancy or use is ancillary to the provision of services, guaranty or warranty contracts, subscriptions, memberships in organizations, and eligible gift card sales.

Under § 1.451–5, advance payments were defined more narrowly than under Revenue Procedure 2004–34 to include payments received by an accrual-method taxpayer for the future sale of goods held by the taxpayer in the ordinary course of trade or business and as payments for the building, installing, constructing, or manufacturing of goods by the taxpayer in a future taxable year. Such advance payments were generally included in taxable income either in the year of receipt or in the year in which the payment was properly accruable under the taxpayer's method of accounting.

An exception to this general rule occurred in the case of certain advance payments for certain goods properly held in inventory by the taxpayer. In the case of such goods, the receipt of a substantial advance payment required that all previously unrecognized advance payments be included in taxable income by the end of the second taxable year following the taxable year in which the substantial advance payment was received. The taxpayer was considered to have received a substantial advance payment if the sum of the advance payment received in the current taxable year and prior taxable years for the same contract was greater than or equal to total inventoriable costs and expenditures.

The TCJA substantially amended section 451 providing, among other things, new rules addressing deviations from the all-events test. The amended section 451(b) more closely aligns when income is recognized for Federal tax purposes with when it is recognized on businesses' financial accounting statements. In particular, section 13221 of the TCJA amends section 451(b), such that an item of gross income must be included in gross income no later than the period when the item is included in revenue on an AFS. Thus, this new rule requires taxpayers to recognize income upon the earlier of when the all-events test is met or when the taxpayer includes the amount in revenue

(broadly defined) in its AFS (AFS income inclusion rule). For these taxpayers, income recognition is accelerated for tax purposes when income has been recognized for financial accounting purposes before the all events test has been satisfied.

The amendments made to section 451(b) only apply to taxpayers that use accrual accounting and have an AFS. Neither the statutory changes to 451(b) nor the final regulations regarding 451(b) change the time at which income is recognized for accrual method taxpayers without an AFS.

Section 451(c), added by the TCJA, allows accrual-method taxpayers to elect to recognize as income only a portion of an advance payment in the taxable year in which it is received, and then recognize the remainder in the following taxable year. Section 451(c) essentially codifies the deferral method of accounting for advance payments that was permitted in Revenue Procedure 2004–34. (Joint Committee on Taxation, *General Explanation of Public Law 115–97,* (Washington, U.S. Government Publishing Office, December 2018), at 167.) The new section 451(c), a subject of the final regulations, addresses how advance payments are defined and when they need to be recognized in a business's gross income.

C. Economic Analysis

1. Baseline

In this analysis, the Treasury Department and the IRS assess the benefits and costs of the final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these final regulations.

2. Summary of Economic Effects

The final regulations provide certainty and consistency in the application of sections 451(b) and 451(c) by providing definitions and clarifications regarding the statute's terms and rules. In the absence of the guidance provided in these final regulations, the chance that different taxpayers might interpret the statute differently is exacerbated. For example, two similarly situated taxpayers might interpret the statutory provisions pertaining to the definition of advanced payments differently, with one taxpayer pursuing a project that another comparable taxpayer might decline because of a different interpretation of how the income may be treated under section 451(c). If this second taxpayer's activity is more profitable, an economic loss arises. Similar situations may arise under each of the provisions addressed by these regulations. Certainty and clarity over tax treatment generally also reduce compliance costs for taxpayers.

An economic loss might also arise if all taxpayers have similar interpretations under the baseline of the tax treatment of particular items of income but those interpretations differ slightly from the interpretation Congress intended for these income streams. For example, the final regulations may specify a tax treatment that few or no taxpayers would adopt in the absence of specific guidance but that nonetheless advances Congressional intent. In these cases, guidance provides value by bringing economic decisions closer in line with the intent and purpose of the statute.

While no guidance can curtail all differential or inaccurate interpretations of the statute, the final regulations significantly mitigate the chance for differential or inaccurate interpretations and thereby increase economic efficiency.

Because the final regulations clarify the tax treatment of items of gross income for certain taxpayers, there is the possibility that business decisions may change as a result of these regulations. The final regulations generally have the effect of delaying the timing of tax liability, thus reducing effective tax rates for affected taxpayers. This reduction in effective tax rates, viewed in isolation, will generally lead to an increase in economic activity by these taxpayers.

This delay in the timing of tax liability, viewed in isolation, will also decrease Federal tax revenue. A decrease in Federal tax revenue either increases the deficit or necessitates increases in other taxes or a reduction in spending. This revenue effect will be mitigated to some degree by improved economic performance (and accompanying tax revenues) under these regulations due to (i) the enhanced alignment in the timing of taxes on income and costs; (ii) the enhanced certainty and clarity provided by the final regulations as described previously; and (iii) enhanced economic activity due to lower effective tax rates for affected taxpayers.

The Treasury Department and the IRS have not estimated these effects relative to the no-action baseline or alternative regulatory approaches because they do not have readily available data or models that measure: (i) The volume of cost offsets allowed under the final regulations; [1] (ii) the effect on economic activity by affected taxpayers from the enhanced alignment of income and costs under the final regulations relative to the no-action baseline or alternative regulatory approaches; (iii) the tax positions that taxpayers would take on other provisions of the final regulations, relative to the no-action baseline or alternative regulatory approaches; or (iv) the economic activities that taxpayers would engage in under those tax positions.

The Treasury Department and the IRS have also not made projections of any change in compliance costs arising from the final regulations, relative to the no-action baseline. Treasury generally projects that compliance costs will be lower under the final regulations relative to the no-action baseline because enhanced clarity and certainty reduce compliance costs. The Treasury Department and the IRS recognize that some taxpayers may take advantage of favorable provisions in the final regulations and that this decision could increase their compliance costs. Taxpayers would not take advantage of these provisions, however, unless the overall treatment was beneficial to the taxpayer.

The proposed regulations noted that the economic analysis of the final regulations under section 451(c) would address the economic effects of regulatory guidance, if any, under sections 460 and 461(h) or other sections of the Code that interact with section 451(c), that was issued between the proposed and final regulations. Since the release of the proposed regulations on September 5, 2019, no such regulatory guidance has been issued.

The proposed regulations for 451(b) and 451(c) solicited comments on the economic effects of the proposed regulations. No such comments were received.

3. Number of Affected Taxpayers

The Treasury Department and the IRS estimate that between 174,000 and 299,000 entities are likely to be affected by the final regulations.

Section 451(b) and (c) and the regulations under § 1.451–3 affect only those business entities that (i) use an accrual method of accounting, and (ii) have an AFS. One provision in § 1.451–8 applies to accrual method taxpayers without an AFS. Regarding the accrual method of accounting, section 13102 of TCJA modified section 448 to expand the number of taxpayers eligible to use the cash receipts and disbursements method of accounting (cash method of accounting). In general, C corporations and partnerships with a C corporation

[1] Cost offsets are not reported on current tax returns and will not be separately reported on future tax returns.

partner are now permitted to use the cash method of accounting if average annual gross receipts are $25 million or less for taxable years beginning in 2018 (up from $5 million or less in 2017). This amount was adjusted for inflation for taxable years beginning after December 31, 2018. The amount was $26 million in taxable year 2019.

The statute and the regulations generally affect only those entities that also have an AFS although one provision in the regulations under § 1.451–8 applies to non-AFS taxpayers. The Treasury Department and the IRS do not have readily available data to measure the prevalence of these affected entities. However, Schedule M–3, which is used to reconcile an entity's net income or loss for tax purposes with its book income or loss, reports whether an entity has a certified audited income statement. Schedule M–3 is required to be filed only by entities with at least $10 million of assets. This population is more likely to possess an AFS and, conversely, entities that do not file Schedule M–3 are less likely to possess an AFS or otherwise be affected by the regulations as owners and/or creditors of such smaller entities are less likely to require the entity to certify its financial results via a financial statement audit. Data are currently available only for electronic filers.

The Treasury Department and the IRS estimated the number of affected taxpayers separately for entities with gross receipts of $26 million or less and those with gross receipts above $26 million. For taxable year 2017, 89 percent of accrual-method entities filing Forms 1120, 1120–S, and 1065 with gross receipts of $26 million or less were filers of electronic tax forms. About 11 percent, or 288,000 returns, included a Schedule M–3. About 40 percent of the returns with Schedule M–3, or 113,000, indicated they had a certified audited income statement.[2] Based on the assumption that filers of paper tax forms have the same incidence as electronic filers and that entities that do not file a Schedule M–3 generally do not have an AFS, then the Treasury Department and the IRS estimate that roughly 127,000 (113,000/0.89) entities with gross receipts of $26 million or less are accrual-method entities that have an AFS. If 5 percent of entities that do not file a Schedule M–3 also have an AFS, then approximately 251,000 of these entities are potentially impacted by the final regulations.

For entities with gross receipts above $26 million and that are accrual method entities, the comparable calculations are that 95 percent of returns are e-filed and that 73 percent of those included a Schedule M–3. Based on the assumption that filers of paper tax forms have the same incidence as electronic filers and that entities that do not include a Schedule M–3 generally do not have an AFS, the Treasury Department and the IRS estimate that 47,000 (45,000/0.95) entities with gross receipts above $26 million are accrual-method entities that have an AFS. If 5 percent of entities that do not file a Schedule M–3 also have an AFS, then approximately 48,000 of these entities are potentially affected by these regulations.

Together, these calculations imply that between 174,000 and 299,000 entities are potentially affected by the final regulations.

CORPORATION AND PARTNERSHIP RETURNS USING AN ACCRUAL METHOD OF ACCOUNTING ***

[Taxable year 2017; thousands of returns]

	Entities with gross receipts not greater than $26 million			Entities with gross receipts greater than $26 million		
	E-filed	Paper-filed	Total	E-filed	Paper-filed	Total
Returns	2,503	307	2,810	73	4	77
Returns with a Schedule M–3	288	* 35	* 323	62	* 3	* 65
Returns with a Schedule M–3 and an audited income statement	113	* 14	* 127	45	* 2	* 47
Returns without a Schedule M–3	2,215	* 272	* 2,487	11	* 1	* 12
Returns without a Schedule M–3, but with an audited income statement (estimated)	** 111	** 13	** 124	** 1	** 0	** 1
Returns with an audited income statement	** 224	** 27	** 251	** 46	** 2	** 48

* Estimates are obtained by assuming paper-filed returns are similar to e-filed returns as regards the incidence of a filing entity having a Schedule M–3 and an audited income statement.

** Estimates are obtained by assuming that 5 percent of returns without a Schedule M–3 have an audited income statement.

*** This table does not include sole proprietorships because the number of sole proprietorships with gross receipts above $26 million that used accrual accounting was statistically indistinguishable from zero in 2017. The number of sole proprietorships with gross receipts of $26 million or below that are affected by these regulations is projected to be minimal.

Source: Data compiled by the IRS Research, Applied Analytics and Statistics Division using data from the Compliance Data Warehouse. The total number of accrual method returns of corporations and partnerships may differ slightly from other estimates due to different data sources.

4. Economic Effects of Provisions Under Section 451(b)

a. Provisions Substantially Revised From the Proposed Section 451(b) Regulations

i. Cost Offset Under Section 451(b)

Section 451(b) as amended by TCJA addresses the timing of revenue recognition for tax purposes but makes no mention of the timing of cost recognition. The Treasury Department and the IRS considered three options for addressing the treatment of costs under section 451(b): (i) Do not allow a cost offset; (ii) allow a cost offset for incurred costs; and (iii) expand the allowance for incurred costs by further allowing a cost offset for projected costs. The proposed regulations did not provide a cost offset for the AFS income inclusion rule.

In the proposed section 451(b) regulations (in this part C.4, *proposed regulations*), the Treasury Department and the IRS argued that allowing a cost offset would be inconsistent with the economic performance rules under section 461 and inventory accounting rules under section 471. The proposed regulations further argued that Congress did not make clear any intention to alter those sections of the Code or their

[2] Data are based on estimates from the IRS's Research, Applied Analytics and Statistics Division using data from the Compliance Data Warehouse.

associated regulations. The proposed regulations stated, however, that the subject was still under consideration and requested comments addressing appropriate cost offset rules.

In response to the comments received, the Treasury Department and the IRS have decided to include in the final regulations an offset for the cost of goods in progress (cost offset). This cost offset allows taxpayers to reduce the amount of revenue from the sale of inventory that is otherwise required to be included in gross income under the AFS income inclusion rule in a taxable year prior to the year in which ownership of the inventory is transferred to the customer and defer such revenue to the taxable year in which the ownership of the inventory is transferred to the customer. The amount of such reduction, or cost offset, is determined by reference to the inventoriable costs incurred to date. The offset applies only to incurred costs, not estimated or projected costs. Further, the cost offset cannot reduce the amount of revenue that is included in gross income under the AFS inclusion rule below zero. Any incurred costs subject to this limitation may be carried forward to determine the cost offset in subsequent taxable years.

The cost offset in the final regulations generally reduces the amount of revenue that is required to be included in gross income in a taxable year prior to the year in which ownership of inventory is transferred to the customer relative to the proposed regulations. An improved match of income and cost timing is generally held to provide a more accurate measure of economic activity and thus would lead to a more efficient tax system than under the proposed regulations, within the context of the statute and the overall Code.

This enhanced alignment in the tax treatment of revenue and costs can be expected to reduce financing costs for at least some projects and taxpayers. This reduction in financing costs relative to the proposed regulations may arise because in some cases under the proposed regulations, the inability of taxpayers to match the timing of revenue and cost associated with a project leads to a large, front-loaded tax liability, which may require a costly rebalancing of other assets, particularly for liquidity-constrained taxpayers. Taxpayers who experience a reduction in financing costs as a result of these final regulations, relative to the proposed regulations, may, as a result, increase other expenditures, including investment. The provision of the cost offset in the final regulations may further encourage longer-run projects relative to the proposed regulations.

The Treasury Department and the IRS considered expanding the cost offset to allow for projected costs, with several possible formats for how projected costs would be accounted for. Allowing an offset for projected costs would entail a higher administrative burden than the offset (only) for incurred costs and would not definitively improve the alignment of when income and costs are recognized for tax purposes relative to the offset for incurred costs. The Treasury Department and the IRS project that under an offset for projected costs, more disputes would likely arise over the projected costs because taxpayers would have an incentive to overstate projected costs in order to delay income recognition.

The Treasury Department and the IRS have not estimated the difference in compliance costs, administrative burden, or income-cost alignment (and any subsequent effects on economic activity) between the final regulations and alternative regulatory approaches using projected costs. The Treasury Department and the IRS have not undertaken this estimation because they do not have sufficiently detailed data or models that capture possible differences in cost offset formats that use incurred costs versus projected costs.

ii. Scope of the AFS Income Inclusion Rule

The final regulations also address concerns raised by commenters regarding recent changes to the financial accounting standards. The commenters suggested that the AFS inclusion rule is overly broad in light of these new standards, which generally accelerate AFS revenue recognition relative to the prior standards, and could cause taxpayers to incur a tax liability before they receive, or have a fixed right to receive, the money to pay the liability. Accordingly, the final regulations provide that under the AFS inclusion rule, amounts taken into account as AFS revenue include only those amounts that the taxpayer has an enforceable right to recover if the customer were to terminate the contract at the end of the taxable year.

The final regulations further provide, however, that a taxpayer may treat any amount reported as AFS revenue as being taken into account as AFS revenue regardless of whether the taxpayer has an enforceable right to recover such amounts. The Treasury Department and the IRS project that this option will lead to reduced compliance burden, reduced administrative burden, and to fewer taxpayer disputes relative to an alternative regulatory approach under which amounts taken into account as AFS revenue include only those amounts that the taxpayer has an enforceable right to recover if the customer were to terminate the contract at the end of the taxable year. Under this ''enforceable right'' approach, taxpayers would be required to analyze each contract to determine amounts for which the taxpayer has an enforceable right to recover if the customer were to terminate the contract at the end of the year; this analysis would be potentially costly.

The Treasury Department and the IRS also considered an alternative regulatory approach under which taxpayers would be permitted to defer ''increases'' in the transactions price that are taken into account as AFS revenue in a given year but to which a taxpayer's entitlement is contingent on a future event (contingent transaction price approach). This alternative regulatory approach was reflected in the proposed regulations. However, commenters expressed confusion as to what constitutes an ''increase'' in the transaction price and the types of contingencies that were intended to be included within the scope of the rule. Because of the uncertainties created by the contingent transaction price approach, and the potential for multiple interpretations, the Treasury Department and the IRS decided against this approach. The enforceable right standard adopted by the final regulations may accelerate income inclusion relative to the contingent transaction price approach, although the Treasury Department and the IRS recognize that the opposite result may hold for some taxpayers.

The Treasury Department and the IRS have not estimated the differences in income inclusion between the final regulations and this alternative regulatory approach because they do not have readily available data on the income inclusion timing differences under an enforceable right standard versus the contingent transactions price approach. Because of this lack of data, the Treasury Department and the IRS have further not estimated the difference in compliance costs between the final regulations and the alternative regulatory approach.

b. Provisions Not Substantially Revised From the Proposed Section 451(b) Regulations

i. Application of the AFS Income Inclusion Rule to Multi-Year Contracts

The final regulations clarify how section 451(b) applies to multi-year contracts. The Treasury Department and

the IRS considered two alternative approaches for such contracts: (i) An annual approach and (ii) a cumulative approach. Under an annual approach, for each taxable year under the contract a taxpayer would compare the amount of income taken into account as AFS revenue for that taxable year and the amount of income that meets the requirements for recognition under the all events test for that same taxable year to determine its gross income inclusion for that taxable year; that is, the taxpayer would include the larger of the two amounts. The total amount of gross income recognized under the contract through the end of such taxable year is not to exceed the total contract price.

In contrast, under a cumulative approach, in each taxable year a taxpayer would compare the cumulative amount of revenue included in its AFS up to and including that taxable year with the cumulative amount of income that meets the requirements for recognition under the all events test up to and including that taxable year. The taxpayer would then take the larger of the two amounts and reduce it for any prior taxable year income inclusions with respect to that item of gross income to determine the amount that is required to be included in gross income in the current taxable year.

The difference between the annual approach and the cumulative approach are illustrated by the following example. In 2021, D, an engineering services provider, enters into a non-severable contract with a customer to provide engineering services through 2024 for a total of $100x. Under the contract, D receives payments of $25x in each calendar year of the contract. For its AFS, D reports $50x, $0, $20x, and $30x of AFS revenue from the contract for 2021, 2022, 2023, and 2024, respectively. D has an enforceable right, as defined in § 1.451–3(a)(9), to recover all amounts reported as AFS revenue through the end of a given contract year if the customer were to terminate the contract on the last day of such year. The $25x payment received for 2023 is an advance payment, as defined in § 1.451–8(a)(1), because $5x of the $25x payment is reported as AFS revenue for 2024. D uses the full inclusion method for advance payments.

The accompanying table shows the treatment of gross income under the two approaches.

	2021	2022	2023	2024	Total
Payments	$25x	$25x	$25x	$25x	$100x
AFS Revenue	50x	0x	20x	30x	100x
Gross Income (cumulative approach)	50x	0x	25x	25x	100x
Gross Income (annual approach)	50x	25x	25x	0x	100x

An annual approach could accelerate the recognition of taxable income to a greater degree than what is reflected in revenue for AFS purposes. In this example, such an approach would ignore in 2022 the fact that cumulative AFS revenue of $50x had been recognized as taxable gross income in 2021. Accordingly, the annual approach would require that an additional $25x of income be recognized in 2022, since a payment of that amount was received in that year. In effect, an annual approach would accelerate the recognition of $25x from 2023 to 2022 relative to gross income recognition under the cumulative AFS income inclusion rule.

The Treasury Department and IRS concluded that the extent of acceleration of income that may occur when using an annual approach would be excessive relative to the cumulative approach when considered against the intent and purpose of the statute. The final regulations therefore adopt the cumulative approach.

The Treasury Department and the IRS have not estimated the difference in compliance costs, administrative burden, or economic activity between the final regulations and an alternative regulatory approach of using an annual comparison. The Treasury Department and the IRS have not undertaken this estimation because they do not have sufficiently detailed data or models that capture possible differences in taxpayers' income inclusions under these two alternative regulatory approaches.

ii. Applicable Financial Statement Covering a Group of Entities

The final regulations provide rules for taxpayers whose financial results are included on an AFS covering a group of entities. These rules specify that, if a taxpayer's financial results are reported on the AFS for a group of entities, the taxpayer's AFS is the group's AFS. However, if the taxpayer also reports financial results on a separate AFS that is of equal or higher priority, then the separate AFS is the taxpayer's AFS. The rules also specify how a taxpayer using a group AFS is to determine the amount of revenue allocated to the taxpayer. The Treasury Department and the IRS considered as an alternative not providing substantive rules on how taxpayers should apply the AFS income inclusion rule when their financial results are included in an AFS for a group of entities. This alternative was rejected because it would have increased compliance burdens and potentially led to similarly situated taxpayers applying the AFS income inclusion rule differently.

The Code does not specify how the AFS income inclusion rule is to function whenever the AFS accounting period and the taxable year do not coincide. The final regulations do not adopt a single, one-size-fits-all approach, but rather provide taxpayers three separate options for addressing this situation. A change from one option to another, however, would be considered a change in method of accounting requiring the permission of the IRS. By providing taxpayers with several options, the final regulations will minimize taxpayer compliance costs when dealing with non-congruent tax and financial accounting periods relative to an alternative approach of specifying a single option, with no significant revenue implications or effects on economic decisions.

iii. Revenue in an AFS

The final regulations describe and clarify the definition of AFS revenue to broadly include amounts characterized as revenue in a taxpayer's AFS as well as amounts reported in other comprehensive income or retained earnings provided such amounts relate to an item of gross income that is subject to the rules under section 451(b) and (c). The Treasury Department and the IRS considered and rejected a narrower definition of revenue or a definition that was tied to the AFS definition of revenue. The definition of revenue advanced in the final regulations is consistent with the current application of the all events test under § 1.451–1(a) and ensures that all relevant financial statement items are taken into account for tax purposes. In contrast, a narrow definition of revenue would allow, or even encourage, taxpayers to avoid the AFS income inclusion rule by not

classifying an item as revenue on their financial statement.

iv. Rules for Certain Debt Instruments

Section 451(b)(2) states that the AFS inclusion rule does not apply to items of gross income for which a taxpayer uses a special method of accounting provided under the Code. However, the Code does not apply this exception to special accounting rules that apply to original issue discount (OID), market discount, and certain other items with respect to debt instruments under part V of Subchapter P of the Code.

The final regulations implement this provision by providing a non-exhaustive list of special methods of accounting, and by clarifying how section 451(b) applies to certain credit card receivables. The final regulations specifically except from section 451(b) the timing rules for accrued market discount on bonds and the general OID timing rules, as well as the timing rules for OID determined with respect to special debt instruments (contingent payment and variable rate debt instruments, certain hedged debt instruments, and inflation-indexed debt instruments). Nevertheless, following the legislative history of the TCJA (see Conference Report, p. 276), the final regulations provide that credit card late fees, credit card cash advance fees, and interchange fees are subject to the AFS income inclusion rule. The final regulations further specify that if these credit card fees are subject to the AFS income inclusion rule, they are not to be taken into account in determining whether a debt instrument associated with them has OID. Existing rules continue to apply to these items for taxpayers not possessing an AFS. The Treasury Department and the IRS expect that this treatment will provide a straightforward application of section 451(b) consistent with Congressional intent without unnecessarily complicating OID calculations and adding to taxpayer compliance burdens.

The Treasury Department and the IRS considered and rejected a broader application of the AFS income inclusion rule to include all amounts determined under the OID and market discount accounting methods, even in cases where the items are treated as discount or as an adjustment to the yield of a debt instrument over the life of the instrument in its AFS for financial reporting purposes. The final regulations do not subject these amounts to the AFS income inclusion rule because these special accounting methods do not generally rely on the all events test to determine the timing of income inclusion and these current special accounting methods provide workable income-recognition timing rules that appropriately measure income. The Treasury Department and the IRS expect that subjecting these items to the AFS income inclusion rule of section 451(b) would disrupt and complicate current tax accounting practices with no general economic benefit.

5. Economic Effects of Provisions Under 451(c)

a. Provisions Substantially Revised From the Proposed Section 451(c) Regulations

i. Cost Offset for Advance Payments

The Treasury Department and the IRS considered three options for addressing the treatment of costs under section 451(c): (i) No cost offset; (ii) a cost offset for incurred costs; and (iii) a cost offset that further allowed for projected costs. The proposed section 451(c) regulations (in this part C.5, *proposed regulations*) did not provide for a cost offset for advanced payments. At the time, the Treasury Department and the IRS argued that Congress intentionally simplified the rules for advance payments by limiting the deferral of advance payments for taxpayers with an AFS to a prescribed statutory method that (1) does not include an accelerated cost offset, (2) is consistent with Revenue Procedure 2004–34, and (3) overrides § 1.451–5. Taxpayers commenting on the proposed regulations were concerned that the failure to provide a cost offset rule in 451(c) would cause a mismatch of income and expenses and result in the taxation of gross receipts. For example, if a business has a multi-year contract to build or manufacture a highly customized good, it would report any advance payment in income in the year of receipt or in the following taxable year. If it uses the advance payment to purchase materials and to pay workers as part of the project, it would recover those costs only when the sale takes place. Under the proposed regulations, the statute would generate a tax on the total amount of the advance payment in the first years of the contract with all related costs being recovered later in the contract.

In response to these comments on the proposed regulations, the Treasury Department and the IRS have written the final regulations to include an offset for cost of goods in progress (cost offset). This cost offset allows taxpayers to reduce the amount of an advance payment for the future sale of inventory that is required to be included in gross income in a year prior to the year in which ownership of the inventory is transferred to the customer. The amount of such reduction, or cost offset, is equal to the inventoriable costs incurred as of the end of the taxable year in which the advance payment is required to be included in gross income under the taxpayer's method of accounting for advance payments. This provision of the final regulations allows taxpayers to offset advance payments included in income under either the full inclusion method or the deferral method. However, the cost of goods in progress offset cannot reduce the amount of the advance payment income inclusion below zero. Any incurred costs subject to this limitation may be carried forward to determine the cost of goods in progress in subsequent taxable years.

The cost offset in the final regulations generally reduces the amount of the advance payment that is required to be included in gross income in a taxable year prior to the year in which ownership of the inventory is transferred to the customer relative to the proposed regulations. An improved match of income and cost timing is generally held to provide a more accurate measure of economic activity and thus provide a more efficient tax system than under the proposed regulations. For further discussion of the economic effects of the cost offset for advance payments and for income more generally see 4.a.i.

The Treasury Department and the IRS considered expanding the cost offset to allow for projected costs, with several possible formats being considered for how projected costs would be treated. Allowing an offset for projected costs would entail a higher administrative burden than the offset for incurred costs and may not definitively improve the alignment of when income and costs are recognized for tax purposes relative to the offset for incurred costs.

The Treasury Department and the IRS have not estimated the difference in compliance costs, administrative burden, or income-cost alignment (and any subsequent effects on economic activity) between the final regulations and alternative regulatory approaches using projected costs associated with advance payments. The Treasury Department and the IRS have not undertaken this estimation because they do not have sufficiently detailed data or models that capture possible differences in cost offset formats that use incurred costs versus projected costs.

b. Provisions Not Substantially Revised From the Proposed Regulations

i. Deferral Methods Under Section 451(c)

The statute prescribes a particular deferral method for accrual-method taxpayers that have an AFS (AFS taxpayers) but does not explicitly describe a deferral method to be used by taxpayers that do not have an AFS (non-AFS taxpayers). To remedy this gap, the proposed and final regulations describe and clarify that a method similar to the deferral method available to non-AFS taxpayers under Revenue Procedure 2004–34 will be available to non-AFS taxpayers.

The Treasury Department and the IRS considered and rejected a narrow interpretation of section 451(c) that would have precluded non-AFS taxpayers from using a deferral method similar to that provided in Revenue Procedure 2004–34. Section 451(c) does not explicitly prohibit the use of such a method by non-AFS taxpayers, and the Treasury Department and IRS continue to have authority under the Code to prescribe a deferral method for such taxpayers. Precluding non-AFS taxpayers from using a deferral method similar to that of AFS taxpayers would treat AFS and non-AFS taxpayers quite differently regarding business decisions they might make that are otherwise similar. Such treatment would result in a less economically efficient tax system, which generally treats similar economic decisions similarly.

ii. Advance Payment Acceleration Provisions

If a taxpayer ceases to exist by the close of a taxable year in which an advance payment has been received and deferred, then issues may arise as to when or whether the remaining amount of the payment will be recognized as taxable income because there may not be a succeeding taxable year in which such income can be recognized.

Under the statute, if the taxpayer dies or ceases to exist by the close of the taxable year in which the advance payment was received, any remaining untaxed amounts of advance payments must be included in income in the year they were received. The final regulations extend this payment ''acceleration'' rule to situations in which a performance obligation is satisfied or otherwise ends in the taxable year of receipt or in a succeeding short taxable year, a treatment that is consistent with a similar rule in Revenue Procedure 2004–34.

The Treasury Department and the IRS considered not modifying or expanding the acceleration rule contained in section 451(c) but rejected this alternative because the remaining amount may never be included in income, thus risking a permanent exclusion of the amount from taxable income. The possibility of a permanent exclusion of income provides incentives for taxpayers to structure payments in ways that avoid tax liability, thus reducing Federal tax revenue without providing an accompanying general economic benefit. The proposed and final regulations treat the expanded set of accelerated transactions consistently with similar types of transactions based on the timing and structure of the payments involved.

iii. Advance Payments and Financial Statement Adjustments

Under the statute, if a taxpayer counts an advance payment as an item of deferred revenue, under certain conditions (for example, certain acquisitions of one corporation by another), the taxpayer may be required by its system of accounting to adjust that item on the balance sheet in a subsequent year. The item would then not be included in current earnings or AFS revenues. In this case, taxpayers might argue that they can exclude the amount deferred from taxable income because it is never ''earned'' nor included in revenue under their AFS. If this argument were upheld, taxpayers could convert an income ''deferral'' amount into an income ''exemption'' amount. To address this issue and avoid this possibility, the proposed and final regulations specify that such financial statement adjustments are to be treated as ''revenue.''

The Treasury Department and the IRS considered not providing clarity on the treatment of financial statement write-downs but rejected that approach because it would have risked an inappropriate permanent exclusion of income. The possibility of a permanent exclusion of income provides incentives for taxpayers to structure payments in ways that avoid tax liability, thus reducing Federal tax revenue without providing an accompanying general economic benefit.

iv. Short Taxable Years and the 92-Day Rule

Section 451(c) does not provide a rule relating to the treatment of short taxable years. In the absence of such a rule, it will be unclear to taxpayers how they should implement the deferral method provided in section 451(c) in the case of a short taxable year. To address this issue, the proposed and final regulations provide rules relating to the treatment of short taxable years for advance payments that are generally consistent with Revenue Procedure 2004–34. The Treasury Department and the IRS considered and rejected not providing short taxable year rules because such a decision would have created significant confusion among taxpayers, increased administrative costs for the IRS, and increased compliance costs for taxpayers.

v. Performance Obligations for Non-AFS Taxpayers

A performance obligation is generally a contractual arrangement with a customer to provide a good, service or a series of goods or services that are basically the same and have a routine pattern of transfer. Further, each performance obligation in a contract generally yields a separate item of gross income. The Treasury Department and the IRS interpret the statute as requiring taxpayers to allocate payments attributable to multiple items of gross income in the same manner as such payments are allocated to the corresponding performance obligations in the taxpayer's AFS. The statute does not, however, specify the allocation rules to be used by non-AFS taxpayers.

To address this issue, the proposed and final regulations provide allocation rules for non-AFS taxpayers consistent with a similar rule in Revenue Procedure 2004–34. That rule specifies that a payment that is attributable to multiple items of gross income is required to be allocated to such items in a manner that is based on objective criteria. The objective criteria standard will be satisfied if the allocation method is based on payments the taxpayer regularly receives for an item or items that are regularly sold or provided separately. The Treasury Department and the IRS considered not providing allocation rules for non-AFS taxpayers but rejected such an approach because it would have treated similarly situated taxpayers quite differently and would have led to increased administrative costs for the IRS and increased compliance costs for taxpayers relative to the rules provided in the final regulations. While the allocation rules for AFS taxpayers and non-AFS taxpayers differ to some degree under the final regulations, the chosen provision provides a rule upon which non-AFS taxpayers can rely, while minimizing the differences between AFS and non-AFS taxpayers in this regard within the constraints imposed by the statute.

vi. Specified Good Exception

Section 451(c) provides that certain items are excluded from the definition of an advance payment. Those items include rent; insurance premiums governed by subchapter L; payments with respect to financial instruments; payments with respect to certain warranty or guaranty contracts; payments subject to section 871(a), 881, 1441, or 1442; payments in property to which section 83 applies; and other payments identified by the Secretary. This list of items excluded from the definition of an advance payment is generally comparable to the list of items excluded from the definition of an advance payment in Revenue Procedure 2004–34.

Prior to release of the proposed regulations, several commenters requested that the list of excluded items be expanded to include certain goods that require a significant amount of capital to produce and that may require considerable time from development to delivery. Generally, for financial statement purposes, such manufacturers recognize revenue related to these goods when the product is completed and delivered and the title and risk of loss have transferred to the customer.

To address this issue, the proposed regulations crafted a narrow specified-goods exception for taxpayers who receive advance payments but do not perform the work or deliver the good for several years in the future. Specifically, an exclusion was introduced for certain goods for which a taxpayer requires a customer to make an upfront payment under the contract if (i) the contracted delivery month and year of the good occurs at least two taxable years after an upfront payment, (ii) the taxpayer does not have the good or a substantially similar good on hand at the end of the year the upfront payment is received, and (iii) the taxpayer recognizes all of the revenue from the sale of the good in its AFS in the year of delivery.

The final regulations make one minor modification to the specified good exception. In response to comments, the final regulations give taxpayers the option to treat upfront payments that satisfy the criteria for the specified good exception as a typical advance payment under section 451(c). In other words, taxpayers have the option of including the advance payment in gross income under the full inclusion method or the deferral method. This flexibility in the section 451(c) regime reduces uncertainty for taxpayers who may be unsure if a contract meets the specified good exception relative to the proposed regulations. It also allows taxpayers using the 1-year deferral under Revenue Procedure 2004–34 prior to the passage of the TCJA the option to continue to do so.

The Treasury Department and the IRS considered as an alternative not using the authority granted to the Secretary in section 451(c)(4)(B)(vii) to exclude certain payments. For manufacturers of highly customizable goods with a delivery date more than two years after the upfront payment, the one-year deferral period has the potential to increase book-tax accounting differences relative to the final regulations. For some companies, a one-year deferral period may require the creation of separate records to track advance payments for accounting and tax purposes. Thus, for these taxpayers, the final regulations may provide greater conformity between accounting (book) income and taxable income to the extent that applicable case law would defer the inclusion of income related to the specified goods exception.

II. Paperwork Reduction Act

These regulations do not impose any additional information collection requirements in the form of reporting, recordkeeping requirements or third-party disclosure requirements related to tax compliance. Instead, because section 451(b) and section 451(c) and these regulations provide various methods of accounting affecting the timing of income inclusion, taxpayers without an existing method of accounting for these items may initially adopt such method without the consent of the Commissioner. However, the consent of the Commissioner under section 446(e) and the accompanying regulations is required before implementing method changes from one method to another method. See §§ 1.451–3(l) and 1.451–8(g). Some of the methods of accounting referenced by and discussed in these regulations are represented in the following chart.

Section	Brief description of method
§ 1.451–3(b)(2)(i)	Application of AFS income inclusion rule by making all AFS revenue adjustments.
§ 1.451–3(b)(2)(ii)	Application of AFS income inclusion rule by making certain AFS revenue adjustments (Alternative AFS Revenue method).
§ 1.451–3(c)	AFS cost offset method.
§ 1.451–3(i)(4)	Computing revenue when the AFS and taxable years are mismatched.
§ 1.451–3(l)	Change in the method of recognizing revenue in an AFS.
§ 1.451–8(c)	Deferral method for taxpayers with an AFS.
§ 1.451–8(d)	Deferral method for taxpayer without an AFS.
§ 1.451–8(e)	Advance payment cost offset method.
§ 1.451–8(f)	Election for the specified goods exception to not apply.
§ 1.451–8(g)	Change in the method for recognizing advance payments on an AFS.

Taxpayers request consent to use a method in these regulations by filing Form 3115, *Application for Change in Accounting Method* (Parts I, II, IV and Schedule B). Filing of Form 3115 and any statements attached thereto (for taxpayers who are required to do so or who elect certain methods of accounting described in the regulations) is the sole collection of information requirement imposed by the statute and the regulations.

For the Paperwork Reduction Act (PRA), the reporting burden associated with the collections of information in these regulations will be reflected in the IRS Form 3115 PRA Submissions (OMB control numbers 1545–0074 for individual filers, 1545–0123 for business filers, and 1545–2070 for all other types of filers).

In 2018, the IRS released and invited comment on a draft of Form 3115 to give the public the opportunity to benefit from certain specific revisions 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. Form 3115 applies to changes of accounting methods generally and is therefore broader than section 451(b).

On November 25, 2019, the Treasury Department and the IRS published Revenue Procedure 2019–43, 2019–28 I.R.B. 1107, which updated Revenue Procedure 2018–31, and provides a

global list of automatic method change procedures, including procedures for taxpayers to comply with various provisions in section 451(b) and (c) and the proposed regulations. Under the procedures, taxpayers can request permission to change to a method of accounting to comply with the various provisions in section 451(b) and (c) and the proposed regulations using reduced filing requirements, such as by filing a short Form 3115, or for certain taxpayers, by using a streamlined method change procedure that involves not filing a Form 3115.

The current status of the PRA submissions that will be revised as a result of the information collections in these regulations is provided in the accompanying table. As described earlier, the reporting burdens associated with the information collections in these 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 and filers subject to Revenue Procedure 2018–31). The overall burden estimates associated with the OMB control numbers identified later are aggregate amounts that relate to the entire package of forms associated with the applicable OMB control number and will in the future 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 unrelated to the future calculations needed to assess the burden imposed by these regulations. These 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 these regulations are currently available. The Treasury Department and the IRS have not estimated the burden, including that of any new information collections, related to the requirements under these regulations. 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 these regulations and other regulations that affect the compliance burden for that form.

The Treasury Department and IRS request comment on all aspects of information collection burdens related to these regulations, including estimates for how much time it would take to comply with the paperwork burdens described earlier for each relevant form and ways for the IRS to minimize the paperwork burden. In addition, when available, drafts of IRS forms are posted for comment at *https://apps.irs.gov/app/picklist/list/draftTaxForms.htm*. IRS forms are available at *https://www.irs.gov/forms-instructions*. Forms will not be finalized until after they have been approved by OMB under the PRA.

Form/ revenue procedure	Type of filer	OMB no.(s)	Status
Form 3115	All other Filers (mainly trusts and estates) (Legacy system).	1545–2070	Published in the **Federal Register** on 2/15/17. Public comment period closed on 4/17/17.
	Link: *https://www.federalregister.gov/documents/2017/02/15/2017-02985/proposed-information-collection-comment-request*.		
	Business (NEW Model)	1545–0123	Published in the **Federal Register** on 10/8/18. Public comment period closed on 12/10/18.
	Link: *https://www.federalregister.gov/documents/2018/10/09/2018-21846/proposed-collection-comment-request-for-forms-1065-1065-b-1066-1120-1120-c-1120-f-1120-h-1120-nd*.		
	Individual (NEW Model)	1545–0074	Limited scope submission (1040 only) on 10/11/18 at OIRA for review. Full ICR submission for all forms in 2019.
	Link: *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201808-1545-031*.		
Revenue Procedure 2018–31	IRS Research estimates	1545–0123	Published in the **Federal Register** on 9/30/19. Public Comment period closed on 12/23/19.
	Link: *https://www.federalregister.gov/documents/2019/10/22/2019–23009/proposed-collection-comment-request-for-rev-proc-2018-31*.		

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the Regulatory Flexibility Act (small entities). This certification can be made because the Treasury Department and the IRS have determined that the regulations may affect a substantial number of small entities but have also concluded that the economic effect on small entities as a result of these regulations is not expected to be significant. Section 451(b) requires that an item of income be included in gross income for tax purposes no later than when the item is counted as revenue in an AFS. Due to the revised financial accounting standards for calculating revenue in an AFS under ASC 606, the result of section 451(b) generally will be to move the recognition of income forward by a year or two compared to previous law. Section 451(c) provides rules regarding the treatment of advance payments. These regulations provide general guidance on the rules, including the scope of the rules, exceptions to the rules, definitions of key terms, and examples demonstrating applicability of the rules.

The Treasury Department and the IRS have estimated the number of small

business entities that may be affected by the statute and these regulations. Section 451(b) and (c) and the regulations under § 1.451–3 affect only those business entities that (i) use an accrual method of accounting, and (ii) have an AFS. One provision in § 1.451–8 applies to accrual method taxpayers without an AFS. The remaining provisions in § 1.451–8 apply to accrual method taxpayers with an AFS.

Regarding the accrual method of accounting, section 13102 of TCJA modified section 448 to expand the number of taxpayers eligible to use the cash receipts and disbursements method of accounting (cash method of accounting). In general, C corporations and partnerships with a C corporation partner are now permitted to use the cash method of accounting if average annual gross receipts are $25 million or less for taxable years beginning in 2018 (up from $5 million or less in 2017). The $25 million figure is considered for adjustment for inflation annually. This amount was adjusted for inflation for taxable years beginning after December 31, 2018. The amount was $26 million for taxable year 2019. The Treasury Department and the IRS estimate that approximately 3,128,000 business entities with gross receipts of $26 million or less used an accrual method of accounting in taxable year 2017, which represents approximately 8.5 percent of all business entities with gross receipts of $26 million or less. The Treasury Department and the IRS project that in future years, the number of entities with gross receipts not greater than $26 million that will be using the accrual method will be less than 8.5 percent of all entities with gross receipts of $26 million or less.

Many small business entities use the cash method of accounting, as opposed to an accrual method, and thus are not subject to these regulations. The percent of returns that use an accrual method of accounting, by entity types and for entities with gross receipts not greater than $26 million, is shown in the accompanying table.

TOTAL RETURNS AND RETURNS USING ACCRUAL METHOD OF ACCOUNTING

[Taxable year 2017]

Entities with gross receipts not greater than $26 million			
Entity	Total returns (thousands)	Returns using an accrual method of accounting (thousands)	Percent of returns using accrual method of accounting
C corporations	1,570	691	44
S corporations	4,684	1,146	24
Partnerships	3,884	912	23
Sole proprietors and LLCs	26,425	379	1
All entities	36,425	3,128	8.5

Source: Internal Revenue Service, RAAS, KDA.

The Treasury Department and the IRS next examined the second condition, that entities with an AFS are affected by section 451(b) and the regulations. The Treasury Department and the IRS do not have readily available data to measure the prevalence of entities with an AFS, as defined in the statute and in § 1.451–3(b)(1). However, Schedule M–3, which is used to reconcile an entity's net income or loss for tax purposes with its book income or loss, reports whether an entity has a certified audited income statement. The Schedule M–3 is required to be filed only by entities with at least $10 million of assets. This population is more likely to possess an AFS and, conversely, entities that do not file Schedule M–3 are less likely to possess an AFS as owners and/or creditors of such smaller entities are less likely to require the entity to certify its financial results via a financial statement audit. Data is currently available only for electronic filers.

For taxable year 2017, approximately 89 percent of accrual-method entities filing Forms 1120, 1120–S, and 1065 with gross receipts of $26 million or less were filers of electronic tax forms. About 11 percent, or 288,000 returns, included a Schedule M–3. About 40 percent of the returns with Schedule M–3, or 113,000, indicated they had a certified audited income statement. Based on the assumption that filers of paper tax forms have the same incidence as electronic filers and that entities that do not file a Schedule M–3 generally do not have an AFS, then the Treasury Department and the IRS estimate that roughly 127,000 (113,000/0.89) entities with gross receipts of $26 million or less are accrual-method entities that have an AFS. If 5 percent of entities that do not file a Schedule M–3 also have an AFS then approximately 224,000 entities with gross receipts of $26 million or less are potentially affected by these regulations. These estimates of affected filing entities are reproduced in the following table.

CORPORATION AND PARTNERSHIP RETURNS USING AN ACCRUAL METHOD OF ACCOUNTING—TAXABLE YEAR 2017

[Thousands of returns]

Entities with gross receipts not greater than $26 million			
	E-filed returns	Paper-filed returns	Total returns
Returns	2,503	307	2,810
Returns with a Schedule M–3	288	* *35*	* *323*
Returns with a Schedule M–3 and an audited income statement	113	* *14*	* *127*
Returns without a Schedule M–3	2,215	* *272*	* *2,487*
Returns without a Schedule M–3, but with an audited income statement	** *111*	** *13*	** *124*

CORPORATION AND PARTNERSHIP RETURNS USING AN ACCRUAL METHOD OF ACCOUNTING—TAXABLE YEAR 2017—Continued

[Thousands of returns]

Entities with gross receipts not greater than $26 million			
	E-filed returns	Paper-filed returns	Total returns
Returns with an audited income statement	** *224*	** *27*	** *251*

* Estimates are obtained by assuming paper-filed returns are similar to e-filed returns as regards the incidence of a filing entity having a Schedule M–3 and an audited income statement.

** Estimates are obtained by assuming that 5% of returns without a Schedule M–3 have an audited income statement. This compares with approximately 40% of returns with a Schedule M–3 having such a statement.

Source: Non-italic entries are estimates taken from the IRS Research, Applied Analytics and Statistics KDA Division using data from the Compliance Data Warehouse. The total number of accrual method returns of corporations and partnerships differs slightly from that reported in the earlier table due to the use of different data sources for the two estimates. Italicized entries are additional estimates obtained in the manner indicated in the table notes.

This rule would not have a significant economic impact on small entities affected. The costs 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 have provided streamlined procedures for certain taxpayers to change their method of accounting to comply with section 451(b) and (c), and plan to provide streamlined procedures for such taxpayers to change to the methods of accounting described in these regulations. Under the streamlined procedures, eligible taxpayers would either complete only a portion of the Form 3115 or would not complete the Form 3115 at all to comply with the guidance. The streamlined method change procedures are available to taxpayers, other than a tax shelter, who satisfy the gross receipts test under section 448(c) and for taxpayers making such a method change which results in a zero section 481(a) adjustment. In addition, contemporaneous with these regulations, the Treasury Department and the IRS are issuing a streamlined procedure for taxpayers using a section 451(b) method who have a change in their AFS for revenue recognition that requires a method change for tax purposes.

The estimated cumulative annual reporting and/or recordkeeping burden for the statutory method changes relating to the streamlined procedures used to be described under OMB control number 1545–1551. In 2019, OMB number 1545–1551 was merged into OMB number 1545–0123. The estimated number of respondents, after taking into account the streamlined procedures that are being issued is 28,046 respondents, and a total annual reporting and/or recordkeeping burden of 34,279 hours. The estimated annual burden per respondent/recordkeeper under OMB control number 1545–0123 before publication of this revenue procedure varies from ⅙ hour to 8½ hours, depending on individual circumstances, with an estimated average of 1½ hours. The estimated monetized burden for compliance is $95 per hour. The estimated cumulative annual reporting and/or recordkeeping burden for the method changes described under OMB control number 1545–0123 after the revenue procedure is accounted for is 28,046 respondents, and a total annual reporting and/or recordkeeping burden is 34,279 hours. These burdens are essentially unaffected by these regulations.

Accordingly, the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f), the notice of proposed rulemaking preceding this final rule was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business. No comments on the notice were received from the Chief Counsel for the Office of Advocacy of the Small Business Administration.

IV. Unfunded Mandates Reform Act

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

V. 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.

VI. Congressional Review Act

The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget has determined that this is a major rule for purposes of the Congressional Review Act (5 U.S.C. 801 *et seq.*). Under 5 U.S.C. 801(a)(3), a major rule takes effect 60 days after the rule is published in the **Federal Register**.

Notwithstanding this requirement, 5 U.S.C. 808(2) allows agencies to dispense with the requirements of 5 U.S.C. 801 when the agency for good cause finds that such procedure would be impracticable, unnecessary, or contrary to the public interest and the rule shall take effect at such time as the agency promulgating the rule determines. Pursuant to 5 U.S.C. 808(2), the Treasury Department and the IRS find, for good cause, that a 60-day delay in the effective date is contrary to the public interest.

Following the amendments to section 451(b) and (c) by the TCJA, the Treasury Department and the IRS published the proposed regulations to provide certainty to taxpayers. In particular, as demonstrated by the wide variety of public comments in response to the proposed regulations received,

taxpayers continue to express uncertainty regarding the proper application of the statutory rules under section 451(b) and (c). This is especially the case for taxpayers in the manufacturing and retail industries producing or reselling inventoriable goods because the final regulations allow such taxpayers to more clearly reflect their income for Federal income tax purposes compared to the approach of the proposed regulations. An earlier effective date will allow taxpayers to implement the final regulations earlier to take advantage of certain provisions in the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136 (March 27, 2020) that were designed to enhance liquidity, such as the 5-year net operating loss carryback provisions. Consistent with Executive Order 13924 (May 19, 2020), the Treasury Department and the IRS have therefore determined that an expedited effective date of the final regulations would more appropriately provide such critical businesses greater liquidity needed to remain open or ''re-open by providing guidance on what the law requires.'' 85 FR 31353–54. Accordingly, the Treasury Department and the IRS have determined that the rules in this Treasury decision will take effect on the date of filing for public inspection in the **Federal Register**.

Drafting Information

The principal author of these regulations is Jo Lynn Ricks (Office of the Associate Chief Counsel (Income Tax and Accounting)). Other personnel from the Treasury Department and the IRS, including Kate Abdoo, John Aramburu, James Beatty (formerly Income Tax and Accounting), David Christensen, Alexa Dubert, Sean Dwyer, Peter Ford, Christina Glendening, Anna Gleysteen, Charlie Gorham, Evan Hewitt, William Jackson, Doug Kim, Tom McElroy, and Karla Meola, Office of the Associate Chief Counsel (Income Tax and Accounting); and William E. Blanchard, Charles Culmer, and Deepan Patel, Office of the Associate Chief Counsel (Financial Institutions and Products), 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 is amended by adding entries in numerical order for §§ 1.451–3 and 1.451–8 to read, in part, as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 1.451–3 also issued under 26 U.S.C. 451(b)(1)(A)(ii), (b)(3)(C) and 461(h).

Section 1.451–8 also issued under 26 U.S.C. 451(c)(2)(A), (3), (4)(A)(iii), (4)(b)(vii), and 461(h).

* * * * *

■ **Par. 2.** Section 1.446–1 is amended by adding a parenthetical sentence between the first and second sentences of paragraph (c)(1)(ii)(A) to read as follows:

§ 1.446–1 General rule for methods of accounting.

* * * * *

(c) * * *

(1) * * *

(ii) * * *

(A) * * * (See § 1.451–1 for rules relating to the taxable year of inclusion.) * * *

■ **Par. 3.** Section 1.446–2 is amended by removing ''or'' at the end of paragraph (a)(2)(i)(E), removing the period at the end of paragraph (a)(2)(i)(F) and adding ''; or'' in its place, and adding paragraph (a)(2)(i)(G) to read as follows:

§ 1.446–2 Method of accounting for interest.

(a) * * *

(2) * * *

(i) * * *

(G) Section 1.451–3(j) (special ordering rule for specified fees).

* * * * *

■ **Par. 4.** Section 1.451–1 is amended by:

■ a. Adding ''(all events test)'' to the end of the second sentence of paragraph (a).

■ b. Redesignating paragraphs (b) through (g) as (d) through (i).

■ c. Adding new paragraphs (b) and (c).

The additions read as follows:

§ 1.451–1 General rule for taxable year of inclusion.

* * * * *

(b) *Timing of income inclusion for accrual method taxpayers with an applicable financial statement.* For the timing of income inclusion for taxpayers that have an applicable financial statement, as defined in § 1.451–3(b)(1), and that use an accrual method of accounting, see section 451(b) and § 1.451–3.

(c) *Special rule for timing of income inclusion from advance payments.* For the timing of income inclusion for taxpayers that receive advance payments, as defined in § 1.451–8(a)(1), and that use an accrual method of accounting, see section 451(c) and § 1.451–8.

* * * * *

■ **Par. 5.** Section 1.451–3 is added to read as follows:

§ 1.451–3 Timing of income inclusion for taxpayers with an applicable financial statement using an accrual method of accounting.

(a) *Definitions.* The following definitions apply for this section:

(1) *AFS income inclusion amount.* The term *AFS income inclusion amount means the amount* of an item of gross income that is required to be included in gross income under the AFS income inclusion rule in paragraph (b)(1) of this section.

(2) *AFS income inclusion rule.* The term *AFS income inclusion rule* has the meaning provided in paragraph (b)(1) of this section.

(3) *AFS inventory inclusion amount.* The term *AFS inventory inclusion amount* has the meaning provided in paragraph (c)(2)(i)(A) of this section.

(4) *AFS revenue.* The term *AFS revenue* means revenue reported in the taxpayer's AFS. The characterization of an amount in the AFS is not determinative of whether the amount is AFS revenue. For example, AFS revenue can include amounts reported as other comprehensive income or adjustments to retained earnings in an AFS. See paragraph (b) of this section for adjustments to AFS revenue that may need to be made to apply the rules of this section.

(5) *Applicable financial statement (AFS).* Subject to the rules in paragraph (a)(5)(iv) of this section, the terms *applicable financial statement* and *AFS* are synonymous and mean the taxpayer's financial statement listed in paragraph (a)(5)(i) through (iii) of this section that has the highest priority, including priority within paragraphs (a)(5)(i)(B) and (a)(5)(ii)(B) of this section. The financial statements are, in order of descending priority:

(i) *GAAP statements.* A financial statement that is certified as being prepared in accordance with United States generally accepted accounting principles (GAAP) and is:

(A) A Form 10–K (or successor form), or annual statement to shareholders, filed with the United States Securities and Exchange Commission (SEC);

(B) An audited financial statement of the taxpayer that is used for:

(*1*) Credit purposes;

(*2*) Reporting to shareholders, partners, or other proprietors, or to beneficiaries; or

(*3*) Any other substantial non-tax purpose; or

(C) A financial statement, other than a tax return, filed with the Federal Government or any Federal agency, other than the SEC or the Internal Revenue Service (IRS);

(ii) *IFRS statements.* A financial statement that is certified as being prepared in accordance with international financial reporting standards (IFRS) and is:

(A) Filed by the taxpayer with an agency of a foreign government that is equivalent to the SEC, and has financial reporting standards not less stringent than the standards required by the SEC;

(B) An audited financial statement of the taxpayer that is used for:

(*1*) Credit purposes;

(*2*) Reporting to shareholders, partners, or other proprietors, or to beneficiaries; or

(*3*) Any other substantial non-tax purpose; or

(C) A financial statement, other than a tax return, filed with the Federal Government, Federal agency, a foreign government, or agency of a foreign government, other than the SEC, IRS, or an agency that is equivalent to the SEC or the IRS; or

(iii) *Other statements.* A financial statement, other than a tax return, filed with the Federal Government or any Federal agency, a state government or state agency, or a self-regulatory organization including, for example, a financial statement filed with a state agency that regulates insurance companies or the Financial Industry Regulatory Authority. Additional financial statements beyond those included in this paragraph (a)(5)(iii) may be provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(iv) *Additional rules for determining priority.* If a taxpayer restates AFS revenue for a taxable year prior to the date that the taxpayer files its Federal income tax return for such taxable year, the restated AFS must be used instead of the original AFS. If using the restated AFS revenue results in a change in method of accounting, the preceding sentence applies only if the taxpayer receives permission to change its method of accounting to use the restated AFS revenue. In addition, if a taxpayer with different financial accounting and taxable years is required to file both annual financial statements and periodic financial statements covering less than a year with a government or government agency, the taxpayer must prioritize the annual financial statement in accordance with this paragraph (a)(5).

(6) *Cost of goods.* The term *cost of goods* means the costs that are properly capitalized and included in inventory under sections 471 and 263A or any other applicable provision of the Internal Revenue Code (Code) and that are allocable to an item of inventory for which an AFS inventory inclusion amount is calculated. See paragraph (c)(5)(iii) of this section for specific rules for taxpayers using simplified methods under section 263A.

(7) *Cost of goods in progress offset.* The term *cost of goods in progress offset* has the meaning provided in paragraph (c)(3) of this section.

(8) *Cumulative cost of goods in progress offset.* The term *cumulative cost of goods in progress offset* means the cumulative cost of goods in progress offset amounts under paragraph (c) of this section for a specific item of inventory that have reduced an AFS inventory inclusion amount attributable to such item of inventory in prior taxable years.

(9) *Enforceable right.* The term *enforceable right* means any right that a taxpayer has under the terms of a contract or under applicable Federal, state, or international law, including rights to amounts recoverable in equity and liquidated damages. A contract can include, but is not limited to, a statement of work, purchase order, or invoice.

(10) *Equity method.* The term *equity method* means a method of accounting for financial accounting purposes under which an investment is initially recorded at cost and subsequently increased or decreased in carrying value by the investor's proportionate share of income and losses and such income or losses are reported as separate items on the investor's statement of income.

(11) *Performance obligation.* The term *performance obligation* means a promise in a contract with a customer to transfer to the customer a distinct good, service, or right; or a series of distinct goods, services, or rights, or a combination thereof, that are substantially the same and that have the same pattern of transfer to the customer. A performance obligation includes a promise to grant or transfer a right to use or access intangible property. Performance obligations in a contract are identified by applying the accounting standards the taxpayer uses to prepare its AFS. Additionally, to the extent the contract with the customer provides the taxpayer with an enforceable right to payment, the revenue from which is not allocated to a performance obligation described in the first two sentences of this paragraph (a)(11) in the taxpayer's AFS but is accounted for as a separate source of revenue in the taxpayer's AFS, such right shall be treated as a separate performance obligation under this section. A fee described in paragraph (j)(2) of this section is an example of an enforceable right that is treated as a separate performance obligation.

(12) *Prior income inclusion amounts.* The term *prior income inclusion amounts* means amounts of an item of gross income that were required to be included in the taxpayer's gross income under this section or § 1.451–8 in prior taxable years.

(13) *Special method of accounting.* The term *special method of accounting* means a method of accounting expressly permitted or required under any provision of the Code, the regulations in this part, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter) under which the time for taking an item of gross income into account in a taxable year is not determined under the all events test in § 1.451–1(a). See, however, paragraph (j) of this section relating to certain items of income for debt instruments. The term special method of accounting does not include any method of accounting expressly permitted or required under this section. The following are examples of special methods of accounting to which the AFS income inclusion rule does not apply:

(i) The crop method of accounting under sections 61 and 162;

(ii) Methods of accounting provided in sections 453 through 460;

(iii) Methods of accounting for notional principal contracts under § 1.446–3;

(iv) Methods of accounting for hedging transactions under § 1.446–4;

(v) Methods of accounting for REMIC inducement fees under § 1.446–6;

(vi) Methods of accounting for gain on shares in a money market fund under § 1.446–7;

(vii) Methods of accounting for certain rental payments under section 467;

(viii) The mark-to-market method of accounting under section 475;

(ix) Timing rules for income and gain associated with a transaction that is integrated under § 1.988–5, and income and gain under the nonfunctional currency contingent payment debt instrument rules in § 1.988–6;

(x) Except as otherwise provided in paragraph (j) of this section, timing rules for original issue discount (OID) under section 811(b)(3) or 1272 (and the regulations in this part under section 1272 of the Code), income under the contingent payment debt instrument rules in § 1.1275–4, income under the

variable rate debt instrument rules in § 1.1275–5, income and gain associated with a transaction that is integrated under § 1.1275–6, and income under the inflation-indexed debt instrument rules in § 1.1275–7;

(xi) Timing rules for de minimis OID under § 1.1273–1(d) and for de minimis market discount (as defined in section 1278(a)(2)(C));

(xii) Timing rules for accrued market discount under sections 1276 and 1278(b);

(xiii) Timing rules for short-term obligations under sections 1281 through 1283;

(xiv) Timing rules for stripped bonds under section 1286; and

(xv) Methods of accounting provided in sections 1502 and 1503 and the regulations thereunder, including the method of accounting relating to intercompany transactions under § 1.1502–13.

(14) *Transaction price amount.* The term *transaction price amount* means the total amount of consideration to which a taxpayer is, or expects to be, entitled from all performance obligations under a contract. The transaction price amount is determined under the standards the taxpayer uses to prepare its AFS.

(b) *AFS income inclusion rule*—(1) *In general.* Except as otherwise provided in this section, if a taxpayer uses an accrual method of accounting for Federal income tax purposes and has an AFS, the all events test under § 1.451–1(a) for any item of gross income, or portion thereof, is met no later than when that item, or portion thereof, is taken into account as AFS revenue (AFS income inclusion rule). See paragraph (b)(2) of this section for rules regarding when an item of gross income, or portion thereof, is treated as *taken into account as AFS revenue* under the AFS income inclusion rule. See paragraph (c) of this section for optional rules to determine the AFS income inclusion amount for an item of gross income from the sale of inventory. See paragraph (d) of this section for rules regarding the allocation of the transaction price amount to multiple items of gross income. See paragraph (e) of this section for rules to determine the AFS income inclusion amount for an item of gross income from a multi-year contract. See paragraphs (f) and (g) of this section for limitations of the AFS income inclusion rule. See paragraph (h) of this section for special rules that may affect the determination of AFS revenue under the AFS income inclusion rule. See paragraph (j) of this section for special ordering rules for certain items of income with respect to debt instruments.

(2) *Amounts taken into account as AFS revenue*—(i) *General rule.* Unless the taxpayer uses the alternative AFS revenue method described in paragraph (b)(2)(ii) of this section, the amount of the item of gross income that is treated as *taken into account as AFS revenue* under paragraph (b)(1) of this section is determined by making adjustments to AFS revenue for the amounts described in paragraphs (b)(2)(i)(A) through (D) of this section.

(A) If AFS revenue reflects a reduction for amounts described in paragraph (b)(2)(i)(A)(*1*) or (*2*) of this section, AFS revenue is increased by the amount of the reduction.

(*1*) Cost of goods sold and liabilities that are required to be accounted for under other provisions of the Code such as section 461, including liabilities for allowances, rebates, chargebacks, rewards issued in credit card transactions and other reward programs, and refunds, regardless of when any amount described in this paragraph (b)(2)(i)(A)(*1*) is incurred.

(*2*) Amounts anticipated to be in dispute or anticipated to be uncollectable.

(B) If AFS revenue includes an amount the taxpayer does not have an enforceable right to recover if the customer were to terminate the contract on the last day of the taxable year (regardless of whether the customer actually terminates the contract), AFS revenue is reduced by such amount.

(C) If the transaction price was increased because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS, then any AFS revenue attributable to such increase is disregarded.

(D) AFS revenue may be increased or reduced by additional amounts as provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(ii) *Alternative AFS revenue method.* A taxpayer that chooses to apply the AFS income inclusion rule by using the alternative AFS revenue method described in this paragraph (b)(2)(ii) in lieu of the rules in paragraph (b)(2)(i) of this section, determines the amount of the item of gross income that is treated as *taken into account as AFS revenue* under paragraph (b)(1) of this section by making adjustments to AFS revenue for only the amounts described in paragraphs (b)(2)(i)(A), (C), and (D) of this section. A taxpayer that uses the alternative AFS revenue method for a trade or business must apply the method to all items of gross income in the trade or business that are subject to the AFS income inclusion rule.

(3) *Exceptions.* The AFS income inclusion rule in paragraph (b)(1) of this section does not apply to:

(i) Any item of gross income, or portion thereof, if the timing of income inclusion for that item, or portion thereof, is determined using a special method of accounting;

(ii) Any item of gross income, or portion thereof, in connection with a mortgage servicing contract; or

(iii) Any taxable year that is not covered for the entire year by one or more AFS.

(4) *Examples.* The following examples illustrate the provisions of paragraph (b) of this section. Unless the facts specifically state otherwise, the taxpayer has an AFS, is on a calendar year for Federal income tax purposes and AFS purposes, and uses an accrual method of accounting for Federal income tax purposes. Further, the taxpayer does not use the alternative AFS revenue method under paragraph (b)(2)(ii) of this section or the AFS cost offset method under paragraph (d) of this section, and does not use a special method of accounting:

(i) *Example 1: Provision of installation services*—(A) *Facts.* In 2021, B enters into a 2-year service contract with a customer to install the customer's manufacturing equipment for $100,000. Throughout the term of the contract, the customer retains control of the equipment. B begins providing the installation services in 2021 and completes the installation services in 2022. Under the contract, B bills the customer $55,000 in 2021 when installation begins, but does not have a fixed right to receive the remaining $45,000 until installation is complete and approved by the customer. However, if the customer were to terminate the contract prior to completion, B would have an enforceable right to payment for all services performed prior to the termination date. For its AFS, B reports $60,000 of AFS revenue for 2021 and $40,000 of AFS revenue for 2022, in accordance with the services performed in each respective year.

(B) *Analysis.* Under the all events test in § 1.451–1(a), B is required to include $55,000 in gross income in 2021 as B has a fixed right to receive $55,000 as of the end of 2021. However, under the AFS income inclusion rule, because B has an enforceable right to recover the entire $60,000 that was reported in AFS revenue for 2021 had the customer terminated the contract on the last day of 2021, the entire $60,000 is treated as taken into account as AFS revenue in 2021. Accordingly, the all events test is

met for the $60,000 of gross income no later than the end of 2021 and B is required to include $60,000 in gross income in 2021.

(ii) *Example 2: Provision of goods included in AFS with enforceable right*—(A) *Facts.* In November 2021, C enters into a contract with a customer to provide 50 customized computers for $80,000. Under the contract, C can bill $80,000 after the customer accepts delivery of the computers. However, the contract provides that C has an enforceable right to be paid for work performed to date if the customer were to terminate the contract prior to delivery. C produces and ships all of the computers in 2021. In 2022, the customer accepts delivery of the computers and C bills the customer. For its AFS, C reports $80,000 of AFS revenue for 2021.

(B) *Analysis.* Under the all events test in § 1.451–1(a), C does not have a fixed right to receive the $80,000 until the customer accepts delivery of the computers in 2022. However, under the AFS income inclusion rule, because C has an enforceable right to recover the entire $80,000 of AFS revenue that was reported for 2021 had the customer terminated the contract on the last day of 2021, the entire $80,000 is treated as ''taken into account as AFS revenue'' in 2021. Accordingly, the all events test is met for the $80,000 no later than in 2021 and C is required to include $80,000 in gross income in 2021.

(iii) *Example 3: Provision of services included in AFS with enforceable right*—(A) *Facts.* In 2021, D, an engineering services provider, enters into a 4-year contract with a customer to provide services for a total of $100x. Under the contract, D bills and receives $25x for each year of the contract. If the customer were to terminate the contract prior to completion, D has an enforceable right to only the billed amounts. For its AFS, D reports $60x, $0, $20x, and $20x of AFS revenue from the contract for 2021, 2022, 2023, and 2024, respectively.

(B) *Analysis.* Under the all events test in § 1.451–1(a), D is required to include $25x in gross income in 2021 as D has a fixed right to receive $25x as of the end of 2021. Although D reports $60x of AFS revenue from the provision of services for 2021, D has an enforceable right to recover only $25x if the customer were to terminate the contract on the last day of 2021. Accordingly, pursuant to paragraph (b)(2)(i)(B) of this section, of the $60x of AFS revenue reported for 2021, only $25x is treated as ''taken into account as AFS revenue'' under the AFS income inclusion rule. As a result, D is required to include only $25x in gross income in 2021. Similarly, in 2022, 2023 and 2024, D includes in gross income only the yearly $25x contract payments under the all events test as only the billed amounts are treated as ''taken into account as AFS revenue'' under the AFS income inclusion rule.

(iv) *Example 4: Sale of good under cost-plus contract*—(A) *Facts.* In 2021, E, a manufacturer, enters into a contract with Fire Department for the manufacture and delivery of a fire truck. The fire truck takes 10 months to manufacture at an estimated cost of $60,000. The contract provides E with an enforceable right to recover costs incurred in manufacturing the fire truck regardless of whether the Fire Department accepts delivery of the fire truck or terminates the contract, and an enforceable right to an additional $20,000 if the fire truck is accepted by the Fire Department. E does not have an enforceable right to recover any portion of the additional $20,000 if the Fire Department were to terminate the contract before it accepts the fire truck. E has an obligation to cure any defects if the customer rejects the fire truck. In August 2021, E begins manufacturing the fire truck ordered by Fire Department and incurs $30,000 of costs for materials and labor for the contract. For its AFS, E reports $40,000 of AFS revenue for 2021 ($30,000 costs plus $10,000 expected profit on the sale of the fire truck).

(B) *Analysis for 2021 taxable year.* Under the all events test in § 1.451–1(a), E is required to include $30,000 in gross income in 2021 as E has a fixed right to receive $30,000 as of the end of 2021. Although E reports $40,000 of AFS revenue for 2021, E has an enforceable right to recover only $30,000 if the Fire Department were to terminate the contract on the last day of 2021. Accordingly, pursuant to paragraph (b)(2)(i)(B) of this section, of the $40,000 of AFS revenue reported for 2021, only $30,000 is treated as ''taken into account as AFS revenue'' under the AFS income inclusion rule. As a result, E is required to include only $30,000 in gross income in 2021.

(v) *Example 5: Sale of goods with AFS revenue adjustments*—(A) *Facts.* In July 2021, F, a manufacturer of automobile parts, enters into a contract to sell 1,000 parts to a customer for $10 per part, for a total of $10,000 (1,000 × $10). The contract also provides that F will receive a $200 bonus if it delivers all the parts to the customer by February 1, 2022. F delivers 500 non-defective parts to the customer on December 31, 2021 and schedules the remaining 500 parts for delivery to the customer on January 1, 2022. F does not have an enforceable right to recover any portion of the $200 bonus if the customer were to terminate the contract before all 1,000 parts are delivered. F expects to earn the $200 bonus and have 5% of the non-defective parts returned. For its AFS, F reports $4,850 ($5,000 + $100 − $250) of AFS revenue for 2021, which includes a $100 (50% × $200) adjustment to increase AFS revenue for the expected bonus and a $250 (5% × $5,000) adjustment to decrease AFS revenue for anticipated returns.

(B) *Analysis.* Under the all events test in § 1.451–1(a), F is required to include $5,000, less the corresponding cost of goods sold under sections 263A and 471 as applicable, in gross income in 2021 as F has a fixed right to receive $5,000 from the delivery of 500 parts to the customer in 2021. However, F does not have a fixed right to receive any portion of the $200 delivery bonus as of the end of 2021 as the remaining 500 parts had yet to be delivered. Under the AFS income inclusion rule and, specifically, paragraphs (b)(2)(i)(A)(*1*) and (b)(2)(i)(B) of this section, the amount treated as ''taken into account as AFS revenue'' for 2021 is also $5,000, calculated as $4,850 of AFS revenue that was reported for 2021, decreased by $100 for the expected delivery bonus that F does not have an enforceable right to recover if the customer were to terminate the contract as of the end of 2021 and increased by $250 for anticipated return liabilities that are accounted for under section 461 ($4,850 − $100 + $250 = $5,000). Accordingly, F is required to include $5,000, less the corresponding cost of goods sold determined under sections 263A and 471 as applicable, in gross income in 2021.

(vi) *Example 6: Chargebacks*—(A) *Facts.* In November 2021, G, a pharmaceutical manufacturer, enters into a contract to sell 1,000 units to W, a wholesaler, for $10 per unit, totaling $10,000 (1,000 × $10). The contract also provides that G will credit or pay W $4 per unit (a 40% ''chargeback'') for sales W makes to certain qualifying customers. G delivers 600 units to W on December 31, 2021, and bills W $6,000 under the contract. W does not make any sales to qualifying customers in 2021. For its AFS, G reports $3,600 ($6,000 − $2,400) of AFS revenue for 2021, which includes a reduction of the $6,000 of sales revenue by $2,400 (40% × $6,000) for anticipated chargebacks.

(B) *Analysis.* Under the all events test in § 1.451–1(a), G is required to include $6,000, less the corresponding cost of goods sold under sections 263A and 471 as applicable, in gross income in 2021 as G has a fixed right to receive $6,000

from the delivery of 600 units to W in 2021. The anticipated chargebacks are liabilities that are accounted for under section 461. Under the AFS income inclusion rule and, specifically, paragraph (b)(2)(i)(A)(*1*) of this section, the amount treated as ''taken into account as AFS revenue'' for 2021 is also $6,000, calculated as $3,600 of AFS revenue reported for 2021, increased by $2,400 of anticipated chargeback liabilities that are accounted for under section 461 ($3,600 + $2,400 = $6,000). Accordingly, G is required to include $6,000, less the corresponding cost of goods sold under sections 263A and 471 as applicable, in gross income in 2021.

(vii) *Example 7: Sale of property using a special method of accounting.* In 2021, H, a financial services provider, sells a building for $100,000, payable in five annual payments of $20,000 together with adequate stated interest, starting in 2021. For its AFS, H reports $100,000 of AFS revenue for 2021 from the sale of the building. For Federal income tax purposes, H uses the installment method under section 453 for the sale of the building. Because the installment method under section 453 is a special method of accounting under paragraphs (a)(13)(ii) and (b)(3)(i) of this section, the AFS income inclusion rule does not apply to H's sale of the building. Accordingly, the gain from the sale is included in income as prescribed in section 453.

(viii) *Example 8: Insurance contract renewals*—(A) *Facts.* J, an insurance agent, is engaged by an insurance carrier to sell insurance. Pursuant to the contract between J and the insurance carrier, J is entitled to receive a $50 commission from the insurance carrier at the time a policy is sold to a customer. The contract also provides that J is entitled to receive an additional $25 commission each time a policy is renewed. J does not have an enforceable right to a renewal commission if the insurance carrier terminates the contract before a policy is renewed. J sells 1,000 one-year policies in 2021, of which 800 are expected to be renewed in 2022 and 700 are expected to be renewed in 2023. J does not have any ongoing obligation to provide additional services to the insurance carrier or the customers after the initial sale of the policy. For its AFS, J reports $87,500 of AFS revenue for 2021, which includes $50,000 ($50 × 1,000) of commission income for policies sold in 2021 and an estimate of $37,500 ($25 × 1,500) of commission income for the policies expected to be renewed in 2022 and 2023.

(B) *Analysis.* Under the all events test in § 1.451–1(a), J is required to include $50,000 in gross income in 2021 as J has a fixed right to receive $50,000 of commission income for the policies it sold during 2021. However, as of the end of 2021, J does not have a fixed right to receive any commission income from anticipated policy renewals. Under the AFS income inclusion rule, although J reports $87,500 of AFS revenue for 2021, J does not have an enforceable right to recover the $37,500 of anticipated commission income from future policy renewals if the insurance carrier were to terminate the contract on the last day of 2021. Accordingly, pursuant to paragraph (b)(2)(i)(B) of this section, of the $87,500 of AFS revenue reported for 2021, only $50,000 is treated as ''taken into account as AFS revenue'' under the AFS income inclusion rule. As a result, J is required to include $50,000 in gross income in 2021. Alternatively, if J uses the alternative AFS revenue method in paragraph (b)(2)(ii) of this section, all $87,500 of AFS revenue reported for 2021 would be treated as ''taken into account as AFS revenue'' under the AFS income inclusion rule and J would be required to include $87,500 of commission income in gross income in 2021.

(ix) *Example 9: Escalating rents*—(A) *Facts.* (*1*) K is a landlord in the business of leasing office space. On January 1, 2021, K enters into a 5-year lease with a tenant that provides for annual rent of $30,000 for 2021 and increases by 5% each year over the lease term. The annual rents are due at the end of each year. Accordingly, the rent for each year (rounded to the nearest dollar) is as follows:

TABLE 1 TO PARAGRAPH (b)(4)(ix)(A)

Year	Calculation	Total rent
2021	$30,000	$30,000
2022	30,000 * 1.05	31,500
2023	31,500 * 1.05	33,075
2024	33,075 * 1.05	34,729
2025	34,729 * 1.05	36,465
Total Rent for Five Years		165,769

(*2*) The lease is not a section 467 rental agreement as defined under section 467(d). If the tenant terminates the lease early, the tenant must pay K the balance of the rent due for the remainder of the termination year. On its AFS, K reports AFS revenue from rents on a straight-line basis over the term of the lease, or approximately $33,154 per year ($165,769 total rent/5 years). Accordingly, for its AFS, K reports $33,154 of AFS revenue for 2021.

(B) *Analysis.* Under the all events test in § 1.451–1(a), K is required to include $30,000 in gross income in 2021 as K has a fixed right to receive $30,000 for the 2021 rental period under the terms of the lease agreement. Under the AFS income inclusion rule, although K reports $33,154 of AFS revenue for 2021, K has an enforceable right to recover only $30,000 if the tenant were to cancel the lease on the last day of 2021. Accordingly, pursuant to paragraph (b)(2)(i)(B) of this section, of the $33,154 of AFS revenue reported for 2021, only $30,000 is treated as ''taken into account in AFS revenue'' under the AFS income inclusion rule. As a result, K is required to include $30,000 in gross income in 2021.

(x) *Example 10: Licensing income from digital services*—(A) *Facts.* M is engaged in the business of licensing media entertainment content packages. M licenses content packages to customers by entering into subscription plans with customers. In January 2021, M enters into a two-year subscription plan with Customer. M charges Customer $40 per month billed monthly in arrears. If Customer terminates the plan prior to the two-year term, it must pay the balance of the subscription fee for the remaining term of the contract. For its AFS, M reports $960 ($40 × 24 months) of AFS revenue for 2021.

(B) *Analysis.* Under the all events test in § 1.451–1(a), M is required to include $480 in gross income in 2021 as M has a fixed right to receive $480 ($40 × 12) for the 12 months of media content licensed to Customer in 2021. M does

not have a fixed right to receive any portion of the 2022 subscription fee as of the end of 2021 as such fee is not due under the terms of the subscription agreement until 2022 and M has yet to provide the media content for the 2022 subscription period. However, under the AFS income inclusion rule, because M has an enforceable right to recover all $960 of AFS revenue reported for 2021 if Customer were to terminate the contract at the end of 2021, all $960 is treated as ''taken into account as AFS revenue'' in 2021. Accordingly, M is required to include $960 in gross income in 2021.

(c) *Cost offsets*—(1) *In general.* This paragraph (c) provides an optional method of accounting that may be used to determine the AFS income inclusion amount for an item of gross income from the sale of inventory (AFS cost offset method). A taxpayer that uses the AFS cost offset method for a trade or business must apply this method to all items of gross income in the trade or business that meet the criteria in this paragraph (c). Additionally, a taxpayer that uses this method for a trade or business must also use the advance payment cost offset method described in § 1.451–8(e) to account for all advance payments received by such trade or business that meet the criteria in § 1.451–8(e), if applicable. A taxpayer that uses the AFS cost offset method to account for gross income from the sale of an item of inventory, but not the advance payment cost offset method because it does not receive any advance payments for such item, determines the corresponding AFS income inclusion amount for a taxable year by following the rules in paragraph (c)(2) of this section. A taxpayer that uses the AFS cost offset method and the advance payment cost offset method to account for gross income, including advance payments, from the sale of an item of inventory, determines the corresponding AFS income inclusion amount and the advance payment income inclusion amount, as defined in § 1.451–8(a)(2), for a taxable year by following the rules in paragraph (c)(2) of this section rather than the rules under § 1.451–8(e). However, if all payments received for the sale of an item of inventory meet the definition of an advance payment under § 1.451–8(a)(1), a taxpayer that uses the advance payment cost offset method determines the corresponding advance payment income inclusion amount for a taxable year by following the rules in § 1.451–8(e).

(2) *AFS cost offset method.* A taxpayer that uses the AFS cost offset method and, if applicable, the advance payment cost offset method, to account for gross income from the sale of an item of inventory determines the AFS income inclusion amount, or, if applicable, the advance payment income inclusion amount, for a taxable year prior to the taxable year in which ownership of the item of inventory is transferred to the customer by following the rules in paragraph (c)(2)(i) of this section, subject to the additional rules and limitations in paragraphs (c)(4) through (6) of this section. Such taxpayer determines the AFS income inclusion amount or, if applicable, the advance payment income inclusion amount, for the taxable year in which ownership of the item of inventory is transferred to the customer by following the rules in paragraph (c)(2)(ii) of this section. A taxpayer described in this paragraph (c)(2) that receives advance payments for the sale of the item of inventory may be required to include in gross income for a taxable year an amount that is comprised of both an AFS income inclusion amount and an advance payment income inclusion amount. In such case, it is not necessary to determine the portion of the total inclusion that is comprised of the AFS income inclusion amount and the portion of the total inclusion that is comprised of the advance payment income inclusion amount.

(i) *Determining gross income for a year prior to the year of sale.* To determine the amount required to be included in gross income from the sale of an item of inventory for a taxable year prior to the taxable year in which ownership of the item of inventory is transferred to the customer, a taxpayer must first determine the AFS inventory inclusion amount for such item for such year by applying the steps in paragraph (c)(2)(i)(A) of this section. This AFS inventory inclusion amount is then reduced by the cost of goods in progress offset for the taxable year, as determined under paragraphs (c)(3) through (5) of this section. This net amount is required to be included in gross income for the taxable year.

(A) *AFS inventory inclusion amount for a taxable year.* To determine the AFS inventory inclusion amount for an item of inventory for a taxable year:

(*1*) The taxpayer first takes the greater of the amount described in paragraph (c)(2)(i)(A)(*1*)(*i*) of this section, or the amount described in paragraph (c)(2)(i)(A)(*1*)(*ii*) of this section (or if the two amounts are equal, the equal amount).

(*i*) The cumulative amount of revenue from the item of inventory that satisfies the all events test under § 1.451–1(a) through the last day of the taxable year, less any advance payment inventory inclusion amount, as defined in § 1.451–8(a)(3), with respect to a subsequent taxable year.

(*ii*) The cumulative amount of revenue from the item of inventory that is treated as ''taken into account as AFS revenue'' under paragraph (b)(2) of this section through the last day of the taxable year.

(*2*) The taxpayer then reduces the amount determined under paragraph (c)(2)(i)(A)(*1*) of this section by the amount computed under paragraph (c)(2)(i)(A)(*1*) of this section for that item of inventory for the immediately preceding taxable year.

(B) [Reserved]

(ii) *Determining the gross income for the year of sale.* To determine the amount required to be included in gross income from the sale of an item of inventory for the taxable year in which ownership of the item of inventory is transferred to the customer:

(A) The taxpayer first takes the greater of the amount described in paragraph (c)(2)(ii)(A)(*1*) of this section, or the amount described in paragraph (c)(2)(ii)(A)(*2*) of this section (or if the two amounts are equal, the equal amount).

(*1*) The cumulative amount of revenue from the item of inventory that satisfies the all events test under § 1.451–1(a) through the last day of the taxable year, including the full amount of any advance payment received for the item of inventory.

(*2*) The cumulative amount of revenue from the item of inventory that is treated as ''taken into account as AFS revenue'' under paragraph (b)(2) of this section through the last day of the taxable year.

(B) The taxpayer then reduces such amount by any prior income inclusion amounts with respect to such item of inventory. This net amount is required to be included in gross income for the taxable year. The taxpayer does not further reduce such amount by a cost of goods in progress offset under paragraph (c)(3) of this section. However, the taxpayer is entitled to recover the costs capitalized to the item of inventory as cost of goods sold in accordance with sections 471 and 263A or any other applicable provision of the Internal Revenue Code. See § 1.61–3.

(3) *Cost of goods in progress offset for a taxable year.* The cost of goods in progress offset for the taxable year is calculated as:

(i) The cost of goods allocable to the item of inventory through the last day of the taxable year; reduced by

(ii) The cumulative cost of goods in progress offset attributable to the item of inventory, if any.

(4) *Limitations to the cost of goods in progress offset.* The cost of goods in progress offset is determined separately for each item of inventory. Further, the cost of goods in progress offset attributable to one item of inventory cannot reduce the AFS inventory inclusion amount attributable to a separate item of inventory. The cost of goods in progress offset cannot reduce the AFS inventory inclusion amount for the taxable year below zero.

(5) *Inventory methods*—(i) *Inventory costs not affected by cost of goods in progress offset.* The cost of goods comprising the cost of goods in progress offset does not reduce the costs that are capitalized to the items of inventory produced or items of inventory acquired for resale by the taxpayer. While the cost of goods in progress offset reduces the AFS inventory inclusion amount, the cost of goods in progress offset does not affect how and when costs are capitalized to inventory under sections 471 and 263A or any other applicable provision of the Internal Revenue Code or when those capitalized costs will be recovered.

(ii) *Consistency between inventory methods and AFS cost offset method.* The costs of goods comprising the cost of goods in progress offset must be determined by applying the taxpayer's method of accounting for inventory for Federal income tax purposes. A taxpayer using the AFS cost offset method and, if applicable, the advance payment cost offset method must calculate its cost of goods in progress offset by reference to all costs that the taxpayer has permissibly capitalized and allocated to items of inventory under its method of accounting for inventory for Federal income tax purposes, but including no more costs than what the taxpayer has permissibly capitalized and allocated to items of inventory.

(iii) *Allocation of ''additional section 263A costs'' for taxpayers using simplified methods.* If a taxpayer uses the simplified production method as defined under § 1.263A–2(b), the modified simplified production method as defined under § 1.263A–2(c), or the simplified resale method as defined under § 1.263A–3(d) to determine the amount of its *additional section 263A costs,* as defined under § 1.263A–1(d)(3), to be included in ending inventory, then solely to compute the cost of goods in progress offset, the taxpayer must determine the portion of additional section 263A costs allocable to an item of inventory by multiplying its total additional section 263A costs accounted for under the simplified method for all items of inventory subject to the simplified method by the following ratio:

Section 471 costs allocable to the specific item of inventory

Total section 471 costs for all items of inventory subject to the simplified method

(6) *Acceleration of gross income.* A taxpayer that uses the AFS cost offset method or the advance payment cost offset method must include in gross income for a taxable year prior to the taxable year in which an item of inventory is transferred to the customer, all payments received for the item of inventory that were not previously included in gross income:

(i) If, in that taxable year, the taxpayer either dies or ceases to exist in a transaction other than a transaction to which section 381(a) applies; or

(ii) If, and to the extent that, in that taxable year, the taxpayer's obligation to the customer with respect to the item of inventory ends other than in:

(A) A transaction to which section 381(a) applies; or

(B) A section 351(a) transfer that is part of a section 351 transaction in which:

(*1*) Substantially all assets of the trade or business, including the item of inventory, are transferred;

(*2*) The transferee adopts or uses, in the year of the transfer, the same methods of accounting for the item of inventory under this section and § 1.451–8 as those used by the transferor; and

(*3*) The transferee and the transferor are members of the same consolidated group, as defined in § 1.1502–1(h).

(7) *Additional procedural guidance.* The IRS may publish procedural guidance in the Internal Revenue Bulletin (see § 601.601(d) of this chapter) that provides alternative procedures for complying with the rules under this paragraph (c), including alternative methods of accounting for cost offsets.

(8) *Examples.* The following examples illustrate the AFS cost offset method. Unless the facts specifically state otherwise, the taxpayer has an AFS, is on a calendar year for both Federal income tax purposes and AFS purposes, uses an accrual method of accounting for Federal income tax purposes, and does not use a special method of accounting. Further, the taxpayer properly applies its inventory accounting method, uses the AFS cost offset method under paragraph (c) of this section, and, except as otherwise provided, does not receive advance payments. Lastly, the taxpayer does not produce unique items, as described in § 1.460–2(a)(1) and (b), or any item that normally requires more than 12 calendar months to complete, as determined under § 1.460–2(a)(2) and (c). Any production period that exceeds 12 calendar months is due to unforeseen production delays.

(i) *Example 1*—(A) *Facts.* During 2021, A enters into a contract with Customer to manufacture and deliver a good with a total contract price of $100x. The costs to produce the good are required to be capitalized under sections 471 and 263A as the good is inventory in the hands of A. Ownership of the good is transferred from A to Customer upon its delivery in 2022. A determines, under paragraph (c)(2)(i)(A) of this section, that its AFS inventory inclusion amount for 2021 is $20x. A incurs $12x of costs in 2021, and $48x of costs in 2022 ($60x in total) that are permissibly capitalized and allocated to the produced good under sections 471 and 263A. A has a fixed right to receive the $100x contract price when it delivers the good in 2022. A does not receive any payments from Customer prior to delivery. Further, all $100x is treated as ''taken into account as AFS revenue'' as of the last day of 2022.

(B) *Analysis for 2021.* For 2021, A's AFS income inclusion amount, as determined under paragraph (c)(2)(i) of this section, is $8x ($20x AFS inventory inclusion amount less $12x cost of goods in progress offset, which is the cost of goods incurred through December 31, 2021).

(C) *Analysis for 2022.* During 2022, ownership of the good is transferred to Customer. Accordingly, pursuant to paragraph (c)(2)(ii) of this section, A determines the AFS income inclusion amount for 2022 by:

(*1*) First taking the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2022 ($100x); or

(ii) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2022 ($100x) (or if the two amounts are equal, the equal amount).

(*2*) Then subtracting from such amount ($100x) the prior income inclusion amounts attributable to the transferred good ($8x). This net amount of $92x is the AFS income inclusion amount for 2022. Although A does not reduce such amount by a cost of goods in progress offset under this paragraph (c), A is entitled to recover the $60x of costs capitalized to the good as cost of goods sold in 2022 in accordance with sections 471 and 263A. See § 1.61–3. Accordingly, A's gross income for 2022 is $32x.

(ii) *Example 2*—(A) *Facts.* In December of 2021, A enters into a contract with Customer to manufacture and deliver 10 items of inventory at a price of $10x per item by the end of 2023. A determines, under paragraph (c)(2)(i)(A) of this section, that the AFS inventory inclusion amount attributable to each item of inventory under the contract is $3x for 2021. A also incurs $10x of inventory costs during 2021. Such costs are permissibly capitalized and allocated under sections 471 and 263A and are allocated equally to each item of inventory under the contract ($1x per item). During 2022, the taxpayer incurs $18x of costs to finish manufacturing 6 of the 10 items and delivers such items to Customer in October of 2022. Such costs are permissibly capitalized and allocated under sections 471 and 263A and are allocated equally to each of the 6 items delivered in October of 2022 ($3x per item). Upon delivering the 6 items, ownership of the delivered items transfers to Customer, A has a fixed right to receive $60x of the total contract price, and all $60x is treated as ''taken into account as AFS revenue.'' A does not incur any inventory costs during 2022 that are allocable to the 4 remaining undelivered items, nor does the taxpayer have an AFS inventory inclusion amount attributable to such items for 2022. During 2023, A incurs $12x of costs to finish manufacturing the 4 remaining items and delivers such items to Customer. Such costs are permissibly capitalized and allocated under sections 471 and 263A and are allocated equally to each of the 4 items delivered in 2023 ($3x per item). Upon delivering the 4 remaining items, ownership of the items transfers to Customer, A has a fixed right to receive the remaining $40x contract price, and all $40x is treated as ''taken into account as AFS revenue.''

(B) *Analysis for 2021* A's AFS income inclusion amount for 2021 is $2x per item ($3x AFS inventory inclusion amount per item less $1x cost of goods in progress offset per item, which is the cost of goods as of December 31, 2021). Accordingly, A's total gross income inclusion for 2021 is $20x.

(C) *Analysis for 2022.* During 2022, ownership of 6 of the 10 items is transferred to Customer. Accordingly, pursuant to paragraph (c)(2)(ii) of this section, A determines the AFS income inclusion amount for 2022 by:

(*1*) First taking the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2022 ($10x per item); or

(*ii*) The cumulative amount of revenue that is treated as taken into account as AFS revenue through the last day of 2022 ($10x per item) (or if the two amounts are equal, the equal amount).

(*2*) Then subtracting from such amount ($10x per item) the prior income inclusion amounts attributable to each transferred item ($2x per item). This net amount of $8x per item is the AFS income inclusion amount for each transferred item for 2022. Although A does not reduce such amount by a cost of goods in progress offset under this paragraph (c), A is entitled to recover the $4x of costs capitalized to each item delivered as cost of goods sold in 2022 in accordance with sections 471 and 263A. Accordingly, on an aggregate basis, A's gross income for 2022 is $24x (aggregate AFS income inclusion amount for the 6 items delivered in 2022 of $ 48x less aggregate cost of goods sold of $24x). A does not include any amounts in gross income for 2022 with respect to the 4 items of inventory that were not delivered to Customer until 2023 as A does not have an AFS inventory inclusion amount attributable to such items for 2022.

(D) *Analysis for 2023.* During 2023, ownership of the 4 remaining items are transferred to Customer. Based on the facts, A did not have an AFS inventory inclusion amount attributable to the 4 remaining items for 2022, nor did it incur any cost for such items in 2022 so the analysis for the 4 remaining items for 2023 is similar to the analysis for the 6 items transferred to the customer in 2022 on a per item basis. Pursuant to paragraph (c)(2)(ii) of this section, A determines the AFS income inclusion amount for 2023 by:

(*1*) First taking the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2023 ($10x per item); or

(ii) The cumulative amount of revenue that is treated as taken into account as AFS revenue through the last day of 2023 ($10x per item) (or if the two amounts are equal, the equal amount).

(*2*) Then subtracting from such amount ($10x per item) the prior income inclusion amounts attributable to each transferred item ($2x per item). This net amount of $8x per item is the AFS income inclusion amount for each transferred item for 2023. Although A does not reduce such amount by a cost of goods in progress offset under this paragraph (c), A is entitled to recover the $4x of costs capitalized to each item delivered as cost of goods sold in 2023 in accordance with sections 471 and 263A. On an aggregate basis, A's gross income for 2023 is $16x (aggregate AFS income inclusion amount for the 4 items delivered in 2023 of $32x less aggregate cost of goods sold of $16x).

(iii) *Example 3*—(A) *Facts.* In December of 2021, A enters into a contract with Customer to manufacture and deliver a good with a total contract price of $100x. The costs to produce the good are required to be capitalized under sections 471 and 263A as the good is inventory in the hands of the taxpayer. Ownership of the good is transferred from A to Customer upon its delivery in January of 2023. A determines, under paragraph (c)(2)(i)(A) of this section, that its AFS inventory inclusion amount for 2021 and 2022 is $40x per year. A incurs $25x of costs each year ($75x in total) that are permissibly capitalized and allocated to the manufactured good under sections 471 and 263A. A has a fixed right to receive the $100x contract price when it delivers the good in January of 2023. A does not receive any payments from Customer prior to delivery. Further, all $100x is treated as ''taken into account as AFS revenue'' as of the last day of 2023.

(B) *Analysis for 2021 and 2022.* For 2021, A's AFS income inclusion amount, as determined under paragraph (c)(2)(i) of this section, is $15x ($40x AFS inventory inclusion amount for 2021 less the $25x cost of goods in progress offset for 2021, which is equal to the cost of goods as of December 31, 2021). For 2022, A's AFS income inclusion amount is $15x ($40x AFS inventory inclusion amount for 2022 less the $25x cost of goods in progress offset for 2022, which is the $50x cost of goods as of December 31, 2022 less the 25x cumulative cost of goods in progress offset amount taken into account in 2021).

(C) *Analysis for 2023.* During 2023, ownership of the good is transferred to Customer. Accordingly, pursuant to paragraph (c)(2)(ii) of this section, A determines the AFS income inclusion amount for 2023 by:

(*1*) First taking the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2023 ($100x); or

(*ii*) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2023 ($100x) (or if the two amounts are equal, the equal amount).

(*2*) Then subtracting from such amount ($100x) the prior income inclusion amounts attributable to the transferred good of $30x ($15x for 2021 and $15x for 2022). This net amount of $70x is the AFS income inclusion

amount for 2023. Although A does not reduce such amount by a cost of goods in progress offset under this paragraph (c), A is entitled to recover the $75x of costs capitalized to the good as cost of goods sold in 2023 in accordance with sections 471 and 263A. See § 1.61–3. Accordingly, A's gross income for 2025 is −$5x.

(iv) *Example 4*—(A) *Facts.* In December 2021, A enters into a contract with Customer to manufacture and deliver a good with a total contract price of $100x. A reports $5x of AFS revenue for 2021, $90x of cumulative AFS revenue through the end of 2022, and $100x of cumulative AFS revenue through the end of 2023. A has an enforceable right to recover all AFS revenue reported through the end of each contract year if Customer were to terminate the contract on the last day of each year. Under the terms of the contract, A is entitled to and receives a payment of $40x in 2021 and a payment of $60x when Customer accepts delivery of the good in 2023, which is also when ownership of the good transfers to Customer. The costs to produce the good are required to be capitalized under sections 471 and 263A as the good is inventory in the hands of A. A incurs $10x of costs in 2021, $55x of costs in 2022, and $5x of costs in 2023 ($70x in total). Such costs are permissibly capitalized and allocated to the produced good under sections 471 and 263A. A uses the AFS cost offset method under paragraph (c) of this section and accounts for advance payments, as defined in § 1.451–8(a)(1), under the deferral method and advance payment cost offset method under § 1.451–8(c) and (e), respectively.

(B) *Analysis for 2021.* The $40x payment A receives in 2021 meets the definition of an advance payment under § 1.451–8(a)(1) as the full inclusion of $40x in gross income in the year of receipt is a permissible method of accounting, a portion of the payment ($35x) is ''taken into account as AFS revenue'' in a subsequent year, and the payment is for a good. Pursuant to § 1.451–8(a)(3), A's advance payment inventory inclusion amount for 2022 is $35x (the portion of the payment deferred for AFS purposes). Pursuant to paragraph (c)(2)(i) of this section, A must first determine the AFS inventory inclusion amount for 2021 by applying the rules in paragraph (c)(2)(i)(A) of this section. A then reduces such amount by the cost of goods in progress offset for 2021, as determined under paragraphs (c)(3) through (5) of this section.

(*1*) Pursuant to paragraph (c)(2)(i)(A)(*1*) of this section, A first takes the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2021, less any advance payment inventory inclusion amount attributable to a subsequent year ($5x, determined as the $40x under the all events test, less the $35x of advance payment inventory inclusion amount attributable to 2022); or

(*ii*) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2021 ($5x) (or if the two amounts are equal, the equal amount).

(*2*) Pursuant to paragraph (c)(2)(i)(A)(*2*) of this section, A then subtracts from such amount ($5x) the amount determined under paragraph (c)(2)(i)(A)(*1*) of this section for the item of inventory for the immediately preceding year ($0). This net amount of $5x is the AFS inventory inclusion amount for 2021.

(*3*) Pursuant to paragraph (c)(2)(i) of this section, A reduces this $5x AFS inventory inclusion amount by the cost of goods in progress offset for 2021 of $5x, determined as the cost of goods as of December 31, 2021 of $10x, less the cumulative cost of goods in progress offset taken into account in prior years of $0, less 5x for the AFS inventory inclusion amount limitation under paragraph (c)(4) of this section. Accordingly, A is required to include $0 in gross income for 2021.

(C) *Analysis for 2022.* Pursuant to paragraph (c)(2)(i) of this section, A must first determine the AFS inventory inclusion amount for 2022 by applying the rules in paragraph (c)(2)(i)(A) of this section. A then reduces such amount by the cost of goods in progress offset for 2022, as determined under paragraphs (c)(3) through (5) of this section.

(*1*) Pursuant to paragraph (c)(2)(i)(A)(*1*) of this section, A first takes the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2022 ($40x); or

(*ii*) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2022 ($90x).

(*2*) Pursuant to (c)(2)(i)(A)(*2*) of this section, A then subtracts from such amount ($90x) the amount determined under paragraph (c)(2)(i)(A)(*1*) of this section for the item of inventory for 2021 ($5x). This net amount of $85x is the AFS inventory inclusion amount for 2022.

(*3*) Pursuant to paragraph (c)(2)(i) of this section, A reduces this $85x AFS inventory inclusion amount by the cost of goods in progress offset for 2022 of $60x, determined as the cost of goods as of December 31, 2022 of $65x, less the cumulative cost of goods in progress offset taken into account in prior years of $5x. Accordingly, A is required to include $25x in gross income for 2022.

(D) *Analysis for 2023.* During 2023, ownership of the good is transferred to Customer. Accordingly, pursuant to paragraph (c)(2)(ii) of this section, A determines its gross income inclusion for 2023 by:

(*1*) First taking the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2023 ($100x); or

(*ii*) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2023 ($100x) (or if the two amounts are equal, the equal amount).

(*2*) Then subtracting from such amount ($100x) the prior income inclusion amounts attributable to the transferred good of $25x ($0 for 2021 plus $25x for 2022). A is required to include this net amount of $75x in gross income for 2023. Although A does not reduce such amount by a cost of goods in progress offset under this paragraph (c), A is entitled to recover the $70x of costs capitalized to the good as cost of goods sold in 2023 in accordance with sections 471 and 263A. See § 1.61–3. Accordingly, A's gross income for 2023 is $5x.

(v) *Example 5—(A) Facts.* The same facts as in paragraph (c)(8)(iv) of this section (*Example 4*) apply, except that in 2022, A's obligation to Customer with respect to the good ends other than in a transaction to which section 381(a) applies, or a section 351 transaction described in paragraph (c)(6)(ii)(B) of this section. A does not receive any additional payments in 2022.

(B) *Analysis for 2021.* The analysis for 2021 is the same as in paragraph (c)(8)(iv) of this section (*Example 4*).

(C) *Analysis for 2022.* Because, in 2022, A's obligation to Customer with respect to the good ends in a transaction other than a transaction described in paragraph (c)(6)(ii)(A) or (B) of this section, A is required to apply the acceleration rules in paragraph (c)(6) of this section. Accordingly, because A received $40x of payments as of the date of the transaction, but did not include any portion of such payments in gross income in prior years, A is required to include the remaining $40x of the payments received in gross income in 2022 pursuant to paragraph (c)(6) of this section. A is not permitted to further reduce the $40x income inclusion by a cost of goods in progress offset under this paragraph (c).

(vi) *Example 6*—(A) *Facts.* In 2021, A enters into a contract with Customer to produce and deliver a good. The contract provides that A will receive payments equal to AFS costs plus a 100% mark-up, however, A can only bill the customer on December 31, 2022 and, if the good is not delivered by December 31, 2022, A can also bill Customer upon delivery of the good, for the AFS costs (plus markup) incurred to date, less any amounts previously billed. A recognizes AFS revenue based on a percentage of completion (cost to cost) method. A recognizes AFS revenue of $100 through the last day of 2021, $150 through the last day of 2022, and $300 through the last day of 2023, and has an enforceable right to all AFS revenue reported as of the end of each year if the customer were to terminate the contract on the last day of the year. A bills the customer $150 on December 31 of 2022 and $150 in 2023 when A delivers the good and ownership transfers to Customer. The costs to produce the good are required to be capitalized under sections 471 and 263A as the good is inventory in the hands of the taxpayer. A incurs the following costs each year that are permissibly capitalized and allocated to the produced good under sections 471 and 263A: $125 in 2021; $0 in 2022; and $25 in year 2023.

(B) *Analysis for taxable year 2021.* Pursuant to paragraph (c)(2)(i) of this section, A must first determine the AFS inventory inclusion amount for 2021 by applying the rules in paragraph (c)(2)(i)(A) of this section. A then reduces such amount by the cost of goods in progress offset for 2021, as determined under paragraphs (c)(3) through (5) of this section.

(*1*) Pursuant to paragraph (c)(2)(i)(A)(*1*) of this section, A first takes the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2021 ($0); or

(*ii*) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2021 ($100).

(*2*) Pursuant to paragraph (c)(2)(i)(A)(*2*) of this section, A then subtracts from such amount ($100) the amount determined under paragraph (c)(2)(i)(A)(*1*) of this section for the item of inventory for the immediately preceding year ($0). This net amount of $100 is the AFS inventory inclusion amount for 2021.

(*3*) Pursuant to paragraph (c)(2)(i) of this section, A reduces this $100 AFS inventory inclusion amount by the cost of goods in progress offset for 2021 of $100. Although A's cost of goods in progress as of the end of 2021 is $125, the cost of goods in progress offset is limited to $100, the amount of A's AFS inventory inclusion amount for 2021. Accordingly, A is required to include $0 in gross income in 2021.

(C) *Analysis for taxable year 2022.* Pursuant to paragraph (c)(2)(i) of this section, A must first determine the AFS inventory inclusion amount for 2022 by applying the rules in paragraph (c)(2)(i)(A) of this section. A then reduces such amount by the cost of goods in progress offset for 2022, as determined under paragraphs (c)(3) through (5) of this section.

(*1*) Pursuant to paragraph (c)(2)(i)(A)(*1*) of this section, A first takes the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2022 ($150 due under the terms of the contract); or

(*ii*) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2022 ($150) (or if the two amounts are equal, the equal amount).

(*2*) Pursuant to paragraph (c)(2)(i)(A)(*2*) of this section, A then subtracts from such amount ($150) the amount determined under paragraph (c)(2)(i)(A)(*1*) of this section for the item of inventory for the immediately preceding year ($100). This net amount of $50 is the AFS inventory inclusion amount for 2022.

(*3*) Pursuant to paragraph (c)(2)(i) of this section, A reduces this $50 AFS inventory inclusion amount by the cost of goods in progress offset for 2022 of $25, determined as $125 cost of goods as of December 31, 2022 minus $100 cumulative cost of goods in progress offset amount taken into account in 2021. Accordingly, A is required to include $25 in gross income for 2022.

(D) *Analysis for taxable year 2023.* During 2023, ownership of the good is transferred to the customer. Accordingly, pursuant to paragraph (c)(2)(ii) of this section, A determines its gross income inclusion for 2023 by:

(*1*) First taking the greater of:

(*i*) The cumulative amount of revenue that satisfies the all events test under § 1.451–1(a) through the last day of 2023 ($300x); or

(*ii*) The cumulative amount of revenue that is treated as ''taken into account as AFS revenue'' through the last day of 2025 ($300x) (or if the two amounts are equal, the equal amount).

(*2*) Then subtracting from such amount ($300x) the prior income inclusion amounts attributable to the transferred good of $25 ($0 for 2021 plus $25 for 2022). This net amount of $275 is the AFS income inclusion amount for 2023. Although A does not reduce such amount by a cost of goods in progress offset under this paragraph (c), A is entitled to recover the $150 of costs capitalized to the good as cost of goods sold in 2023 in accordance with sections 471 and 263A. See § 1.61–3. Accordingly, A's gross income for 2023 is $125 ($275 AFS income inclusion amount less $150 cost of goods sold).

(d) *Contracts with multiple performance obligations*—(1) *In general.* Each performance obligation generally yields a corresponding item of gross income that must be accounted for separately under the AFS income inclusion rule in paragraph (b)(1) of this section. Except as provided in paragraph (d)(5) of this section, if a contract contains more than one performance obligation, and thus yields more than one corresponding item of gross income, the transaction price amount shall be allocated to each corresponding item of gross income in accordance with the transaction price amount allocated to each performance obligation for AFS purposes, subject to the adjustments to the transaction price amount and special allocation rules in paragraph (d)(3) of this section.

(2) *Single performance obligation with more than one item of gross income.* If a single performance obligation yields more than one corresponding item of gross income, the transaction price amount allocated to the single performance obligation for AFS purposes must be further allocated among the corresponding items of gross income using any reasonable method.

(3) *Adjustments to transaction price amount and special allocation rules*—(i) *Increases to transaction price amount.* If the transaction price amount includes a reduction for amounts described in paragraph (b)(2)(i)(A)(*1*) or (*2*) of this section, or has been reduced because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS, the taxpayer must determine the specific performance obligation to which such reduction relates and increase the transaction price amount allocable to the corresponding item of gross income by the amount of such reduction (specific identification approach). If it is impracticable from the taxpayer's records to use the specific identification approach, the taxpayer may use any reasonable method to allocate the reduction amount to the items of gross income in the contract. A pro-rata allocation of the reduction amount across all items of gross income under the contract based on the relative

transaction price amounts allocated to such items under paragraph (d)(1) of this section is a reasonable method.

(ii) *Decrease to transaction price amount.* If the transaction price amount has been increased because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS, the taxpayer must determine the specific performance obligation to which such amount relates and decrease the transaction price amount allocable to the corresponding item of gross income by such amount (specific identification approach). If it is impracticable from the taxpayer's records to use the specific identification approach, the taxpayer may use any reasonable method to allocate such amount to the items of gross income in the contract. A pro-rata allocation of such amount across all items of gross income under the contract based on the relative transaction price amounts allocated to such items under paragraph (d)(1) of this section is a reasonable method.

(4) *Examples.* The following examples illustrate the rules of paragraph (d)(1) through (3) of this section. Unless the facts specifically state otherwise, the taxpayer has an AFS, is on a calendar year for Federal income tax purposes and AFS purposes, and uses an accrual method of accounting for Federal income tax purposes.

(i) *Example 1*—(A) *Facts.* On November 1, 2021, A, a software developer, enters into a contract with a customer to transfer a software license, perform software installation services, and provide technical support for a two-year period for $100x. The installation service does not significantly modify the software and the software remains functional without the technical support. A receives an additional $10x bonus if the installation service is performed before February 1, 2022, which A expects to receive. Further, the customer is entitled to a refund of $2x if technical support does not meet performance standards set forth in the contract, which A expects it will pay to the customer. For its AFS, A identifies three performance obligations in the contract:

(*1*)(*i*) The software license;

(*ii*) The installation service; and

(*iii*) Technical support.

(*2*) Also, for its AFS, A determines that the transaction price amount is $108x, determined as $100x contract price plus $10x bonus for installation services minus $2x customer refund. Finally, for its AFS, A allocates the $108x transaction price amount to the three performance obligations as follows: $60x to the software license; $40x to the installation service ($30x + $10x bonus); and $8x to technical support ($10x − $2x refund).

(B) *Analysis.* Pursuant to paragraph (d)(1) of this section, A's contract with the customer has three performance obligations, and each performance obligation yields a corresponding item of gross income that is accounted for separately. Pursuant to paragraph (d)(1) of this section, A is required to allocate the $108x transaction price amount to each corresponding item of gross income in accordance with the transaction price amount allocated to each respective performance obligation for AFS purposes. Accordingly, A initially allocates $60x to the software license item, $40x to the installation service item, and $8 to the technical support item. However, because the transaction price amount was reduced by the anticipated refund of $2x, which relates specifically to the technical support item, A must increase the transaction price allocable to that item of gross income pursuant to the specific identification approach in paragraph (d)(3) of this section. Accordingly, the amount allocated to the item of gross income related to technical support is $10x.

(ii) *Example 2*—(A) *Facts.* In 2021, B, a manufacturer and servicer of airplane parts, enters into a contract with a customer to sell airplane parts in 2021 and to service those parts, as necessary, in 2021, 2022, and 2023 for $100x. B regularly sells the airline parts and the services separately. For its AFS, B identifies two performance obligations in the contract:

(*1*)(*i*) The sale of airplane parts; and

(*ii*) The services for those parts.

(*2*) The customer receives a refund of $5x if it does not require a specified level of service for the parts, which B expects it will pay to the customer. Also, for its AFS, B determines that the transaction price amount is $95x, determined as the $100x contract price minus the $5x refund that it expects to pay the customer. Finally, for its AFS, B allocates the $95x transaction price amount to the two performance obligations as follows: $40x to the sale of parts and $55x to the provision of services ($60x − $5x refund).

(B) *Analysis.* Pursuant to paragraph (d)(1) of this section, B's contract with the customer has two performance obligations, and each performance obligation yields a corresponding item of gross income that is accounted for separately. Pursuant to paragraph (d)(1) of this section, B is required to allocate the $95x transaction price amount to each corresponding item of gross income in accordance with the transaction price amount allocated to each respective performance obligation for AFS purposes. Accordingly, B initially allocates $40x to the sale of parts item and $55x to the provision of services item. However, because the transaction price amount was reduced by the anticipated refund of $5x, which relates specifically to provision of services item, B must increase the transaction price allocable to that item of gross income pursuant to the specific identification approach in paragraph (d)(3) of this section. Accordingly, the amount allocated to the item of gross income related to servicing the parts is $60x.

(iii) *Example 3: Reward points*—(A) *Facts.* On December 31, 2021, U, in the business of selling consumer electronics, sells a new TV for $1,000 and gives the customer 50 reward points. Each reward point is redeemable for a $1 discount on any future purchase of U's products. For its AFS, U identifies two performance obligations from the transaction:

(*1*)(*i*) The sale of the TV; and

(*ii*) The provision of rewards points.

(*2*) Also, for its AFS, U allocates $950 of transaction price amount to the sale of the TV and the remaining $50 of the transaction price amount to the reward points.

(B) *Analysis.* Pursuant to paragraph (d)(1) of this section, U's contract with the customer has two performance obligations, and each performance obligation yields a corresponding item of gross income that is accounted for separately. Pursuant to paragraph (d)(1) of this section, U is required to allocate the $1,000 transaction price amount to each corresponding item of gross income in accordance with the transaction price amount allocated to each respective performance obligation for AFS purposes. Accordingly, U allocates the transaction price amount as follows: $950 to the TV sale item and $50 to the reward points item. If U reports any portion of the $50 payment allocated to the reward points as AFS revenue for 2022, or later, the payment is an advance payment, as defined in § 1.451–8(a)(1), and may be accounted for under the deferral method if U satisfies the criteria in § 1.451–8(c).

(iv) *Example 4: Airline reward miles*—(A) *Facts.* On January 1, 2021, W, a passenger airline company, sells a customer a $700 airline ticket to fly roundtrip in 2021. As part of the purchase, the customer receives 7,000 points (air miles) from W to be redeemed for future air travel. For its AFS, W identifies two performance obligations in the contract:

(*1*)(*i*) The sale of the airline ticket; and

(*ii*) The provision of air miles.

(*2*) W also anticipates that it will issue a rebate to the customer for $10. Also, for its AFS, W determines that the transaction price amount is $690, determined as the $700 ticket price minus the anticipated $10 rebate. Finally, for its AFS, W allocates the $690 transaction price amount to the separate performance obligations as follows: $660 to the ticket ($670 − $10 rebate = $660) and $30 to the air miles.

(B) *Analysis.* Pursuant to paragraph (d)(1) of this section, W's contract with the customer has two performance obligations, and each performance obligation yields a corresponding item of gross income that is accounted for separately. Pursuant to paragraph (d)(1) of this section, W must allocate the $690 transaction price amount to each corresponding item of gross income in accordance with the transaction price amount allocated to each respective performance obligation for AFS purposes. Accordingly, W initially allocates $660 to the ticket sale item and $30 to the air miles item. However, because the transaction price amount was reduced by the anticipated rebate of $10x, which relates to the ticket sale item, W must increase the transaction price allocable to that item of gross income pursuant to paragraph (d)(3) of this section. Accordingly, the amount allocated to the item of gross income related to the ticket sale is $670. If W reports any portion of the $30 payment allocated to the air miles item as AFS revenue for 2022, or later, the payment is an advance payment, as defined in § 1.451–8(a)(1), and may be accounted for under the deferral method if W satisfies the criteria in § 1.451–8(c).

(v) *Example 5: Contract with significant financing component amounts*—(A) *Facts.* On January 1, 2021, C, a manufacturer and servicer of airline parts, enters into a contract with a customer to sell airline parts in December 2022, and to service those parts, as necessary, through 2024. The contract contains two alternative payment options: payment of $5,000 in December 2022 when the customer obtains control of the parts or payment of $4,000 when the contract is signed. The customer pays $4,000 when the contract is signed, which reflects an implicit interest rate of 11.8% and is C's incremental borrowing rate. C regularly sells the airline parts and the services separately. For its AFS, C identifies two performance obligations in the contract:

(*1*)(*i*) The sale of airplane parts; and

(*ii*) The services for those parts.

(*2*) Also, for its AFS, although the contract only requires the customer to pay $4,000, the transaction price is increased by $1,000 to $5,000 because the customer is deemed to provide financing to C under the standards C uses to prepare its AFS. The $1,000 increase is attributable to a significant financing component. Finally, for its AFS, C allocates the $5,000 transaction price amount to the separate performance obligations as follows: $3,750 to the sale of parts ($3,000 upfront payment plus $750 financing component) and $1,250 ($1,000 upfront payment plus $250 financing component) to the provision of services.

(B) *Analysis.* Pursuant to paragraph (d)(1) of this section, C's contract with the customer has two performance obligations, and each performance obligation yields a corresponding item of gross income that is accounted for separately. Pursuant to paragraph (d)(1) of this section, C must allocate the $5,000 transaction price amount to each corresponding item of gross income in accordance with the transaction price amount allocated to each respective performance obligation for AFS purposes. Accordingly, C initially allocates $3,750 to the sale of the parts item and $1,250 to the provision of services item. However, because the transaction price was increased by a significant financing component of $1,000, $750 of which was allocated to sale of the parts item and $250 of which was allocated to the provision of services item, pursuant to paragraph (d)(3) of this section, C must decrease the transaction price amount allocable to the sale of parts item from $3,750 to $3,000 and must decrease the transaction price allocable to the provision of services from $1,250 to $1,000.

(5) *Contracts accounted for in part under this section and in part under a special method of accounting*—(i) *In general.* If a taxpayer has a contract with a customer that includes one or more items of gross income that are subject to a special method of accounting and one or more items of gross income that are subject to this section (*special method/451 contract*), the transaction price allocation rule in paragraph (d)(1) of this section does not apply to determine the amount of each item of gross income that is subject to a special method of accounting. For purposes of this paragraph (d)(5)(i), a special method of accounting has the meaning set forth in paragraph (a)(13) of this section, except as otherwise provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter). For special method/451 contracts, paragraphs (d)(5)(ii) and (iii) of this section apply to determine the transaction price amount and the portion of such amount that is allocated to each item of gross income that is subject to this section.

(ii) *Transaction price adjustments.* If the transaction price amount for the special method/451 contract includes a reduction for amounts described in paragraph (b)(2)(i)(A)(*1*) or (*2*) of this section, or has been reduced because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS, the taxpayer must increase the transaction price amount by the amount of such reduction. If the transaction price amount for the special method/451 contract has been increased because a significant financing component is deemed to exist under the standards the taxpayer uses to prepare its AFS, the taxpayer must decrease the transaction price amount by the amount of such increase.

(iii) *Transaction price allocation.* After the taxpayer determines the adjusted transaction price amount for the special method/451 contract under paragraph (d)(5)(ii) of this section, the taxpayer first allocates such amount to the item(s) of gross income subject to a special method of accounting and then allocates the remainder (residual amount) to the item(s) of gross income that are subject to this section. If the contract contains more than one item of gross income that is subject to this section, the taxpayer allocates the residual amount to such items in proportion to the amounts allocated to the corresponding performance obligations for AFS purposes or as otherwise provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(iv) *Example*—(1) *Facts.* B is a calendar-year accrual method taxpayer with an AFS. In 2020, B enters into a $100x contract to design, build, operate and maintain a toll road. The contract meets the definition of a long-term contract under § 1.460–1(b)(1). B determines that the obligations to design and build the toll road are long-term contract activities under § 1.460–1(d)(1) and accounts for the gross income from these activities under section 460 and the regulations in this part under section 460 of the Code. In addition, B determines that the obligations to operate and maintain the toll road are non-long-term contract activities under § 1.460–1(d)(2) and that the gross income attributable to these activities is required to be accounted for under this section. B determines that of the $100x transaction price amount, $60x is properly allocable to the items of gross income that are subject to section 460

and the regulations in this part under section 460 of the Code. However, for its AFS, B allocates $55x of the transaction price amount to performance obligations that are long-term contract activities, $30x to the toll road operation performance obligation and $15x to the toll road maintenance performance obligation.

(2) *Analysis.* A method of accounting under section 460 is a special method of accounting that is within the scope of paragraph (d)(5) of this section. Pursuant to paragraph (d)(5) of this section, B first allocates $60x of the transaction price amount to the items of gross income that are subject to section 460 and the regulations in this part under section 460 of the Code and then allocates the residual amount of $40x to the two items of gross income that are required to be accounted for under this section in proportion to the amounts allocated to the corresponding performance obligations for AFS purposes. Accordingly, B allocates $26.7 × ($30x/$45x × $40x residual amount) to the toll road operations item of gross income and $13.3x ($15x/$45x × $40x residual amount) to the toll road maintenance item of gross income.

(e) *Cumulative rule for multi-year contracts*—(1) *In general.* In the case of an item of gross income from a multi-year contract, a taxpayer determines the AFS income inclusion amount for a taxable year by applying the steps in paragraph (e)(1)(i) or (ii) of this section. For this paragraph (e), the term *multi-year contract* means a contract that spans more than one taxable year.

(i) *Inventory items.* If the item of gross income is from the sale of an item of inventory and the taxpayer uses the cost offset method under paragraph (c) of this section, see paragraph (c) of this section.

(ii) *Other items of gross income.* For all other items of gross income, the taxpayer first compares the cumulative amount of the item of gross income that satisfies the all events test under § 1.451–1(a) through the last day of the taxable year, including the full amount of any advance payment received for such item in a prior taxable year, with the cumulative amount of the item of gross income that is treated as ''taken into account as AFS revenue'' under paragraph (b)(2) of this section through the last day of the taxable year and identifies the larger of the two amounts (or, if the two amounts are equal, the equal amount). The taxpayer then reduces such amount by all prior year inclusion amounts attributable to the item of gross income, if any, to determine the AFS income inclusion amount for the current taxable year. If, however, the taxpayer receives an advance payment, as defined in § 1.451–8(a)(1), that is allocable to an item of gross income from a multi-year contract, the taxpayer applies the applicable rules in § 1.451–8, rather than the rules in this paragraph (e)(1)(ii), to determine the amount of the item of gross income that is required to be included in gross income in the taxable year in which such advance payment is received, or, if applicable, in a short taxable year described in § 1.451–8(c)(6).

(2) *Examples.* The following examples illustrate the rules of paragraph (e)(1) of this section. Unless the facts specifically state otherwise, the taxpayer has an AFS, is on a calendar year for both Federal income tax purposes and AFS purposes and uses an accrual method of accounting for Federal income tax purposes. Further, the taxpayer does not use a special method of accounting.

(i) *Example 1: Provision of services included in AFS revenue with full inclusion method for advance payments*—(A) *Facts.* In 2021, D, an engineering services provider, enters into a nonseverable contract with a customer to provide engineering services through 2024 for a total of $100x. Under the contract, D receives payments of $25x in each calendar year of the contract. For its AFS, D reports $50x, $0, $20x, and $30x of AFS revenue from the contract for 2021, 2022, 2023, and 2024, respectively. D has an enforceable right to recover all amounts reported as AFS revenue through the end of a given contract year if the customer were to terminate the contract on the last day of such year. The $25x payment received in 2023 is an advance payment, as defined in § 1.451–8(a)(1), because $5x of the $25x payment is reported as AFS revenue for 2024. D uses the full inclusion method for advance payments.

(B) *Taxable year 2021.* Under the all events test in § 1.451–1(a), D is required to include $25x in gross income in 2021 as $25x is due under the terms of the contract and received by D during 2021. D does not have a fixed right to receive any portion of the remaining $75 as such amount is not due under the terms of the contract until future years and is also contingent on D's completion of the nonseverable services. Under the AFS income inclusion rule, because D has an enforceable right to recover all $50x reported as AFS revenue for 2021 if the customer were to terminate the contract on the last day of such year, all $50x is treated as ''taken into account as AFS revenue'' in 2021. Accordingly, D is required to include $50x in gross income in 2021.

(C) *Taxable year 2022.* Under the all events test in § 1.451–1(a), D is required to include $50x in gross income through the end of 2022 as $50x is due under the terms of the contract and received by D as of the end of 2022. D does not have a fixed right to receive any portion of the remaining $50 as such amount is not due under the terms of the contract until future years and is also contingent on D's completion of the nonseverable services. Under the AFS income inclusion rule, because D has an enforceable right to recover all $50x reported as AFS revenue through the end of 2022 if the customer were to terminate the contract on the last day of such year, all $50x is treated as ''taken into account as AFS revenue'' as of the last day of 2022. Under the cumulative rule in paragraph (e)(1)(ii) of this section, D compares the cumulative all events test amount of $50x with the cumulative AFS revenue amount of $50x and selects the larger of the two amounts (or if the two amounts are equal, the equal amount). From this equal amount of $50x, D subtracts the prior income inclusion amount of $50x. Accordingly, under the cumulative rule D is not required to include any amount in gross income in 2022.

(D) *Taxable year 2023.* The payment received during 2023 meets the definition of an advance payment under § 1.451–8(a)(1). Accordingly, pursuant to paragraph (e)(1)(ii) of this section, D must determine the amount that is required to be included in gross income in 2023 under the rules in § 1.451–8. Because D uses the full inclusion method under § 1.451–8(b), D is required to include the $25x that was due and received during 2023 in gross income in 2023.

(E) *Taxable year 2024.* Under the all events test in § 1.451–1(a), D is required to include $100x in gross income through the end of 2024 as $100x is due under the terms of the contract and received by D as of the end of 2024. Under the AFS income inclusion rule, because D has an enforceable right to recover all $100x reported as AFS revenue through the end of 2024 if the customer were to terminate the contract on the last day of such year, all $100x is treated as ''taken into account as AFS revenue'' through the last day of 2024. Under the cumulative rule in paragraph (e)(1)(ii) of this section, D compares the cumulative all events test amount of $100x with the cumulative AFS revenue amount of $100x and selects the larger of the two amounts (or, if the two amounts are equal, the equal amount). From this equal amount of $100x, D subtracts the prior income inclusion amount of $75x ($50x from 2021 plus

$0x from 2022 plus $25x from 2023). Accordingly, under the cumulative rule D is required to include $25 in gross income in 2024. The example in this paragraph (e)(2)(i)(E) is summarized in the following table:

TABLE 2 TO PARAGAPH (e)(2)(i)(E)

	2021	2022	2023	2024	Total
All Events/Full Inclusion Income	$25x	$25x	$25x	$25x	$100x
AFS Revenue	50x	0	20x	30x	100x
Cumulative rule income	50x	0	25x	25x	100x

(ii) *Example 2: Provision of services included in AFS revenue with deferral method for advance payments*—(A) *Facts.* The facts are the same as in paragraph (e)(2)(i) of this section (*Example 1*), except D elects to use the deferral method under § 1.451–8(c) to account for advance payments.

(B) *Taxable years 2021 and 2022.* The analysis for tax years 2021 and 2022 is the same as in paragraph (e)(2)(i) of this section (*Example 1*).

(C) *Taxable year 2023.* The payment received during 2023 meets the definition of an advance payment under § 1.451–8(a)(1). Accordingly, pursuant to paragraph (e)(1)(ii) of this section, D must determine the amount that is required to be included in gross income in 2023 under the rules in § 1.451–8. Because D uses the deferral method under § 1.451–8(b), D is required to include $20x of the $25x payment in gross income in 2023 as $20x of such payment was treated as ''taken into account as AFS revenue'' as of the end of 2023.

(D) *Taxable year 2024.* Under the all events test in § 1.451–1(a), D is required to include $100x in gross income through the end of 2024. Under the AFS income inclusion rule, because D has an enforceable right to recover all $100x reported as AFS revenue through the end of 2024 if the customer were to terminate the contract on the last day of such year, all $100x is treated as ''taken into account as AFS revenue'' through the last day of 2024. Under the cumulative rule in paragraph (e)(1)(ii) of this section, D compares the cumulative all events test amount of $100x, which includes the full amount of the $25 advance payment received in 2023, with the cumulative AFS revenue amount of $100x and selects the larger of the two amounts (or, if the two amounts are equal, the equal amount). From this equal amount of $100x, D subtracts the prior income inclusion amount of $70x ($50x from 2021 plus $0x from 2022 plus $20x from 2023). Accordingly, under the cumulative rule D is required to include $30x in gross income in 2024. The example in this paragraph (e)(2)(ii)(D) is summarized in the following table:

TABLE 3 TO PARAGRAPH (e)(2)(ii)(D)

	2021	2022	2023	2024	Total
All Events Test/Deferral Method Income	$25x	$25x	[1] $20x	$30x	$100x
AFS Revenue amount	50x	0	20x	30x	100x
Cumulative rule income	50x	0	20x	30x	100x

[1] $5x of the advance payment in 2023 is deferred and taken into income in 2024.

(f) *No change in the treatment of a transaction.* Except as provided in paragraph (j) of this section and § 1.1275–2(l), the AFS income inclusion rule does not change the treatment of a transaction or the character of an item for Federal income tax purposes. The following are examples of transactions where the treatment or character for AFS purposes does not change the treatment of the transaction or character of the item for Federal income tax purposes:

(1) A transaction treated as a lease, license, or similar transaction for Federal income tax purposes that is treated as a sale or financing for AFS purposes, and vice versa;

(2) A transaction or instrument that is not required to be marked-to-market for Federal income tax purposes but that is marked-to-market for AFS purposes;

(3) Asset sale and liquidation treatment under section 336(e) or 338(h)(10);

(4) A distribution of a corporation or the allocable share of partnership items or an income inclusion under section 951, 951A, or 1293(a) for Federal income tax purposes that is accounted for under the equity method for AFS purposes;

(5) A distribution of previously taxed earnings and profits of a foreign corporation; and

(6) A deposit, return of capital, or conduit payment that is not gross income for Federal income tax purposes that is treated as AFS revenue.

(g) *No change to exclusion provisions and the treatment of non-recognition transactions*—(1) *In general.* The AFS income inclusion rule accelerates the time at which the all events test under § 1.451–1(a) is treated as satisfied, and therefore does not change the applicability of any exclusion provision, or the treatment of non-recognition transactions, in the Code, the regulations in this part, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter). The following are examples of exclusion provisions and non-recognition transactions that are not affected by the AFS income inclusion rule:

(i) Any non-recognition transaction, within the meaning of section 7701(a)(45), including, for example, a liquidation described in sections 332 and 337, an exchange described in section 351, a distribution described in section 355, a reorganization described in section 368, a contribution described in section 721, or transactions described in sections 1031 through 1045; and

(ii) Items specifically excluded from income under sections 101 through 140.

(2) *Example: Non-recognition provisions not changed for Federal income tax purposes*—(i) *Facts.* Taxpayer (Distributing) is a calendar-year accrual method C corporation with an AFS. On December 31, 2021, Distributing:

(A)(*1*) Contributes assets to a wholly owned subsidiary (Controlled) in exchange for Controlled stock and $100x; and

(*2*) Distributes all the Controlled stock pro rata to its shareholders.

(B) The transaction qualifies as a reorganization under section 368(a)(1)(D) and a distribution to which section 355 applies (D reorganization). Distributing's realized gain on the transferred assets for book and tax purposes is $150x. On January 15, 2022, in pursuance of the plan of reorganization, Distributing distributes the $100x to its shareholders. Consequently, no gain to Distributing is recognized under section 361(b)(1)(A). On Distributing's 2021 AFS, Distributing recognizes revenue of $150x related to the D reorganization.

(ii) *Analysis.* For Federal income tax purposes, under section 361, Distributing does not recognize gain on Distributing's:

(A)(*1*) Contribution of assets to Controlled;

(*2*) Receipt of Controlled stock and cash; and

(*3*) Distribution of Controlled stock and cash to Distributing's shareholders.

(B) Pursuant to paragraph (g) of this section, the AFS income inclusion rule does not change the result of this paragraph (g)(2).

(h) *Additional AFS issues*—(1) *AFS covering groups of entities*—(i) *In general.* If a taxpayer's financial results are reported on the AFS for a group of entities (consolidated AFS), the taxpayer's AFS is the consolidated AFS. However, if the taxpayer's financial results are also reported on a separate AFS that is of equal or higher priority to the consolidated AFS under paragraph (a)(5) of this section, then the taxpayer's AFS is the separate AFS.

(ii) *Example.* Taxpayer B, a reseller of computers and electronics, is a calendar-year accrual method taxpayer. In 2021, B's financial results are included in P's consolidated financial statement, which is certified as being prepared in accordance with GAAP, and is a Form 10–K filed with the SEC. B also has a separate audited financial statement prepared in accordance with GAAP that is used for credit purposes. B must use its parent corporation's consolidated Form 10–K as its AFS.

(2) *Separately listed items.* If a consolidated AFS is treated as the taxpayer's AFS, the taxpayer must include the amount of any items listed separately in the consolidated AFS, including any notes or other supplementary data that is considered part of the consolidated AFS, in determining the amount of AFS revenue allocated to the taxpayer.

(3) *Non-separately listed items.* If a consolidated AFS does not separately list items for the taxpayer, the portion of the AFS revenue allocable to the taxpayer is determined by relying on the taxpayer's separate source documents that were used to create the consolidated AFS and includes amounts subsequently eliminated in the consolidated AFS. Whether a taxpayer that changes the source documents it uses for this purpose from one taxable year to another taxable year has changed its method of accounting is determined under the rules of section 446.

(4) *Computation of AFS revenue for the taxable year when the AFS covers mismatched reportable periods*—(i) *In general.* If a taxpayer's AFS is prepared on the basis of a financial accounting year that differs from the taxpayer's taxable year, the taxpayer must use one of the following permissible methods of accounting described in paragraph (h)(4)(i)(A) through (C) of this section to determine the AFS income inclusion amount for the taxable year:

(A) The taxpayer computes AFS revenue as if its financial reporting period is the same as its taxable year by conducting an interim closing of its books using the accounting principles it uses to prepare its AFS.

(B) The taxpayer computes AFS revenue by including a pro rata portion of AFS revenue for each financial accounting year that includes any part of the taxpayer's taxable year. If the taxpayer's AFS for part of the taxable year is not available by the due date of the return (with extension), the taxpayer must make a reasonable estimate of AFS revenue for the pro rata portion of the taxable year for which an AFS is not yet available. See § 1.451–1(a) for adjustments after actual amounts are determined.

(C) If a taxpayer's financial accounting year ends five or more months after the end of its taxable year, the taxpayer computes AFS revenue for the taxable year based on the AFS revenue reported on the AFS prepared for the financial accounting year ending within the taxpayer's taxable year. For this paragraph (h)(4)(i)(C), if a taxpayer uses a 52–53 week year for financial accounting or Federal income tax purposes, the last day of such year shall be deemed to occur on the last day of the calendar month ending closest to the end of such year.

(ii) *Examples.* The following examples illustrate the principles of paragraph (j)(4) of this section.

(A) *Example 1: Interim closing of the books.* A is a calendar year taxpayer. For its AFS, A's financial results are reported on a June 30 fiscal year. Using the method described in paragraph (h)(4)(i)(A) of this section, for the taxable year 2021, A uses the financial results reported on its June 30, 2021 AFS to determine whether an item of gross income is treated as ''taken into account as AFS revenue'' from January 1, 2021, through June 30, 2021, and uses financial data and accounting procedures from its June 30, 2022 AFS to prepare an interim closing of the books as of December 31, 2021 to determine whether an item of gross income is treated as ''taken into account as AFS revenue'' from July 1, 2021, through December 31, 2021.

(B) *Example 2: Pro rata approach.* A is a calendar year taxpayer. For its AFS, A's financial results are reported on a June 30 fiscal year. Using the method described in paragraph (h)(4)(i)(B) of this section, for the taxable year 2021, A computes AFS revenue for the 2021 tax year by taking the AFS revenue for the financial accounting year ending June 30, 2021 and multiplying it by a ratio equal to the number of days in the financial accounting year that are part of the 2021 tax year/365 and then adding to that amount the AFS revenue for the financial accounting year ending June 30, 2022 multiplied by the number of days in the financial accounting year that are part of the 2021 tax year/365.

(C) *Example 3: AFS revenue for the taxable year based on AFS ending in taxpayer's taxable year.* The same facts as in paragraph (h)(4)(ii)(B) of this section (*Example 2*) apply, except that A uses the method described in paragraph (h)(4)(i)(C) of this section. For the taxable year 2021, A uses the financial results reported on its June 30, 2021 AFS to determine whether an item of gross income is treated as ''taken into account as AFS revenue'' as of the end of its 2021 taxable year. Accordingly, any AFS revenue reported on the taxpayer's June 30, 2022 AFS is disregarded when determining whether an item of gross income is treated as ''taken into account as AFS revenue'' as of the end of the 2021 taxable year.

(i) [Reserved]

(j) *Special ordering rule for certain items of income for debt instruments*—(1) *In general.* If an item of income, or portion thereof, with respect to a debt instrument is described in paragraph (j)(2) of this section, the rules of this section apply before the rules in sections 1271 through 1275 and §§ 1.1271–1 through 1.1275–7 (OID rules). Therefore, an item of income, or portion thereof, described in paragraph (j)(2) of this section may not be included in income later than when that item, or portion thereof, is treated as *taken into account as AFS revenue,* as determined under paragraph (b)(2) of this section, regardless of whether the timing of income inclusion for that item is

normally determined using a special method of accounting. See also § 1.1275–2(l) for the treatment of the items described in paragraph (j)(2) of this section under the OID rules.

(2) *Specified fees.* Paragraph (j)(1) of this section applies to fees (specified fees) that are not spread over a period of time as discount or as an adjustment to the yield of a debt instrument (such as points) in the taxpayer's AFS and, but for paragraph (j) of this section and § 1.1275–2(l), would be treated as creating or increasing OID for Federal income tax purposes. For example, the following specified fees (specified credit card fees) are described in this paragraph (j)(2):

(i) A payment of additional interest or a similar charge provided with respect to amounts that are not paid when due on a credit card account (for example, credit card late fees);

(ii) Amounts charged under a credit card agreement when the cardholder uses the credit card to conduct a cash advance transaction (for example, credit card cash advance fees); and

(iii) Amounts a credit or debit card issuer is entitled to upon a purchase of goods or services by one of its cardholders (for example, interchange fees, which are sometimes labeled merchant discount in certain private label credit card transactions).

(3) *Example.* C, a credit card issuer, is a calendar-year accrual method taxpayer with a calendar year AFS. In 2021, a cardholder uses C's credit card to purchase $100 of merchandise from a merchant and the cardholder earns a reward of 1% of the purchase price of $100 ($1) as part of C's cardholder loyalty program. Upon purchase, C becomes entitled to an interchange fee equal to 2% of the purchase price of $100 ($2). For its AFS, C reports the $2 of interchange fees as AFS revenue for 2021. C's $2 of interchange fees is described in paragraph (j)(2)(iii) of this section. Under paragraph (j)(1) of this section, C must apply the rules in this section before applying the OID rules. See also § 1.1275–2(l). Therefore, C's $2 of interchange fees is included in gross income in 2021, the year it is treated as ''taken into account as AFS revenue.'' Under paragraph (b)(2)(i)(A) of this section, the $2 of interchange revenue is not reduced by the $1 reward. Even if C reports interchange fees net of rewards in its AFS for 2021 ($2 of interchange fee minus $1 reward liability), under paragraph (b)(2)(i)(A) of this section, C includes $2 of interchange revenue in gross income in 2021. See sections 162 and 461(h) for the treatment of the reward by C.

(k) *Treatment of adjustments to deferred revenue in an AFS*—(1) *In general.* If a taxpayer treats an item of gross income as deferred revenue in its AFS and writes down or adjusts that item, or portion thereof, to an equity account (for example, retained earnings) or otherwise writes down or adjusts that item of deferred revenue in a subsequent taxable year, AFS revenue for that subsequent taxable year is increased or decreased, as applicable by the amount of that item, or portion thereof, that is written down or adjusted. See § 1.451–8(c)(5).

(2) *Example*—(i) *Facts.* D, a remanufacturer of industrial equipment, is a calendar-year, accrual method taxpayer with a calendar year AFS. On January 1, 2021, D enters into a contract with a customer and receives a payment of $100x to remanufacture equipment in 2021 and 2022. The contract is not a long-term contract under section 460. For its AFS 2021, D performs remanufacturing services and reports $40x of the $100x payment as AFS revenue for 2021, and treats $60x of the $100x payment as deferred revenue.

(ii) *Facts for taxable year 2022.* On January 1, 2022, all of the stock of D is acquired by an unrelated third party and D adjusts deferred AFS revenue to $50x (the expected cost to provide the services) by charging $10x ($60x − $50× = $10x) to retained earnings. In addition, for 2022, D performs remanufacturing services and reports $50x of the deferred revenue as AFS revenue.

(iii) *Analysis for taxable year 2022.* Under paragraph (k)(1) of this section, D's $10x write down to deferred revenue for 2022 is treated as ''taken into account as AFS revenue'' for 2022.

(l) *Methods of accounting*—(1) *In general.* Except as otherwise provided in this section, a change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481 and the regulations in this part under sections 446 and 481 of the Code apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method. For example, the use of the AFS income inclusion rule under paragraph (b)(1) of this section under which the taxpayer determines the amount of gross income that is treated as ''taken into account as AFS revenue'' by making the adjustments provided in paragraph (b)(2)(i) of this section, the use of the AFS income inclusion rule under paragraph (b)(1) of this section under which the taxpayer determines the amount of the item of gross income that is treated as ''taken into account as AFS revenue'' by making only the adjustments provided in paragraph (b)(2)(ii) of this section (the alternative AFS revenue method), the AFS cost offset method under paragraph (c) of this section, the use of a method of determining AFS revenue under paragraph (i)(4) of this section, are methods of accounting under section 446 and the regulations in this part under section 446 of the Code. In addition, a change in the manner of recognizing revenue in an AFS that changes or could change the timing of the inclusion of income for Federal income tax purposes is generally a change in method of accounting under section 446 and the regulations in this part under section 446 of the Code. However, a change resulting from the restatement of AFS revenue may not always constitute a change in method of accounting under section 446 and the regulations in this part under section 446 of the Code. For example, a restatement of AFS revenue to correct an error described in § 1.446–1(e)(2)(ii)(b) does not constitute a change in method of accounting under section 446.

(2) *Transition rule for changes in method of accounting*—(i) *In general.* Except as provided in paragraph (l)(2)(ii) of this section, a taxpayer that makes a qualified change in method of accounting for the taxpayer's first taxable year beginning after December 31, 2017, is treated as making a change in method of accounting initiated by the taxpayer under section 481(a)(2). A taxpayer obtains the consent of the Commissioner to make the change in method of accounting by using the applicable administrative procedures that govern changes in method of accounting under section 446(e). See § 1.446–1(e)(3).

(ii) *Special rules for OID and specified credit card fees.* The rules of paragraph (l)(2)(i) of this section apply to a qualified change in method of accounting for the taxpayer's first taxable year beginning after December 31, 2018, if the change relates to a specified credit card fee as defined in paragraph (j)(2) of this section. For paragraph (l) of this section, the section 481(a) adjustment period for any adjustment under section 481(a) for a change in method of accounting described in the preceding sentence is six taxable years.

(iii) *Qualified change in method of accounting.* For paragraph (l)(2) of this section, a qualified change in method of accounting means any change in method of accounting that is required by section 13221 of Public Law 115–97, 131 Stat. 2054 (2017) (TCJA), or was prohibited under the Internal Revenue Code of 1986 prior to TCJA section 13221 and is now permitted as a result of TCJA section 13221.

(m) *Applicability date*—(1) *In general.* Except as provided in paragraph (m)(2) of this section, this section applies for taxable years beginning on or after January 1, 2021.

(2) *Delayed application with respect to certain fees.* Notwithstanding paragraph (m)(1) of this section, paragraph (j) of this section applies to specified fees (as defined in paragraph (j)(2) of this section) that are not specified credit card fees (as defined in paragraph (j)(2) of this section) for taxable years beginning on or after January 6, 2022.

(3) *Early application of this section*—(i) *In general.* Except as provided in paragraph (m)(3)(ii) of this section, taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), may apply both the rules in this section and, to the extent relevant, the rules in § 1.451–8, in their entirety and in a consistent manner, to a taxable year beginning after December 31, 2017, and before January 1, 2021, provided that, once applied to a taxable year, the rules in this section and, to the extent relevant, the rules in § 1.451–8, are applied in their entirety and in a consistent manner to all subsequent taxable years. See section 7508(b)(7) and § 1.451–8(h).

(ii) *Certain fees*—(A) *Specified credit card fees.* In the case of specified credit card fees, a taxpayer and its related parties, within the meaning of sections 267(b) and 707(b), may apply both the rules in this section and the rules in § 1.1275–2(l), in their entirety and in a consistent manner, to a taxable year beginning after December 31, 2018, and before January 1, 2021, provided that, once applied to a taxable year, the rules in this section and § 1.1275–2(l) that apply to specified credit card fees are applied in their entirety and in a consistent manner to all subsequent taxable years (other than the rules applicable to specified fees that are not specified credit card fees). See section 7508(b)(7) and § 1.1275–2(l)(2).

(B) *Specified fees.* Paragraphs (m)(3)(i) and (m)(3)(ii)(A) of this section do not apply to specified fees that are not specified credit card fees.

■ **Par. 6.** Section 1.451–8 is added to read as follows:

§ 1.451–8 Advance payments for goods, services, and certain other items.

(a) *Definitions.* Except as otherwise provided in this section, the following definitions apply for this section:

(1) *Advance payment*—(i) *In general.* An *advance payment* is a payment received by a taxpayer if:

(A) The full inclusion of the payment in the gross income of the taxpayer for the taxable year of receipt is a permissible method of accounting, without regard to this section;

(B) Any portion of the payment is taken into account as AFS revenue for a subsequent taxable year, or, if the taxpayer does not have an applicable financial statement any portion of the payment is earned by the taxpayer in a subsequent taxable year. To determine the amount of the payment that is treated as ''taken into account as AFS revenue,'' the taxpayer must adjust AFS revenue for any amounts described in § 1.451–3(b)(2)(i)(A), (C), and (D);

(C) The payment is for:

(*1*) Services;

(*2*) The sale of goods;

(*3*) The use, including by license or lease, of intellectual property, including copyrights, patents, trademarks, service marks, trade names, and similar intangible property rights, such as franchise rights and arena naming rights;

(*4*) The occupancy or use of property if the occupancy or use is ancillary to the provision of services, for example, advance payments for the use of rooms or other quarters in a hotel, booth space at a trade show, campsite space at a mobile home park, and recreational or banquet facilities, or other uses of property, so long as the use is ancillary to the provision of services to the property user;

(*5*) The sale, lease, or license of computer software;

(*6*) Guaranty or warranty contracts ancillary to an item or items described in paragraph (a)(1)(i)(C)(*1*), (*2*), (*3*), (*4*), or (*5*) of this section;

(*7*) Subscriptions in tangible or intangible format. Subscriptions for which an election under section 455 is in effect is not included in this paragraph (a)(1)(i)(C)(*7*);

(*8*) Memberships in an organization. Memberships for which an election under section 456 is in effect are not included in this paragraph (a)(1)(i)(C)(*8*);

(*9*) An eligible gift card sale;

(*10*) Any other payment identified by the Secretary of the Treasury or his delegate (Secretary) under section 451(c)(4)(A)(iii), including in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter); or

(*11*) Any combination of items described in paragraphs (a)(1)(i)(C)(*1*) through (*10*) of this section.

(ii) *Exclusions from the definition of advance payment.* An advance payment does not include:

(A) Rent, except for amounts paid for an item or items described in paragraph (a)(1)(i)(C)(*3*), (*4*), or (*5*) of this section;

(B) Insurance premiums, to the extent the inclusion of those premiums is governed by Subchapter L of the Internal Revenue Code;

(C) Payments with respect to financial instruments (for example, debt instruments, deposits, letters of credit, notional principal contracts, options, forward contracts, futures contracts, foreign currency contracts, credit card agreements (including rewards or loyalty points under such agreements), financial derivatives, or similar items), including purported prepayments of interest;

(D) Payments with respect to service warranty contracts for which the taxpayer uses the accounting method provided in Revenue Procedure 97–38, 1997–2 C.B. 479 (see § 601.601(d)(2) of this chapter);

(E) Payments with respect to warranty and guaranty contracts under which a third party is the primary obligor;

(F) Payments subject to section 871(a), 881, 1441, or 1442;

(G) Payments in property to which section 83 applies;

(H) Payments received in a taxable year earlier than the taxable year immediately preceding the taxable year of the contractual delivery date for a specified good (specified good exception) unless the taxpayer uses the method under paragraph (f) of this section;

(I) Any other payment identified by the Secretary under section 451(c)(4)(B)(vii), including in guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter); and

(J) Any combination of items described in paragraphs (a)(1)(ii)(A) through (I) of this section.

(2) *Advance payment income inclusion amount.* The term *advance payment income inclusion amount* means the amount of the advance payment that is required to be included in gross income for the taxable year under the applicable rules in this section.

(3) *Advance payment inventory inclusion amount.* The term *advance payment inventory inclusion amount* means the amount of the advance payment from the sale of an item of

inventory that, but for the cost of goods in progress offset, would be includable in gross income under paragraph (b), (c), or (d) of this section, as applicable, for the taxable year.

(4) *AFS revenue.* The term *AFS revenue* has the same meaning as provided in § 1.451–3(a)(4).

(5) *Applicable financial statement.* The term *applicable financial statement* (AFS) has the same meaning as provided in § 1.451–3(a)(5).

(6) *Contractual delivery date.* The term *contractual delivery date* means the month and year of delivery listed in the original written contract to the transaction entered into between the parties prior to initial receipt of any payments.

(7) *Cost of goods.* The term *cost of goods* means the costs that are properly capitalized and included in inventory under sections 471 and 263A or any other applicable provision of the Internal Revenue Code and that are allocable to an item of inventory for which an advance payment inventory inclusion amount is calculated. See paragraph (e)(6) of this section for specific rules for a taxpayer using the simplified methods under section 263A.

(8) *Cost of goods in progress offset.* The term *cost of goods in progress offset* has the meaning provided in paragraph (e)(4) of this section.

(9) *Cumulative cost of goods in progress offset.* The term *cumulative cost of goods in progress offset* means the cumulative cost of goods in progress offset amounts under paragraph (e) of this section for a specific item of inventory that have reduced an advance payment inventory inclusion amount attributable to such item of inventory in prior taxable years.

(10) *Eligible gift card sale.* The term *eligible gift card sale* means the sale of a gift card or gift certificate if:

(i) The taxpayer is primarily liable to the customer, or holder of the gift card, for the value of the card until redemption or expiration; and

(ii) The gift card is redeemable by the taxpayer or by any other entity that is legally obligated to the taxpayer to accept the gift card from a customer as payment for items listed in paragraphs (a)(1)(i)(C)(*1*) through (*11*) of this section.

(11) *Enforceable right.* The term *enforceable right* has the same meaning as provided in § 1.451–3(a)(9).

(12) *Performance obligation.* The term *performance obligation* has the same meaning as provided in § 1.451–3(a)(11).

(13) *Prior income inclusion amounts.* The term *prior income inclusion amounts* means the amount of an item of gross income that was included in the taxpayer's gross income under this section or § 1.451–3 in a prior taxable year.

(14) *Received.* An item of gross income is *received* by the taxpayer if it is actually or constructively received, or if it is due and payable to the taxpayer.

(15) *Specified good.* The term *specified good* means a good for which:

(i) During the taxable year a payment is received, the taxpayer does not have on hand, or available to it in such year through its normal source of supply, goods of a substantially similar kind and in a sufficient quantity to satisfy the contract to transfer the good to the customer; and

(ii) All the revenue from the sale of the good is recognized in the taxpayer's AFS in the year of delivery.

(16) *Transaction price.* The term *transaction price* has the same meaning as provided in § 1.451–3(a)(14).

(b) *In general.* Except as provided in paragraph (c) or (d) of this section, an accrual method taxpayer shall include an advance payment in gross income no later than in the taxable year in which the taxpayer receives the advance payment.

(c) *Deferral method for taxpayers with an applicable financial statement (AFS)*—(1) *In general.* An accrual method taxpayer with an AFS that receives an advance payment may elect the deferral method described in this paragraph (c) if the taxpayer can determine the extent to which the advance payment is taken into account as AFS revenue as of the end of the taxable year of receipt and, if applicable, a short taxable year described in paragraph (c)(6) of this section. Except as otherwise provided in this section, a taxpayer that uses the deferral method described in this paragraph (c) must:

(i) Include the advance payment, or any portion thereof, in gross income in the taxable year of receipt to the extent *taken into account as AFS revenue* as of the end of such taxable year, as determined under paragraph (c)(2) of this section; and

(ii) Include the remaining portion of such advance payment in gross income in the taxable year following the taxable year in which such payment is received (next succeeding year).

(2) *Adjustments to AFS revenue.* The amount of an advance payment that is treated as ''taken into account as AFS revenue'' as of the end of the taxable year of receipt under paragraph (c)(1)(i) of this section is determined by adjusting AFS revenue by amounts described in § 1.451–3(b)(2)(i)(A), (C), and (D), as applicable.

(3) *Examples.* The following examples demonstrate the rules in paragraphs (c)(1) and (2) of this section.

(i) *Example 1: Gift cards not eligible for deferral method.* E, a hair styling salon, receives advance payments for gift cards that may later be redeemed at the salon for hair styling services or hair care products at the face value of the gift card. The gift cards may not be redeemed for cash and have no expiration date. E does not track the sale date of the gift cards and includes advance payments for gift cards in AFS revenue when redeemed. Because E is unable to determine the extent to which advance payments are taken into account as AFS revenue for the taxable year of receipt, E cannot use the deferral method for these advance payments.

(ii) *Example 2: Gift cards eligible for deferral method.* The same facts as in paragraph (c)(3)(i) of this section (*Example 1*) apply, except that the gift cards have an expiration date 12 months from the date of sale, E does not accept expired gift cards, and E includes unredeemed gift cards in AFS revenue for the taxable year in which the cards expire. Because E tracks the sale date and the expiration date of the gift cards for its AFS, E can determine the extent to which advance payments are taken into account as AFS revenue for the taxable year of receipt. Therefore, E meets the requirement of paragraph (c)(1) of this section and may elect the deferral method for these advance payments.

(4) *Acceleration of advance payments*—(i) *In general.* A taxpayer that uses the deferral method described in this paragraph (c) must include in gross income for the taxable year, all advance payments not previously included in gross income:

(A) If, in that taxable year, the taxpayer either dies or ceases to exist in a transaction other than a transaction to which section 381(a) applies; or

(B) If, and to the extent that, in that taxable year, the taxpayer's obligation for the advance payments is satisfied or otherwise ends other than in:

(*1*) A transaction to which section 381(a) applies; or

(*2*) A section 351(a) transfer that is part of a section 351 transaction in which:

(*i*) Substantially all assets of the trade or business, including advance payments, are transferred;

(*ii*) The transferee adopts or uses the deferral method in the year of transfer; and

(*iii*) The transferee and the transferor are members of the same consolidated group, as defined in § 1.1502–1(h).

(ii) *Examples.* The following examples illustrate the rules in paragraph (c)(4) of this section. In each of the following examples, the taxpayer is a C corporation, uses an accrual method of accounting for Federal income tax purposes and files its returns on a calendar year basis. In addition, the taxpayer has an AFS and uses the deferral method in paragraph (c) of this section.

(A) *Example 1: Ceasing to exist.* A is in the business of selling and licensing off the shelf, fully customized, and semi-customized computer software and providing customer support. On July 1, 2021, A enters into a 2-year software maintenance contract and receives an advance payment. Under the contract, A will provide software updates if it develops an update within the contract period, as well as online and telephone customer support. A ceases to exist on December 1, 2021, in a transaction that does not involve a section 351(a) transfer described in paragraph (c)(4)(i)(B)(*2*) of this section and is not a transaction to which section 381(a) applies. For Federal income tax purposes, A must include the entire advance payment in gross income in its 2021 taxable year.

(B) *Example 2: Satisfaction of obligation*—(*1*) *Facts.* On November 1, 2021, J, a travel agent, receives payment from a customer for an airline flight that will take place in April 2022. J purchases and delivers the airline ticket to the customer on November 14, 2021. J retains the excess of the customer's payment over the cost of the airline ticket as its commission. The customer may cancel the flight and receive a refund from J only to the extent the airline itself provides refunds. In its AFS, J includes its commission in revenue for 2022.

(*2*) *Analysis.* The payment for commission income is an advance payment. Because J is not required to provide any services after the ticket is delivered to the customer on November 14, 2021, J satisfies its obligation to the customer for its commission when the airline ticket is delivered. Thus, for Federal income tax purposes, J must include the commission in gross income for 2021.

(5) *Financial statement adjustments*—(i) *In general.* If a taxpayer treats an advance payment as an item of deferred revenue in its AFS and writes-down or adjusts that item, or portion thereof, to an equity account such as retained earnings, or otherwise writes-down or adjusts that item of deferred revenue in a subsequent taxable year, AFS revenue for that subsequent taxable year is increased or decreased, as applicable, by the amount that is written down or adjusted. See § 1.451–3(k).

(ii) *Examples.* The following examples illustrate the rules in paragraph (c)(5) of this section. In each of the following examples, the taxpayer is a C corporation, uses an accrual method of accounting for Federal income tax purposes and files its returns on a calendar year basis. In addition, the taxpayer has an AFS and uses the deferral method in paragraph (c) of this section.

(A) *Example 1*—(*1*) *Facts.* On May 1, 2021, A received $100 as an advance payment for a 2-year contract to provide services. For financial accounting purposes, A recorded $100 as a deferred revenue liability in its AFS, expecting to report ¼ ($25) of the advance payment in AFS revenue for 2021, ½ ($50) for 2022, and ¼ ($25) for 2023. On August 31, 2021, C, an unrelated corporation that files its Federal income tax return on a calendar year basis and that is a member of a consolidated group, acquired all of the stock of A, and A joined C's consolidated group. A's short taxable year ended on August 31, 2021, and, as of that date, A had included ¼ ($25) of the advance payment in AFS revenue. On September 1, 2021, after the stock acquisition, and in accordance with purchase accounting rules, C wrote down A's deferred revenue liability to its fair value of $10 as of the date of the acquisition. The $10 is included in revenue on A's AFS in accordance with the method of accounting A uses for financial accounting purposes.

(*2*) *Analysis.* For Federal income tax purposes, A must take ¼ ($25) of the advance payment into income for its short taxable year ending August 31, 2021 and must include the remainder of the advance payment ($75) ($65 write down + $10 future financial statement revenue) in income for its next succeeding taxable year.

(B) *Example 2*—(*1*) *Facts.* On May 1, 2021, B received $100 as an advance payment for a contract to be performed in 2021, 2022, and 2023. On August 31, 2021, D, a corporation that is not a member of a consolidated group for Federal income tax purposes, acquired all of the stock of B. Before the stock acquisition, for 2021, B included $40 of the advance payment in AFS revenue, and $60 as a deferred revenue liability. On September 1, 2021, after the stock acquisition and in accordance with purchase accounting rules, B, at D's direction, wrote down its $60 deferred revenue liability to $10 (its fair value) as of the date of the acquisition. After the acquisition, B does not take into account as AFS revenue any of the $10 deferred revenue liability in its 2021 AFS. B does include $5 in revenue in 2022, and $5 in revenue in 2023.

(*2*) *Analysis.* For Federal income tax purposes, B must include $40 of the advance payment into income in 2021 and must include the remainder of the advance payment ($60) ($50 write down plus $10 future financial statement revenue) in income for the 2022 taxable year.

(6) *Short taxable year rule*—(i) *In general.* If the taxpayer's next succeeding taxable year is a short taxable year, other than a taxable year in which the taxpayer dies or ceases to exist in a transaction other than a transaction to which section 381(a) applies, and the short taxable year consists of 92 days or less, a taxpayer using the deferral method must include the portion of the advance payment not included in the taxable year of receipt in gross income for the short taxable year to the extent taken into account as AFS revenue as of the end of such taxable year, as determined under paragraph (c)(2) of this section. Any amount of the advance payment not included in gross income in the taxable year of receipt or the short taxable year, must be included in gross income for the taxable year immediately following the short taxable year.

(ii) *Example 1*—(A) *Facts.* A is a calendar year taxpayer and is in the business of selling and licensing off the shelf, fully customized, and semi-customized computer software and providing customer support. On July 1, 2021, A enters into a 2-year software maintenance contract and receives an advance payment of $240 under the contract. Under the contract, A will provide software updates if it develops an update within the contract period, as well as provides online and telephone customer support. A changes its taxable period to a fiscal year ending March 31. As a result, A has a short taxable year beginning January 1, 2022, and ending March 31, 2022. In its AFS, A includes 6/24 ($60) of the payment in revenue for the taxable year ending December 31, 2021 to account for the six-month period July 1 through December 31, 2021; 3/24 ($30) in revenue for the short taxable year ending March 31, 2022 to account for the three-month period January 1 through March 31, 2022; 12/24 ($120) in revenue for the taxable year ending March 31, 2023; and 3/24 ($30) in revenue for the taxable year ending March 31, 2024.

(B) *Analysis.* Because the taxable year ending March 31, 2021, is 92 days or less, A must include 6/24 ($60) of the payment in gross income for the taxable year ending December 31, 2021, 3/24 ($30) in gross income for the short

taxable year ending March 31, 2022, and 15/24 ($150), the remaining amount, in gross income for the taxable year ending March 31, 2023.

(iii) *Example 2*—(A) *Facts.* On May 1, 2021, B received $100 as an advance payment for a contract to be performed in 2021, 2022, and 2023. On October 31, 2021, C, an unrelated corporation that files its federal income tax return on a calendar year basis and that is a member of a consolidated group, acquired all the stock of B and B joined C's consolidated group. Before the stock acquisition, for 2021, B included $40 of the advance payment in AFS revenue, and $60 as a deferred revenue liability. On November 1, 2021, after the stock acquisition and in accordance with purchase accounting rules, C wrote down B's $60 deferred revenue liability to $10 (its fair value) as of the date of the acquisition. After the acquisition, B does not include in revenue any of the $10 deferred revenue liability in its 2021 AFS. B includes $5 in revenue in 2022, and $5 in revenue in 2023.

(B) *Analysis.* For Federal income tax purposes, B must take $40 of the advance payment into income in its short tax year ending October 31, 2021. B's subsequent tax year, the short tax year ending December 31, 2021, is a tax year that is 92 days or less. Therefore, under paragraph (c)(6)(i) of this section, B generally will include the portion of the advance payment not included in the taxable year of receipt in gross income for this short taxable year to the extent taken into account as AFS revenue. Although for AFS purposes, no amount is recognized in revenue for the short period beginning November 1, 2021 and ending on December 31, 2021, under paragraph (c)(5)(i) of this section, B must treat the amount of the write-down as AFS revenue in the taxable year in which the write-down occurs. Therefore, B must include $50 of the advance payment into income in the short tax year ending December 31, 2021 (equal to the $50 write down plus $0 recognized in B's AFS for the period beginning on November 1, 2021 and ending December 31, 2021), and must include the remainder of the advance payment ($10) in income for the 2022 taxable year.

(7) *Financial statement conformity requirement.* A taxpayer that uses an AFS to apply the rules under § 1.451–3 must use the same AFS and, if applicable, the same method of accounting under § 1.451–3(h)(4), to apply the deferral method in paragraph (c) of this section. Additionally, the AFS rules under § 1.451–3(h) also apply for purposes of this section.

(8) *Contracts with multiple performance obligations*—(i) *General rule.* If a taxpayer is using the deferral method under this paragraph (c) and the taxpayer's contract with a customer has more than one performance obligation, then any payments received under the contract are allocated to the corresponding item of gross income in the same manner as such payments are allocated to the performance obligations in the taxpayer's AFS.

(ii) *Example: Computer software subscription with multiple performance obligations*—(A) *Facts.* P is in the business of licensing off the shelf, fully customized, and semi-customized computer software and providing customer support. P uses an accrual method of accounting for Federal income tax purposes, files its returns on a calendar year basis, and has an AFS. On July 1, 2021, P receives an advance payment of $100 for a 2-year software subscription comprised of:

(*1*)(*i*) A 1-year ''software maintenance contract'' under which P will provide software updates within the contract period; and

(*ii*) A ''customer support agreement'' for online and telephone customer support.

(*2*) P reflects the software maintenance contract and the customer support agreement as two separate performance obligations in its AFS and allocates $80 of the payment to the software maintenance contract and $20 to the customer support agreement. P includes the $80 allocable to the software maintenance payment in AFS revenue as follows: ¼ ($20) in AFS revenue for 2021; ½ ($40) in AFS revenue for 2022; and the remaining ¼ ($20) in AFS revenue for 2023. Regarding the $20 allocable to the customer support payment, P includes ½ ($10) in AFS revenue for 2021, and the remaining ½ ($10) in AFS revenue for 2022 regardless of when P provides the customer support.

(B) *Analysis.* Since the software maintenance contract and the customer support agreement are two separate performance obligations, each yielding a separate item of gross income, paragraph (c)(8) of this section requires P to allocate the $100 payment to each item of gross income in the same manner as the payment is allocated to each performance obligation in P's AFS. For Federal income tax purposes, P must include $30 in gross income for 2021 ($20 allocable to the software maintenance contract and $10 allocable to the customer support agreement) and the remaining $70 is included in gross income for 2022.

(iii) *Contracts with advance payments that include items subject to a special method of accounting*—(A) *In general.* The portion of the payment allocable to the items of gross income described in paragraph (a)(1)(i)(C) of this section from a contract that includes one or more items of gross income subject to a special method of accounting and one or more items of gross income described in paragraph (a)(1)(i)(C) of this section must be determined based on objective criteria.

(B) *Allocation deemed to be based on objective criteria.* A taxpayer's allocation method is based on objective criteria if an allocation of the payment to each item of gross income is in proportion to the amounts determined in § 1.451–3(d)(5) or as otherwise provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(iv) *Example*—(A) *Facts.* B is a calendar-year accrual method taxpayer with an AFS. In 2020, B enters into a $100x contract to design, build, operate and maintain a toll road and receives an up-front payment of $100x. The contract meets the definition of a long-term contract under § 1.460–1(b)(1). B properly determines that the obligations to design and build the toll road are long-term contract activities under § 1.460–1(d)(1) and accounts for the gross income from these activities under section 460. In addition, B properly determines that the obligations to operate and maintain the toll road are non-long-term contract activities under § 1.460–1(d)(2) and that the gross income attributable to these activities is accounted for under section 451(b). B allocates $60x of the transaction price amount to the long-term contract activities and the remaining $40x to the non-long-term contract activity pursuant to § 1.451–3(d)(5). For AFS purposes, B allocates $55x of the transaction price amount to the performance obligations that are long-term contract activities and $45x to the non-long-term contract activities. B uses the deferral method of accounting.

(B) *Analysis.* For Federal income tax purposes, a method of accounting under section 460 is a special method of accounting under paragraph (c)(8)(iv) of this section. Pursuant to paragraph (c)(8)(iv) of this section, B must allocate the payment among the item(s) of gross income that are subject to section 460 and the item(s) of gross income described in paragraph (a)(1)(i)(C) of this section based on objective criteria. B's allocation is deemed to be based on objective criteria if it allocates the payment in proportion to the amounts determined under § 1.451–3(d)(5). That

is, $60x to the items of gross income subject to section 460 and $40x to the items of gross income described in paragraph (a)(1)(i)(C) of this section.

(9) *Special rule relating to eligible gift card sales.* For paragraphs (a)(1)(i)(B) and (c)(1) of this section, if an eligible gift card is redeemable by an entity described in paragraph (a)(10)(ii) of this section whose financial results are not included in the taxpayer's AFS, a payment will be treated as included by the taxpayer in its AFS revenue to the extent the gift card is redeemed by such entity during the taxable year.

(10) *Examples.* The following examples illustrate the rules of paragraph (c) of this section. In each of the following examples, the taxpayer uses an accrual method of accounting for Federal income tax purposes and files its returns on a calendar year basis. In addition, the taxpayer in each example has an AFS and uses the deferral method under paragraph (c) of this section. Further, the taxpayer does not use the advance payment cost offset method in paragraph (e) of this section.

(i) *Example 1: Services.* On November 1, 2021, A, in the business of giving dancing lessons, receives an advance payment of $480 for a 1-year contract commencing on that date and providing for up to 48 individual, 1-hour lessons. A provides eight lessons in 2021 and another 35 lessons in 2022. A takes into account ⅙ ($80) of the payment as AFS revenue for 2021, and ⅚ ($400) of the payment as AFS revenue for 2022. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, A must include ⅙ ($80) of the payment in gross income for 2021, and the remaining ⅚ ($400) of the payment in gross income for 2022.

(ii) *Example 2: Services.* The same facts as in paragraph (c)(10)(i) of this section (*Example 1*) apply. A receives an advance payment of $960 for a 3-year contract under which A provides up to 96 lessons. A provides eight lessons in 2021, 48 lessons in 2022, and 40 lessons in 2023. A takes into account 1/12 ($80) of the payment as AFS revenue for 2021, ½ ($480) of the payment as AFS revenue for 2022, and 5/12 ($400) of the payment as AFS revenue for 2023. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, A must include 1/12 ($80) of the payment in gross income for 2021, and the remaining 11/12 ($880) of the payment in gross income for 2022.

(iii) *Example 3: Services.* On June 1, 2021, B, a landscape architecture firm, receives an advance payment of $100 for landscape services that, under the terms of the agreement, must be provided by December 2022. On December 31, 2021, B estimates that ¾ of the work under the agreement has been completed. B takes into account ¾ ($75) of the payment as AFS revenue for 2021, and ¼ ($25) of the payment as AFS revenue for 2022. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, B must include ¾ ($75) of the payment in gross income for 2021, and the remaining ¼ ($25) of the payment in gross income for 2022, regardless of whether B completes the job in 2022.

(iv) *Example 4: Repair contracts.* On July 1, 2021, C, in the business of selling and repairing television sets, receives an advance payment of $100 for a 2-year contract under which C agrees to repair the customer's television set. C takes into account ¼ ($25) of the payment as AFS revenue for 2021, ½ ($50) of the payment as AFS revenue for 2022, and ¼ ($25) of the payment as AFS revenue for 2023. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, C must include ¼ ($25) of the payment in gross income for 2021 and the remaining ¾ ($75) of the payment in gross income for 2022.

(v) *Example 5: Online website design.* On July 20, 2021, D, a website designer, receives an online payment of $75 to design a website for Customer to be completed on February 1, 2023. D designs and completes Customer's website on February 1, 2023. D takes into account the $75 payment for Customer's website as AFS revenue for 2023. The $75 payment D receives for Customer's website is an advance payment. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, D must include the $75 payment for the website in gross income for 2022.

(vi) *Example 6: Online subscriptions.* G is in the business of compiling and providing business information for a particular industry in an online format accessible over the internet. On September 1, 2021, G receives an advance payment from a subscriber for 1 year of access to its online database, beginning on that date. G takes into account ⅓ of the payment as AFS revenue for 2021 and the remaining ⅔ as AFS revenue for 2022. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, G must include ⅓ of the payment in gross income for 2021 and the remaining ⅔ of the payment in gross income for 2022.

(vii) *Example 7: Membership fees.* On December 1, 2021, H, in the business of operating a chain of ''shopping club'' retail stores, receives advance payments for membership fees. The membership fees are not prepaid dues income subject to section 456. Upon payment of the fee, a member is allowed access for a 1-year period to H's stores, which offer discounted merchandise and services. H takes into account 1/12 of the payment as AFS revenue for 2021 and 11/12 of the payment as AFS revenue for 2022. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, H must include 1/12 of the payment in gross income for 2021, and the remaining 11/12 of the payment in gross income for 2022.

(viii) *Example 8: Cruise.* In 2021, I, in the business of operating tours, receives $20x payments from customers for a 10-day cruise that will take place in April 2022. Under the agreement, I charters a cruise ship, hires a crew and a tour guide, and arranges for entertainment and shore trips for the customers. I takes into account the $20x payments as AFS revenue for 2022. For Federal income tax purposes, I must include the $20x payments in gross income for 2022.

(ix) *Example 9: Broadcasting rights*—

(A) *Facts.* K, a professional sports franchise, is a member of a sports league that enters into contracts with television networks for the right to broadcast games to be played between teams in the league. The league entered into a 2-year broadcasting contract beginning October 1, 2021. K receives two payments of $100x on October 1 of each contract year, beginning in 2021. K estimates that for each contract year, 25% of the broadcasting rights are transferred by December 31 of the year of payment, and the remaining 75% of the broadcasting rights are transferred in the following year. K takes into account ¼ ($25x) of the first installment payment as AFS revenue for 2021 and ¾ ($75x) as AFS revenue for 2022. K takes into account ¼ ($25x) of the second payment as AFS revenue for 2022 and ¾ ($75x) as AFS revenue for 2023.

(B) *Analysis.* Each installment payment is an advance payment under paragraph (a)(1) of this section because a portion of each payment is included in AFS revenue for a subsequent taxable year and the payment relates to the use of intellectual property. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, K must include ¼ ($25x) of the first $100x installment payment in gross income for 2021 and ¾ ($75x) of the first installment payment in gross income for 2022. In addition, K must include ¼ ($25x) of the second $100x payment in gross income for 2022 and ¾ ($75x) of the second installment payment in gross income for 2023.

(x) *Example 10: Insurance claims administration*—(A) *Facts.* L is in the business of negotiating, placing, and servicing insurance coverage and administering claims for insurance companies. On December 1, 2021, L enters into a contract with an insurance company to provide property and casualty claims administration services for a 4-year period beginning January 1, 2022. Pursuant to the contract, the insurance company makes four equal annual payments to L; each payment relates to a year of service and is made during the month prior to the service year. Since L does not perform any services related to the payment prior to the service year, L does not meet the requirements of § 1.451–1(a) for the payment prior to the service year. For example, L is paid on December 1, 2021, for the service year beginning January 1, 2022. L takes into account the first payment as AFS revenue for 2022; the second payment as AFS revenue for 2023; the third payment as AFS revenue for 2024; and the fourth payment as AFS revenue for 2025.

(B) *Analysis.* Each annual payment is an advance payment under paragraph (a)(1) of this section because each payment is taken into account as AFS revenue for a subsequent taxable year and the payment relates to services. For Federal income tax purposes, under the deferral method in paragraph (c) of this section, L must include: The first payment in gross income for 2022; the second payment in gross income for 2023; the third payment in gross income for 2024; and the fourth payment in gross income for 2025.

(xi) *Example 11: internet services*—(A) *Facts.* M is a cable internet service provider that enters into contracts with subscribers to provide internet services for a monthly fee that is paid prior to the service month. For those subscribers who do not own a compatible modem, M provides a rental cable modem for an additional monthly charge, that is also paid prior to the service month. Pursuant to the contract, M will replace or repair the cable modem if it proves defective during the contract period. In December 2021, M receives $100x payments from subscribers for January 2022 internet service and cable modem use. M takes into account the entire $100x payments as AFS revenue for 2022.

(B) *Analysis.* For Federal income tax purposes, the $100x payments are advance payments. Because M uses the deferral method in paragraph (c) of this section, M must include $100x in gross income for 2022.

(xii) *Example 12: License agreement*—(A) *Facts.* On January 1, 2021, N receives a payment of $250 for entering into a 3-year license agreement for the use of N's trademark throughout the term of the agreement. The $250 payment reflects the first year (2021) license fee of $100 and the third year (2023) license fee of $150. The fee of $125 for the second year is payable on January 1, 2022. N takes into account $100 of the $250 upfront payment as AFS revenue for 2021, $125 as AFS revenue for 2022, and $150 of the $250 payment as AFS revenue for 2023.

(B) *Analysis.* For Federal income tax purposes, N received an advance payment of $150, the 2023 license fee, in 2021. Because N uses the deferral method in paragraph (c) of this section, N must defer the $150 payment and include it in gross income for 2022.

(xiii) *Example 13: Computer software subscription with one performance obligation*—(A) *Facts.* On July 1, 2021, O, in the business of licensing off the shelf, fully customized, and semi-customized computer software and providing customer support, receives a payment of $100 for a 2-year ''software subscription contract'' under which O will provide software updates if it develops an update within the contract period, as well as online and telephone customer support. O determines that its obligations under the software subscription contract are one performance obligation for financial accounting purposes, which yields one item of gross income. O takes into account ¼ ($25) of the payment as AFS revenue for 2021, ½ ($50) as AFS revenue for 2022, and the remaining ¼ ($25) as AFS revenue for 2023, regardless of when O provides updates or customer support.

(B) *Analysis.* For Federal income tax purposes, the $100 payment is an advance payment. Because O uses the deferral method in paragraph (c) of this section, O must include ¼ ($25) of the payment in gross income for 2021 and ¾ ($75) in gross income for 2022.

(xiv) *Example 14: Gift cards administered by another*—(A) *General facts.* Q is a corporation that operates department stores and is the common parent of a consolidated group (the Q group). U, V, and W are domestic corporations wholly owned by Q and members of the Q group. X is a foreign corporation wholly owned by Q and not a member of the Q group. U sells Brand A goods, V sells Brand B goods, X sells Brand C goods, and Z is an unrelated entity that sells Brand D goods. W administers a gift card program for the members of the Q group, X, and Z. Pursuant to the underlying agreements, W issues gift cards that are redeemable for goods or services offered by U, V, X, and Z. In addition, U, V, X, and Z sell gift cards to customers on behalf of W and remit amounts received to W. The agreements provide that W is primarily liable to the customer for the value of the gift card until redemption, and U, V, X, and Z are obligated to accept the gift card as payment for goods or services. When a customer purchases goods or services with a gift card at U, V, X, or Z, W reimburses that entity for the sales price of the goods or services purchased with the gift card, up to the total gift card value.

(B) *Facts for taxable year 2021.* In 2021, W sells gift cards with a total value of $900, and, at the end of 2021, the unredeemed balance of the gift cards is $100. In Q group's AFS, the group includes revenue from the sale of a gift card when the gift card is redeemed. Accordingly, of the $900 of gift cards sold in 2021, $800 were redeemed and taken into account as AFS revenue for 2021. W tracks sales and redemptions of gift cards electronically, determines the extent to which advance payments are taken into account as AFS revenue in Q group's AFS for the taxable year of receipt and meets the requirements of paragraph (c)(1) of this section.

(C) *Analysis.* The payments W receives from the sale of gift cards are advance payments because they are payments for eligible gift cards. Under the deferral method, W must include $800 of the payments from gift card sales in gross income in 2021 and the remaining $100 of the payments in gross income in 2022.

(xv) *Example 15: Gift cards of affiliates*—(A) *Facts.* R is a Subchapter S corporation that operates an affiliated restaurant corporation and manages other affiliated restaurants. These other restaurants are owned by other Subchapter S corporations, partnerships, and limited liability companies. R has a partnership interest or an equity interest in some of the restaurants. R administers a gift card program for participating restaurants. Each participating restaurant operates under a different trade name. Under the gift card program, R and each of the participating restaurants sell gift cards, which are issued with R's brand name and are redeemable at all participating restaurants. Participating restaurants sell the gift cards to customers and remit the proceeds to R, R is primarily liable to the customer for the value of the gift card until redemption, and the participating restaurants are obligated under an agreement with R to accept the gift card as payment for food, beverages, taxes, and gratuities. When a customer uses a gift card to make a purchase at a participating restaurant, R is obligated

to reimburse that restaurant for the amount of the purchase, up to the total gift card value. In R's AFS, R includes revenue from the sale of a gift card when a gift card is redeemed at a participating restaurant. R tracks sales and redemptions of gift cards electronically, is able to determine the extent to which advance payments are taken into account as AFS revenue for the taxable year of receipt and meet the requirements of paragraph (c)(1) of this section.

(B) *Analysis.* The payments R receives from the sale of gift cards are advance payments because they are payments for eligible gift card sales. For Federal income tax purposes, R is eligible to use the deferral method. Using the deferral method, in the taxable year of receipt, R must include the advance payment in income to the extent taken into account as AFS revenue and must include any remaining amount in income in the taxable year following the taxable year of receipt. Under paragraph (c)(9) of this section, R is treated as taking into account revenue from the sale of a gift card as AFS revenue when a gift card is redeemed at a participating restaurant.

(xvi) *Example 16: Gift cards for domestic and international hotels*—(A) *Facts.* S is a corporation that operates for the benefit of its franchisee members, who own and operate domestic and international individual member hotels. S administers a gift card program for its members by selling gift cards that may be redeemed for hotel rooms and food or beverages provided by any member hotel. The agreements underlying the gift card program provide that S is entitled to the proceeds from the sale of the gift cards, must reimburse the member hotel for the value of a gift card redeemed, and until redemption remains primarily liable to the customer for the value of the card. In S's AFS, S includes payments from the sale of a gift card when the card is redeemed. S tracks sales and redemptions of gift cards electronically, determines the extent to which advance payments are included in AFS revenue for the taxable year of receipt and meets the requirements of paragraph (c)(1) of this section.

(B) *Analysis.* The payments S receives from the sale of gift cards are advance payments because they are payments for eligible gift card sales. Thus, for Federal income tax purposes, S is eligible to use the deferral method. Under the deferral method, in the taxable year of receipt, S must include in income the advance payment to the extent taken into account as AFS revenue and must include any remaining amount in income in the taxable year following the taxable year of receipt.

(xvii) *Example 17: Discount voucher*—(A) *Facts.* On December 10, 2021, T, in the business of selling home appliances, sells a washing machine for $500. As part of the sale, T gives the customer a 40% discount voucher for any future purchases of T's goods up to $100 in the next 60 days. In its AFS, T treats the discount voucher as a separate performance obligation and allocates $30 of the $500 sales price to the discount voucher. T takes into account $12 of the amount allocated to the discount voucher as AFS revenue for 2021 and includes $18 of the discount voucher as AFS revenue for 2022.

(B) *Analysis.* For Federal income tax purposes, the $30 payment allocated to the discount voucher is an advance payment. Using the deferral method, T must include the $12 allocable to the discount voucher in gross income in 2021 and the remaining $18 allocated to the discount voucher in gross income in 2022.

(xviii) *Example 18: Rewards*—(A) *Facts.* On December 31, 2021, U, in the business of selling consumer electronics, sells a new TV for $1,000 and gives the customer 50 reward points. Each reward point is redeemable for a $1 discount on any future purchase of U's products. The reward points are not redeemable for cash and have a 2-year expiration date. U tracks the issue date, redemption date, and expiration date of each customer's reward points. Under the terms of U's reward program, when the customer redeems reward points they are deemed to use the earliest issued points first. In its AFS, U treats the rewards points as a separate performance obligation and allocates $50 of the $1,000 sales price to the rewards points. U is able to determine the extent to which a payment that is allocated to a reward point is taken into account in AFS revenue in the year of receipt. U does not take any of the amount allocated to the reward points into account as AFS revenue for 2021. U takes into account $25 of the reward points as AFS revenue for 2022 and $25 of the reward points as AFS revenue for 2023.

(B) *Analysis.* For Federal income tax purposes, U's treatment of the reward points as a separate performance obligation for AFS purposes yields an item of gross income that must be accounted for separately. The $50 payment allocated to the reward points item is an advance payment as the full inclusion of the payment in gross income in the year of receipt is a permissible method of accounting without regard to this section, a portion of the payment is taken into account as AFS revenue in a subsequent taxable year, and the reward points are redeemable for an item described in paragraph (a)(1)(i)(C) of this section (goods). Because the entire amount of the $50 advance payment is taken into account as AFS revenue in tax years following the year of receipt, U defers the payment and includes the $50 payment in gross income in 2022.

(xix) *Example 19: Credit card rewards*—(A) *Facts.* V issues credit cards and has a loyalty program under which cardholders earn reward points when they use V's credit card to make purchases. Each reward point is redeemable for $1 on any future purchases.

(B) *Analysis.* Payments under credit card agreements, including rewards for credit card purchases, are excluded from the definition of an advance payment under paragraph (a)(1)(ii)(C) of this section. Accordingly, V cannot use the deferral method for these amounts.

(xx) *Example 20: Airline reward miles*—(A) *Facts.* On January 1, 2021, W, a passenger airline company, sells a customer a $700 airline ticket to fly roundtrip in 2021. As part of the purchase, the customer receives 7,000 reward points (air miles) from W to be used for future air travel. The reward points are not redeemable for cash and have a 2-year expiration date. W tracks the issue date, redemption date, and expiration date of each customer's reward points. Under the terms of U's reward program, when the customer redeems reward points they are deemed to use the earliest issued points first. In its AFS, W treats the rewards points as a separate performance obligation and allocates $35 of the $700 ticket price to the reward points. W is able to determine the extent to which a payment that is allocated to a reward point is taken into account in AFS revenue in the year of receipt. W takes into account all $35 as AFS revenue in 2023 when the customer redeems the air miles.

(B) *Analysis.* For Federal income tax purposes, W's treatment of the reward points as a separate performance obligation for AFS purposes yields an item of gross income that must be accounted for separately. The $35 allocated to the reward points item is an advance payment as the full inclusion of the payment in gross income in the taxable year of receipt is a permissible method of accounting without regard to this section, a portion of the payment is taken into account as AFS revenue in a subsequent taxable year, and the reward points are redeemable for an item described in paragraph (a)(1)(i)(C) of

this section (services). Because the entire amount of the $35 advance payment is taken into account as AFS revenue in a tax year following the year of receipt, W defers the payment and includes the $35 payment in gross income in 2022.

(xxi) *Example 21: Chargebacks*—(A) *Facts.* In 2021, X, a manufacturer of pharmaceuticals, enters into a contract to sell 1,000 units to W, a wholesaler, for $10 per unit, totaling $10,000 (1,000 × $10 = $10,000). The contract also provides that X will credit W $4 per unit (chargeback) for sales W makes to qualifying customers. X delivers 600 units to W on December 31, 2021, and bills W $6,000 under the contract. X anticipates that all of W's sales will be to qualifying customers and subject to chargeback. For AFS purposes, X adjusts its 2021 AFS revenue of $6,000 by $2,400, the anticipated chargebacks, and reports $3,600 of AFS revenue.

(B) *Analysis.* For Federal income tax purposes, under paragraph (a)(1)(i)(B) of this section, for a payment to qualify as an advance payment, a portion of the payment must be taken into account as AFS revenue for a subsequent taxable year. Under paragraph (a)(1)(i)(B) of this section, the amount of the payment included in AFS revenue for a subsequent taxable year is $0, calculated as the $6,000 payment reduced by $6,000 that is treated as taken into account as AFS revenue for 2021 ($3,600 of AFS revenue for 2021 + $2,400 of anticipated chargebacks (section 461 liabilities) which had reduced AFS revenue for 2021). Because no portion of the $6,000 is taken into account as AFS revenue in a subsequent taxable year (that is, on an AFS after 2021), the $6,000 payment received in 2021 is not an advance payment under paragraph (a)(1)(i) of this section.

(d) *Deferral method for taxpayers without an AFS (non-AFS deferral method)*—(1) *In general.* Only a taxpayer described in paragraph (d)(2) of this section may elect to use the non-AFS deferral method of accounting described in paragraph (d)(4) of this section.

(2) *Taxpayers eligible to use the non-AFS deferral method.* A taxpayer is eligible to use the non-AFS deferral method if the taxpayer does not have an applicable financial statement and can determine the extent to which advance payments are earned in the taxable year of receipt and, if applicable, a short taxable year described in paragraph (d)(6) of this section. The determination whether the advance payment is earned in the taxable year of receipt, or a short taxable year described in paragraph (d)(6) of this section, if applicable, is determined on an item by item basis.

(3) *Deferral of advance payments based on when payment is earned*—(i) *In general.* Except as otherwise provided in this section, a taxpayer that uses the non-AFS deferral method of accounting includes the advance payment in gross income for the taxable year of receipt to the extent that it is earned in that taxable year and includes the remaining portion of the advance payment in gross income in the next succeeding taxable year.

(ii) *When payment is earned.* Under the non-AFS deferral method, a payment is earned when the all events test described in § 1.451–1(a) is met, without regard to when the amount is received, as defined under paragraph (a)(14) of this section, by the taxpayer. If a taxpayer is unable to determine the extent to which a payment is earned in the taxable year of receipt, or a short taxable year described in paragraph (d)(6) of this section, if applicable, the taxpayer may calculate the amount:

(A) On a statistical basis if adequate data are available to the taxpayer;

(B) On a straight-line basis over the term of the agreement if the taxpayer receives the advance payment under a fixed term agreement and if it is reasonable to anticipate at the end of the taxable year of receipt that the advance payment will be earned ratably over the term of the agreement; or

(C) Using any other method that may be provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(4) *Contracts with multiple items of gross income*—(i) *In general.* If a taxpayer receives a payment that is attributable to one or more items described in paragraph (a)(1)(i)(C) of this section, the taxpayer must determine the portion of the payment that is allocable to such item(s) by using an allocation method that is based on objective criteria.

(ii) *Objective criteria.* A taxpayer's allocation method for a payment described in paragraph (d)(4)(i) of this section is deemed to be based on objective criteria if the allocation method is based on payments the taxpayer receives for an item or items it regularly sells or provides separately or any method that may be provided in guidance published in the Internal Revenue Bulletin (see § 601.601(d) of this chapter).

(5) *Acceleration of advance payments.* The acceleration rules in paragraph (c)(4) of this section also apply to a taxpayer that uses the non-AFS deferral method under paragraph (d) of this section.

(6) *Short taxable year rule.* If the taxpayer's next succeeding taxable year is a short taxable year, other than a taxable year in which the taxpayer dies or ceases to exist in a transaction other than a transaction to which section 381(a) applies, and the short taxable year consists of 92 days or less, a taxpayer using the non-AFS deferral method must include the portion of the advance payment not included in the taxable year of receipt in gross income for the short taxable year to the extent earned in such taxable year. Any amount of the advance payment not included in gross income in the taxable year of receipt, or the short taxable year, must be included in gross income for the taxable year immediately following the short taxable year.

(7) *Eligible gift card sale.* For paragraphs (a)(1)(i)(B) and (d)(3) of this section, if an eligible gift card is redeemable by an entity described in paragraph (a)(10)(ii) of this section, including an entity whose financial results are not included in the taxpayer's financial statement, a payment will be treated as earned by the taxpayer to the extent the gift card is redeemed by such entity during the taxable year.

(8) *Examples.* The following examples illustrate the rules of paragraph (d) of this section. In the examples in this paragaph (d)(8), the taxpayer is a calendar year taxpayer that uses the non-AFS deferral method described in paragraph (d) of this section. None of the taxable years are short taxable years.

(i) *Example 1*—(A) *Facts.* A, a video arcade operator, receives payments in 2021 for tokens that customers use to play A's arcade games. The tokens cannot be redeemed for cash, are imprinted with the name of the arcade, but are not individually marked for identification. A completed a study on a statistical basis, based on adequate data available to A, and concluded that for payments received in 2021, 70% of tokens are expected to be used in 2021, 20% of tokens are expected to be used in 2022, and 10% of tokens are expected to never be used. Based on the study, under paragraph (d)(3)(ii)(A) of this section, A determines that 80% of the advance payments are earned for 2021 (70% for tokens expected to be used in 2021 plus 10% for tokens that are expected to never be used).

(B) *Analysis.* For Federal income tax purposes, A must include 80% of the advance payments in gross income for 2021 and 20% of the advance payments in gross income for 2022.

(ii) *Example 2*—(A) *Facts.* B is in the business of providing internet services. On September 1, 2021, B receives an

advance payment from a customer for a 2-year term for access to its internet services, beginning on that date. B does not have an AFS. B is unable to determine the extent to which the payment is earned in the taxable year of receipt. However, at the close of the 2021 taxable year, it is reasonable for B to anticipate that the advance payment will be earned ratably over the term of the agreement.

(B) *Analysis.* For Federal income tax purposes, pursuant to paragraph (d)(3)(ii)(B) of this section, B determines the extent to which the payment is earned in tax year 2021 on a straight-line basis over the term of the agreement and takes that amount into income in 2021. The remaining amount of the advance payment is taken into gross income in the 2022 taxable year.

(e) *Advance payment cost offset method*—(1) *In general.* This paragraph (e) provides an optional method of accounting for advance payments from the sale of inventory (advance payment cost offset method). A taxpayer that chooses to use the advance payment cost offset method for a trade or business must use the method of accounting for all advance payments received by that trade or business that meet the criteria in this paragraph (e). Additionally, a taxpayer that chooses to use this method for a trade or business and that has an AFS must also use the AFS cost offset method described in § 1.451–3(c). A taxpayer that uses the AFS cost offset method and the advance payment cost offset method to account for gross income, including advance payments, from the sale of an item of inventory, determines the corresponding AFS income inclusion amount, as defined in § 1.451–3(a)(1), and the advance payment income inclusion amount for a taxable year by following the rules in § 1.451–3(c)(2) rather than the rules under this paragraph (e). However, if all payments received for the sale of item of inventory meet the definition of an advance payment under paragraph (a)(1) of this section, a taxpayer that uses the advance payment cost offset method determines the corresponding advance payment income inclusion amount for a taxable year by:

(i) Following the rules in paragraph (e)(2) of this section, subject to the additional rules and limitations in paragraphs (e)(5) through (8) of this section, if the taxable year is a taxable year prior to the taxable year in which ownership of the item of inventory is transferred to the customer; and

(ii) Following the rules in paragraph (e)(3) of this section, subject to the additional rules and limitations in paragraphs (e)(5) through (8) of this section, if the taxable year is the taxable year in which ownership of the item of inventory is transferred to the customer.

(2) *Determining the advance payment income inclusion amount in a year prior to the year of sale.* To determine the advance payment income inclusion amount for a taxable year prior to the year in which ownership of the item of inventory is transferred to the customer, the taxpayer must first determine the advance payment inventory inclusion amount for such item for such year. This advance payment inventory inclusion amount is then reduced by the cost of goods in progress offset for the taxable year, as determined under paragraphs (e)(4), (5), and (8) of this section. This net amount is the advance payment income inclusion amount for the taxable year.

(3) *Determining the advance payment income inclusion amount in the year of sale.* The advance payment income inclusion amount for the taxable year in which ownership of the item of inventory is transferred to the customer is equal to the portion of any advance payment for such item that was not required to be included in gross income in a prior taxable year. This amount is not reduced by a cost of goods in progress offset under paragraph (e)(4) of this section. However, the taxpayer is entitled to recover the costs capitalized to the item of inventory as cost of goods sold in accordance with sections 471 and 263A or any other applicable provision of the Internal Revenue Code. See § 1.61–3.

(4) *Cost of goods in progress offset.* The cost of goods in progress offset for the taxable year is calculated as:

(i) The cost of goods allocable to the item of inventory through the last day of the taxable year; reduced by

(ii) The cumulative cost of goods in progress offset attributable to the item of inventory, if any.

(5) *Limitations to the cost of goods in progress offset.* The cost of goods in progress offset is determined separately for each item of inventory. The cost of goods in progress offset attributable to one item of inventory cannot reduce the advance payment inventory inclusion amount attributable to a different item of inventory. Further, the cost of goods in progress offset cannot reduce the advance payment inventory inclusion amount for the taxable year below zero.

(6) *Exception for gift cards.* The cost of goods in progress offset in this paragraph (e) does not apply to eligible gift card sales or payments received for customer reward points.

(7) *Acceleration of advance payments.* The acceleration rules in paragraph (c)(4) of this section also apply to a taxpayer that uses the advance payment cost offset method under this paragraph (e), regardless of whether the taxpayer uses such method in connection with the full inclusion method under paragraph (b) of this section, or the deferral method under paragraph (c) or (d) of this section. If an advance payment is subject to the acceleration rules, paragraph (e)(2) of this section does not apply to determine the advance payment income inclusion amount for the taxable year described in paragraph (c)(4) of this section. Further, a taxpayer that uses the advance payment cost offset method under this paragraph (e) applies paragraph (c)(4)(i)(B)(*2*)(*ii*) of this section by substituting ''same advance payment method as the transferor'' for ''deferral method.''

(8) *Inventory costs for the advance payment cost offset method*—(i) *Inventory costs not affected by cost of goods in progress offset.* The cost of goods comprising the cost of goods in progress offset does not reduce the costs that are capitalized to the items of inventory produced or items of inventory acquired for resale by the taxpayer. While the cost of goods in progress offset reduces the amount of the advance payment inventory inclusion amount, the cost of goods in progress offset does not affect how and when costs are capitalized to inventory under sections 471 and 263A or any other applicable provision of the Internal Revenue Code or when those capitalized costs will be recovered.

(ii) *Consistency between inventory methods and advance payment cost offset method.* The costs of goods comprising the cost of goods in progress offset must be determined by applying the taxpayer's methods of accounting for inventory for Federal income tax purposes. A taxpayer using the advance payment cost offset method must calculate its cost of goods in progress offset by reference to all costs that the taxpayer has permissibly capitalized and allocated to items of inventory under its methods of accounting for inventory for Federal income tax purposes, but including no more costs than what the taxpayer has permissibly capitalized and allocated to items of inventory.

(iii) *Allocation of ''additional section 263A costs'' for taxpayers using simplified methods.* If a taxpayer uses the simplified production method as defined under § 1.263A–2(b), the modified simplified production method as defined under § 1.263A–2(c), or the simplified resale method as defined under § 1.263A–3(d) to determine the amount of its ''additional section 263A

costs,'' as defined under § 1.263A–1(d)(3), to be included in ending inventory, then solely for computing the cost of goods in progress offset, the taxpayer must determine the portion of additional section 263A costs allocable to an item of inventory by multiplying its total additional section 263A costs accounted for under the simplified method for all items of inventory subject to the simplified method by the following ratio:

$$\frac{\text{Section 471 costs allocable to the specific item of inventory}}{\text{Total section 471 costs for all items of inventory subject to the simplified method}}$$

(9) *Additional procedural guidance.* The IRS may publish procedural guidance in the Internal Revenue Bulletin (see § 601.601(d) of this chapter) that provides alternative procedures for complying with the rules under this paragraph (e), including alternative methods of accounting for cost offsets.

(10) *Examples.* The following examples illustrate the rules of paragraph (e) of this section. In each of the following examples, the taxpayer is a C corporation, has an AFS, uses an accrual method of accounting for Federal income tax purposes, and uses a calendar year for Federal income tax purposes and AFS purposes. In addition, in each example, the taxpayer uses the deferral method and the advance payment cost offset method under paragraph (e) of this section. Lastly, the taxpayer does not produce unique items, as described in § 1.460–2(a)(1) and (b), or any item that normally requires more than 12 calendar months to complete, as determined under § 1.460–2(a)(2) and (c). Any production period that exceeds 12 calendar months is due to unforeseen production delays.

(i) *Example 1*—(A) *Facts.* In December 2021, A enters into a contract with Customer to manufacture and deliver a good in 2024, with a total contract price of $100x. The costs to produce the good are required to be capitalized under sections 471 and 263A as the good is inventory in the hands of A. On the same day, A receives a payment of $40x from the customer. For its AFS, A reports all of the revenue from the sale of the good as AFS revenue in the year of delivery, which is also the year in which ownership of the good transfers from A to Customer. As of December 31, 2021, A has not incurred any cost to manufacture the good. The payment of $40x does not satisfy the specified good exception in paragraph (a)(1)(ii)(H) of this section, and thus qualifies as an advance payment. During 2022, A does not receive any additional payments on the contract and incurs $10x of costs to manufacture the good. A properly capitalizes and allocates such costs to the manufactured good under sections 471 and 263A.

(B) *Analysis.* Because no portion of the $40x advance payment is taken into account as AFS revenue as of the end of 2021, A is not required to include any portion of the advance payment in gross income for 2021. For 2022, A's advance payment inventory inclusion amount is $40x, which is the amount of the advance payment that, but for the cost of goods in progress offset, would be includable in gross income in 2022 under the deferral method. Pursuant to paragraph (e)(2) of this section, A reduces such amount by the $10x cost of goods in progress offset, determined as the costs of goods through the end of 2022 ($0 costs incurred in 2021 plus 10x of costs incurred in 2022 = $10x). A is required to include this net amount of $30x in gross income in 2022. The remaining portion of the payment ($10x) is deferred and included in gross income in 2024, the taxable year in which ownership of the good is transferred to Customer.

(ii) *Example 2*—(A) *Facts.* The same facts as in paragraph (e)(10)(i) of this section (*Example 1*) apply. In addition, in 2023, A incurs costs of $20x to manufacture the good but does not receive any additional payments from Customer.

(B) *Analysis.* A includes $0 in gross income in 2023. A's cost of goods in progress offset for 2023 is $20x under paragraph (e)(4) of this section ($30x costs of goods through the last day of 2023 ($10x for 2022 plus $20x for 2023 = $30x) less $10x cumulative cost of goods in progress offset amounts taken in prior taxable years). However, because A's advance payment inventory inclusion amount for 2023 is $0, which is the amount of the advance payment that, but for the cost of goods in progress offset, would be includable in gross income in 2023 under the deferral method, paragraph (e)(5) of this section limits the cost offset to $0.

(iii) *Example 3*—(A) *Facts.* The same facts as in paragraph (e)(10)(i) of this section (*Example 1*) apply, except that in taxable year 2022, A incurs additional costs of $25x to manufacture the good, resulting in total costs of $35x to manufacture the good in taxable year 2022.

(B) *Analysis.* For 2022, A's advance payment inventory inclusion amount is $40x, which is the amount of the advance payment that, but for the cost of goods in progress offset, would be includable in gross income in 2022 under the deferral method. Pursuant to paragraph (e)(2) of this section A reduces such amount by the $35x cost of goods in progress offset, determined as the costs of goods through the end of 2022 ($0 costs incurred in 2021 plus $35x costs incurred in 2022 = $35x). A is required to include this net amount of $5x in gross income in 2022. The remaining portion of the payment ($35x) is deferred and included in gross income in 2024, the taxable year in which ownership of the good is transferred to the customer.

(iv) *Example 4*—(A) *Facts.* The same facts as in paragraph (e)(10)(iii) of this section (*Example 3*) apply, except that for tax year 2023, A receives an additional advance payment of $60x, and does not incur any costs to manufacture the good in 2023. In 2024, A incurs the remaining $10x to manufacture the good, and delivers the good to Customer.

(B) *Analysis for 2023.* Because no portion of the $60x advance payment is taken into account as AFS revenue as of the end of 2023, A is not required to include any portion of the $60x advance payment in gross income for 2023.

(C) *Analysis for 2024.* In 2024, the ownership of the good is transferred to Customer. Accordingly, pursuant to paragraph (e)(3) of this section, A is required to include $95x, the remaining portion of all advance payments that were not required to be included in gross income in a prior taxable year ($100x of total advance payments received less $5x that was required to be included in gross income in 2022). Although A does not reduce such amount by a cost offset, it reduces gross income in 2024 by recovering the $45x of costs capitalized to inventory as cost of goods sold ($35x costs incurred in 2022 plus $10x costs incurred in 2024) in accordance with sections 471 and 263A. Accordingly, A's gross income for 2024 is $50x.

(f) *Method treating payments qualifying for the specified goods exception as advance payments*—(1) *In general.* A taxpayer may choose to use the *specified good section 451(c)*

method to treat all payments that qualify for the specified goods exception in paragraph (a)(1)(ii)(H) of this section as advance payments that are eligible to be accounted for under this section. Under the specified good section 451(c) method, an advance payment is a payment received by the taxpayer in a taxable year earlier than the taxable year immediately preceding the taxable year of the contractual delivery date for a specified good. A taxpayer that chooses to use the specified good section 451(c) method for a trade or business must apply this method of accounting for all advance payments that meet the criteria described in paragraph (a)(1)(ii)(H) of this section.

(2) *Example: Method for the specified goods exception to not apply.* On May 1, 2021, A, a corporation that files its Federal income tax return on the calendar year basis, receives a prepayment for $100x, for a contract to manufacture and deliver a good in September of 2023. All of the revenue from the sale of the good is recognized in A's AFS in the year of delivery. During 2021, A does not have on hand, or available to it in such year through its normal source of supply, goods of a substantially similar kind and in a sufficient quantity to satisfy the contract to transfer the good to the customer. The payment of $100x satisfies the specified good exception. A uses the method under paragraph (f) of this section to treat all payments that otherwise satisfy the specified good exception as advance payments under this section. For Federal income tax purposes, A must treat the payment of $100x as an advance payment and account for such payment under the full inclusion method in paragraph (b) of this section, or the deferral method in paragraph (c) of this section, as applicable. Additionally, the taxpayer may choose to apply the advance payment cost offset method in paragraph (e) of this section.

(g) *Election and methods of accounting*—(1) *Procedures for making election under section 451(c)(1)(B).* An election to apply the deferral method under section 451(c)(1)(B) is made by the taxpayer filing a Federal income tax return reflecting the deferral method in computing its taxable income. If the application of the deferral method under section 451(c)(1)(B) results in the taxpayer changing its method of accounting, the election may only be made by the taxpayer complying with the method change procedures under this paragraph (g).

(2) *Methods of accounting.* A change to comply with this section is a change in method of accounting to which the provisions of sections 446 and 481 and the regulations in this part under sections 446 and 481 of the Code apply. A taxpayer seeking to change to a method of accounting permitted in this section must secure the consent of the Commissioner in accordance with § 1.446–1(e) and follow the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's consent to change its accounting method. For example, use of the full inclusion method under paragraph (b) of this section, the AFS deferral method under paragraph (c) of this section, the non-AFS deferral method under paragraph (d) of this section, the advance payment cost offset method under paragraph (e) of this section, and the specified good section 451(c) method under paragraph (f) of this section are adoptions of, or changes in, a method of accounting under section 446 of the Internal Revenue Code or the regulations in this part under section 446 of the Code. In addition, a change in the manner of recognizing advance payments in revenue in an AFS that changes or could change the timing of the inclusion of income for Federal income tax purposes is a change in method of accounting under section 446 and the regulations in this part under section 446 of the Code.

(h) *Applicability date*—(1) *In general.* The rules of this section apply to taxable years beginning on or after January 1, 2021.

(2) *Early application.* Taxpayers and their related parties, within the meaning of sections 267(b) and 707(b), may apply both the rules in this section and, to the extent relevant, the rules in § 1.451–3, in their entirety and in a consistent manner, to a taxable year beginning after December 31, 2017, and before January 1, 2021, provided that, once applied to a taxable year, the rules in this section and, to the extent relevant, the rules in § 1.451–3, are applied in their entirety and in a consistent manner to all subsequent taxable years. See section 7805(b)(7) and § 1.451–3(m).

■ **Par. 7.** Section 1.1271–0 is amended by adding entries for § 1.1275–2(l) and (l)(1) and (2) to read as follows:

§ 1.1271–0 Original issue discount; effective date; table of contents.

* * * * *

§ 1.1275–2 Special rules relating to debt instruments.

* * * * *

(l) *OID rule for income item subject to section 451(b).*

(1) In general.

(2) Applicability dates.

* * * * *

■ **Par. 8.** Section 1.1275–2 is amended by adding paragraph (l) to read as follows:

§ 1.1275–2 Special rules relating to debt instruments.

* * * * *

(l) *OID rule for income item subject to section 451(b)*—(1) *In general.* Notwithstanding any other rule in sections 1271 through 1275 and §§ 1.1271–1 through 1.1275–7, if, and to the extent, a taxpayer's item of income with respect to a debt instrument is subject to the timing rules in § 1.451–3 because the item of income is a specified fee described in § 1.451–3(j) (such as credit card late fees, credit card cash advance fees, or interchange fees), then the taxpayer does not take the item into account to determine whether the debt instrument has any OID. As a result, the taxpayer does not treat the item as creating or increasing any OID on the debt instrument.

(2) *Applicability dates*—(i) *In general.* Except as provided in paragraph (l)(2)(ii) and (iii) of this section, for a specified credit card fee as defined in § 1.451–3(j)(2), paragraph (l)(1) of this section applies for taxable years beginning on or after January 1, 2021, and, for a specified fee that is not a specified credit card fee, paragraph (l)(1) of this section applies for taxable years beginning on or after January 6, 2022.

(ii) *Early application.* For a taxable year beginning after December 31, 2018, and before January 1, 2021, a taxpayer and its related parties, within the meaning of sections 267(b) and 707(b), may choose to apply both paragraph (l)(1) of this section and the rules in § 1.451–3, in their entirety and in a consistent manner, to all specified credit card fees subject to § 1.451–3, provided that once applied to a taxable year the rules in paragraph (l)(1) of this section and the rules in § 1.451–3 that apply to specified credit card fees, are applied in their entirety and in a consistent manner for all subsequent taxable years. See section 7508(b)(7).

(iii) *Applicability date for accounting method changes.* Paragraph (l)(1) of this section will not apply in applying section 13221(e) of Public Law 115–97, 131 Stat. 2054 (2017), to determine the section 481(a) adjustment period for any adjustment under section 481(a) for a qualified change in method of accounting required under section 451(b) and § 1.451–3 for a specified credit card fee.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

Approved: December 14, 2020.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2020–28653 Filed 12–30–20; 4:15 pm]

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Part V

Environmental Protection Agency

40 CFR Part 751

2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Final Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2019–0080; FRL–10018–90]

RIN 2070–AK59

2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a rule under the Toxic Substances Control Act (TSCA) to address its obligations under TSCA for 2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP) (CASRN 732–26–3), which EPA has determined meets the requirements for expedited action under TSCA. This final rule prohibits the distribution in commerce of 2,4,6-TTBP and products containing 2,4,6-TTBP at concentrations above 0.3% in any container with a volume of less than 35 gallons for any use, in order to effectively prevent the use of 2,4,6-TTBP as an antioxidant in fuel additives or fuel injector cleaners by consumers and small commercial operations (*e.g.,* automotive repair shops, marinas). This final rule also prohibits the processing and distribution in commerce of 2,4,6-TTBP, and products containing 2,4,6-TTBP at concentrations above 0.3 percent by weight, for use as an oil or lubricant additive, regardless of container size. These requirements will reduce the exposure to humans and the environment, by reducing the potential for consumer exposures to 2,4,6-TTBP and potential occupational exposure in certain industries where workers are unprotected, as well as potential releases to the environment from consumer and small commercial operations use.

DATES: This final rule is effective February 5, 2021. For purposes of judicial review and 40 CFR 23.5, this rule shall be promulgated at 1 p.m. (e.s.t.) on January 21, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0080, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

Please note that due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Peter Gimlin, Existing Chemicals Risk Management Division, Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0515; email address: *gimlin.peter@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture (including import), process, distribute in commerce, or use products containing this chemical, 2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP), especially fuel additives, fuel injector cleaners and oil and lubricants. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Petroleum Refineries (NAICS Code: 324110);
- Petrochemical Manufacturing (NAICS Code: 325110);
- All Other Basic Organic Chemical Manufacturing (NAICS Code: 325199);
- Polish and Other Sanitation Good Manufacturing (NAICS Code: 325612);
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS Code: 325998);
- Lawn and Garden Tractor and Home Lawn and Garden Equipment Manufacturing (NAICS Code: 333112);
- Aircraft Manufacturing (NAICS Code: 336411);
- Motor Vehicle Supplies and New Parts Merchant Wholesalers (NAICS Code: 423120);
- Petroleum and Petroleum Products Merchant Wholesalers (except Bulk Stations and Terminals) (NAICS Code: 424720);
- Farm Supplies Merchant Wholesalers (NAICS Code: 424910); Boat Dealers (NAICS Code: 441222);
- Automotive Parts and Accessories Stores (NAICS Code: 441310);
- Gasoline Stations with Convenience Stores (NAICS Code: 447110);
- Other Gasoline Stations (NAICS Code: 447190);
- General Merchandise Stores (NAICS Code: 452);
- Aircraft Maintenance and Repair Services (NAICS Code: 488190);
- Marinas (NAICS Code: 713930); and
- General Automotive Repair (NAICS Code: 811111).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT**.

B. What is the Agency's authority for taking this action?

Section 6(h) of TSCA, 15 U.S.C. 2601 *et seq.,* directs EPA to issue a final rule under TSCA section 6(a) on certain persistent, bioaccumulative, and toxic (PBT) chemical substances. More specifically, EPA must take action on those chemical substances identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1) that, among other factors, EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the TSCA Work Plan Chemicals: Methods Document (Ref. 2). 2,4,6-TTBP is one such chemical substance. TSCA section 6(h) directs EPA to take expedited action on these chemical substances, regardless of whether that substance is primarily found as an impurity or byproduct, to reduce exposure to the substance, including to exposure to the substance as an impurity or byproduct, to the extent practicable. This final rule is final agency action for purposes of judicial review under TSCA section 19(a).

C. What action is the Agency taking?

EPA published a proposed rule on July 29, 2019 to address the five PBT

chemicals EPA identified pursuant to TSCA section 6(h) (84 FR 36728; FRL–9995–76). After publication of the proposed rule, EPA determined to address the five PBT chemicals in separate final actions. This final rule prohibits the distribution in commerce of 2,4,6-TTBP and products containing 2,4,6-TTBP at concentrations above 0.3% (*i.e.,* present as a functional additive instead of as impurity) in any container with a volume of less than 35 gallons for any use, beginning on January 6, 2026, in order to effectively prevent the use of 2,4,6-TTBP as a fuel additive or fuel injector cleaner by consumers and small commercial operations (*e.g.,* automotive repair shops, marinas). This final rule also prohibits the processing and distribution in commerce of 2,4,6-TTBP, and products containing 2,4,6-TTBP at concentrations above 0.3%, for use as an oil or lubricant additive, regardless of container size, beginning on January 6, 2026. Beginning on January 6, 2026, affected persons are required to maintain, for three years from the date the record is generated, ordinary business records related to compliance with these restrictions. For this specific chemical, ordinary business records that include the name of the purchaser and the sizes of the containers supplied would be sufficient. This provision is not intended to require subject companies to retain records in addition to those specified herein, except as needed pursuant to normal business operations.

D. Why is the Agency taking this action?

EPA is issuing this final rule to fulfill EPA's obligations under TSCA section 6(h) to take timely regulatory action on PBT chemicals—specifically, ''to address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and to reduce exposure to the substance to the extent practicable.'' Consistent with that requirement, the Agency is finalizing this rule to reduce exposures to 2,4,6-TTBP to the extent practicable.

E. What are the estimated incremental impacts of this action?

EPA has evaluated the potential costs of these final restrictions and prohibitions and the associated reporting and recordkeeping requirements. The ''Economic Analysis for Final Regulation of 2,4,6-Tris(tert-butyl)phenol (2,4,6-TTBP) Under TSCA Section 6(h)'' (Economic Analysis) (Ref. 3) is available in the docket and is briefly summarized here.

- *Benefits.* EPA was not able to quantify the benefits of reducing the potential for human and environmental exposures to 2,4,6-TTBP. As discussed in more detail in Unit II.A., EPA did not perform risk evaluations for 2,4,6-TTBP, nor did EPA develop quantitative risk estimates. Therefore, the Economic Analysis (Ref. 3) qualitatively discusses the benefits of reducing the exposure under the final action and the primary alternative regulatory action for 2,4,6-TTBP.
- *Costs.* Total quantified annualized social costs for this final rule are approximately $5.6 million at a 3% discount rate and $4.9 million at a 7% discount rate. Potential unquantified costs are those associated with testing, reformulation, importation of articles, foregone profits, and indirect costs. The limited data available for those costs prevents EPA from constructing a quantitative assessment.
- *Small entity impacts.* This rule will impact approximately three small businesses of which none are expected to incur cost impacts of 1% or greater of their revenue.
- *Environmental Justice.* This rule will increase the level of protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population or children.
- *Effects on State, local, and Tribal governments.* This rule does not have any significant or unique effects on small governments, or federalism or tribal implications.

F. Children's Environmental Health

Executive Order 13045 applies if the regulatory action is economically significant and concerns an environmental health risk or safety risk that may disproportionately affect children. This final rule is not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866. While the action is not subject to Executive Order 13045, the Agency's Policy on Evaluating Health Risks to Children (*https://www.epa.gov/children/epas-policy-evaluating-risk-children)* is to consider the risks to infants and children consistently and explicitly during its decision making process. This regulation will reduce the exposure that could occur from activities now prohibited under this final rule to 2,4,6-TTBP for the general population and for potentially exposed or susceptible subpopulations such as children. More information can be found in the Exposure and Use Assessment (Ref. 4).

II. Background

A. History of This Rulemaking: TSCA Sections 6(h) and the TSCA Work Plan

TSCA section 6(h) requires EPA to take expedited regulatory action under TSCA section 6(a) for certain PBT chemicals identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1). As required by the statute, EPA issued a proposed rule to address five persistent, bioaccumulative, and toxic chemicals identified pursuant to TSCA section 6(h) (84 FR 36728, July 29, 2019). The statute required that this be followed by promulgation of a final rule no later than 18 months after the proposal. While EPA proposed regulatory actions on each chemical substance in one proposal, in response to public comments requesting these five actions be separated, EPA is finalizing five separate actions to individually address each of the PBT chemicals. EPA intends for the five separate final rules to publish in the same issue of the **Federal Register**. More discussion on these comments is in the response to comments document (Ref. 5). The details of the proposal for 2,4,6-TTBP are described in more detail in Unit II.D.

Under TSCA section 6(h)(1)(A), chemical substances subject to expedited action are those that:

- EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the 2012 TSCA Work Plan Chemicals: Methods Document or a successor scoring system;
- Are not a metal or a metal compound; and
- Are chemical substances for which EPA has not completed a TSCA Work Plan Problem Formulation, initiated a review under TSCA section 5, or entered into a consent agreement under TSCA section 4, prior to June 22, 2016, the date that TSCA was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. 114–182, 130 Stat. 448).

In addition, in order for a chemical substance to be subject to expedited action, TSCA section 6(h)(1)(B) states that EPA must find that exposure to the chemical substance under the conditions of use is likely to the general population or to a potentially exposed or susceptible subpopulation identified by the Administrator (such as infants, children, pregnant women, workers, or the elderly), or to the environment on

the basis of an exposure and use assessment conducted by the Administrator. TSCA section 6(h)(2) further provides that the Administrator shall not be required to conduct risk evaluations on chemical substances that are subject to TSCA section 6(h)(1).

Based on the criteria set forth in TSCA section 6(h), EPA proposed to determine that five chemical substances meet the TSCA section 6(h)(1)(A) criteria for expedited action, and 2,4,6-TTBP is one of these five chemical substances. In addition, and in accordance with the statutory requirements to demonstrate that exposure to the chemical substance is likely under the conditions of use, EPA conducted an Exposure and Use Assessment for 2,4,6-TTBP. As described in the proposed rule, EPA conducted a review of available literature with respect to 2,4,6-TTBP to identify, screen, extract, and evaluate reasonably available information on use and exposures. This information is in the document entitled ''Exposure and Use Assessment of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 4). Based on this review, which was subject to peer review and public comment, EPA finds that exposure to 2,4,6-TTBP is likely, based on information detailed in the Exposure and Use Assessment.

B. Other Provisions of TSCA Section 6

1. EPA's approach for implementing TSCA section 6(h)(4).

TSCA section 6(h)(4) requires EPA to issue a TSCA section 6(a) rule to ''address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and reduce exposure to the substance to the extent practicable.'' EPA reads this text to require action on the chemical, not specific conditions of use.

The approach EPA takes is consistent with the language of TSCA section 6(h)(4) and its distinct differences from other provisions of TSCA section 6 for chemicals that are the subject of required risk evaluations. First, the term ''condition of use'' is only used in TSCA section 6(h) in the context of the TSCA section 6(h)(1)(B) finding relating to likely exposures under ''conditions of use'' to ''the general population or to a potentially exposed or susceptible subpopulation . . . or the environment.'' In contrast to the risk evaluation process under TSCA section 6(b), this TSCA section 6(h)(1)(B) threshold criterion is triggered only through an Exposure and Use Assessment regarding the likelihood of exposure and does not require identification of every condition of use (Ref. 4). As a result, EPA collected all the information it could on the use of each chemical substance, without regard to whether any chemical activity would be characterized as ''known, intended or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of,'' and from that information created use profiles and then an Exposure and Use Assessment to make the TSCA section 6(h)(1)(B) finding for at least one or more ''condition of use'' activities where some exposure is likely. EPA did not attempt to precisely classify all activities for each chemical substance as a ''condition of use'' and thus did not attempt to make a TSCA section 6(h)(1)(B) finding for all chemical activities summarized in the Exposure and Use Assessment. Second, TSCA section 6 generally requires a risk evaluation under TSCA section 6(b) for chemicals based on the identified conditions of use. However, pursuant to TSCA section 6(h)(2), for chemical substances that meet the criteria of TSCA section 6(h)(1), a risk evaluation is neither required nor contemplated to be conducted for EPA to meet its obligations under TSCA section 6(h)(4). Rather, as noted in Unit II.B.3., if a previously prepared TSCA risk assessment exists, EPA would have authority to use that risk assessment to ''address risks'' under TSCA section 6(h)(4), but even that risk assessment would not necessarily be focused on whether an activity is ''known, intended or reasonably foreseen,'' as those terms were not used in TSCA prior to the 2016 amendments and a preexisting assessment of risks would have had no reason to use such terminology or make such judgments. It is for this reason EPA believes that the TSCA section 6(h)(4) ''address risk'' standard refers to the risks the Administrator determines ''are presented *by the chemical substance*'' and makes no reference to ''conditions of use.'' Congress did not contemplate or require a risk evaluation identifying the conditions of use as defined under TSCA section 3(4). The kind of analysis required to identify and evaluate the conditions of use for a chemical substance is only contemplated in the context of a TSCA section 6(b) risk evaluation, not in the context of an expedited rulemaking to address PBT chemicals.

Similarly, the TSCA amendments require EPA to ''reduce exposure *to the substance* to the extent practicable,'' without reference to whether the exposure is found ''likely'' pursuant to TSCA section 6(h)(1)(B).

Taking this into account, EPA reads its TSCA section 6(h)(4) obligation to apply to the chemical substance generally, thus requiring EPA to address risks and reduce exposures to the chemical substance without focusing on whether the measure taken is specific to an activity that might be characterized as a ''condition of use'' as that term is defined in TSCA section 3(4) and interpreted by EPA in the Risk Evaluation Rule, 82 FR 33726 (July 20, 2017). This approach ensures that any activity involving a TSCA section 6(h) PBT chemical, past, present or future, is addressed by the regulatory approach taken. Thus, under this final rule, EPA grouped all activities with 2,4,6-TTBP into four general categories, and addressed the practicability of specific standards for each group. As described in detail in Unit II.F., EPA has considered the uses of 2,4,6-TTBP in these four general categories: (1) Domestic manufacture and use as an intermediate/reactant in processing at chemical facilities; (2) use in formulations and mixtures for fuel treatment in refineries and fuel facilities; (3) use in formulations intended for the maintenance or repair of motor vehicles and machinery at small commercial entities and for retail sale, and (4) use in formulations and mixtures for liquid lubricant and grease additives/antioxidants additives. This final rule prohibits distribution of 2,4,6-TTBP and products containing 2,4,6-TTBP in any container with a volume of less than 35 gallons for any use, as well as processing and distribution of 2,4,6-TTBP and products containing 2,4,6-TTBP for use as an oil or lubricant additive, and thus reduces the exposures that will result with resumption of past activities or the initiation of similar or other activities in the future. Therefore, EPA has determined that prohibiting these activities will reduce exposures to the extent practicable. The approach taken for this rulemaking is limited to implementation of TSCA section 6(h) and is not relevant to any other action under TSCA section 6 or other statutory actions.

2. EPA's interpretation of ''practicable.''

The term ''practicable'' is not defined in TSCA. EPA interprets this requirement as generally directing the Agency to consider such factors as achievability, feasibility, workability, and reasonableness. In addition, EPA's approach to determining whether particular prohibitions or restrictions are practicable is informed in part by a consideration of certain other provisions in TSCA section 6, such as TSCA

section 6(c)(2)(A) which requires the Administrator to consider health effects, exposure, and environmental effects of the chemical substance; benefits of the chemical substance; and the reasonably ascertainable economic consequences of the rule. In addition, pursuant to TSCA section 6(c)(2)(B), in selecting the appropriate TSCA section 6(a) regulatory approach to take, the Administrator is directed to ''factor in, to the extent practicable'' those same considerations.

EPA received comments on the proposed rule regarding this interpretation of ''practicable.'' EPA has reviewed these comments and believes the interpretation described previously within this Unit is consistent with the intent of TSCA and has not changed that interpretation. EPA's interpretation of an ambiguous statutory term receives deference. More discussion on these comments is in the Response to Comments document for this rulemaking (Ref. 5).

3. EPA did not conduct a risk assessment.

As EPA explained in the proposed rule, EPA does not interpret the ''address risk'' language to require EPA to determine, through a risk assessment or risk evaluation, whether risks are presented. EPA believes this reading gives the Administrator the flexibility Congress intended for issuance of expedited rules for PBTs and is consistent with TSCA section 6(h)(2) which makes clear that a risk evaluation is not required to support this rulemaking.

EPA received comments on the proposed rule regarding its interpretation of TSCA section 6(h)(4) and regarding EPA's lack of risk assessment or risk evaluation of 2,4,6-TTBP. A number of commenters commented that, while EPA was not compelled to conduct a risk evaluation, EPA should have conducted a risk evaluation under TSCA section 6(b) regardless. The rationales provided by the commenters for such a risk assessment or risk evaluation included that one was needed for EPA to fully quantify the benefits to support this rulemaking, and that without a risk evaluation, EPA would not be able to determine the benefits, risks, and cost effectiveness of the rule in a meaningful way. As described by the commenters, EPA would therefore not be able to meet the TSCA section 6(c)(2) requirement for a statement of these considerations. Regarding the contradiction between the mandate in TSCA section 6(h) to expeditiously issue a rulemaking and the time needed to conduct a risk evaluation, some commenters argued that EPA would have had enough time to conduct a risk evaluation and issue a proposed rule by the statutory deadline.

For similar reasons, EPA does not believe that TSCA section 6(c)(2) requires a quantification of benefits, much less a specific kind of quantification. Under TSCA section 6(c)(2)(A)(iv), EPA must consider and publish a statement, based on reasonably available information, on the reasonably ascertainable economic consequences of the rule, but that provision does not require quantification, particularly if quantification is not possible. EPA has reasonably complied with this requirement by including a quantification of direct costs and a qualitative discussion of benefits in each of the preambles to the final rules. EPA was unable to quantify the indirect costs associated with the rule. Further discussion on these issues can be found in the Response to Comment document. (Ref. 5)

EPA disagrees with the commenters' interpretation of EPA's obligations with respect to chemicals subject to TSCA section 6(h)(4). TSCA section 6(h)(4) provides that EPA shall: (1) ''Address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance'' and (2) ''reduce exposure to the substance to the extent practicable.'' With respect to the first requirement, that standard is distinct from the ''unreasonable risk'' standard for all other chemicals for which a section 6(a) rule might be issued. EPA does not believe that TSCA section 6(h) contemplates a new evaluation of any kind, given that evaluations to determine risks are now addressed through the TSCA section 6(b) risk evaluation process and that TSCA section 6(h)(2) explicitly provides that no risk evaluation is required. Moreover, it would have been impossible to prepare a meaningful evaluation under TSCA and subsequently develop a proposed rule in the time contemplated for issuance of a proposed rule under TSCA section 6(h)(1). Although EPA does not believe the statute contemplates a new evaluation of any kind for these reasons, EPA reviewed the hazard and exposure information on the five PBT chemicals EPA had compiled. However, while this information appropriately addresses the criteria of TSCA section 6(h)(1)(A) and (B), it did not provide a basis for EPA to develop sufficient and scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present an identifiable risk of injury to health or the environment.

Rather than suggesting a new assessment is required, EPA reads the ''address risk'' language in TSCA section 6(h)(4) to contemplate reliance on an existing EPA assessment under TSCA, similar to a risk assessment that may be permissibly used under TSCA section 26(l)(4) to regulate the chemical under TSCA section 6(a). This interpretation gives meaning to the ''address risk'' phrase, without compelling an evaluation contrary to TSCA section 6(h)(2), and would allow use of an existing determination, or development of a new determination based on such an existing risk assessment, in the timeframe contemplated for issuance of a proposed rule under TSCA section 6(h). However, there were no existing EPA assessments of risk for any of the PBT chemicals. Thus, because EPA had no existing EPA risk assessments or determinations of risk, the regulatory measures addressed in this final rule focus on reducing exposures ''to the extent practicable.''

In sum, because neither the statute nor the legislative history suggests that a new evaluation is compelled to identify and thereby provide a basis for the Agency to ''address risks'' and one could not be done prior to preparation and timely issuance of a proposed rule, and no existing TSCA risk assessment exists for any of the chemicals, EPA has made no risk determination finding for any of the PBT chemicals. Instead, EPA implements the requirement of TSCA section 6(h)(4) by reducing exposures of each PBT chemical ''to the extent practicable.''

More discussion on these comments is in the response to comments document (Ref. 5).

C. 2,4,6-TTBP Overview, Health Effects and Exposure

1. Uses of 2,4,6-TTBP.

The use information presented in this Unit is based on the EPA's review of the reasonably available information, as presented in the rulemaking record, including public comments on the use documents, proposed regulation and other stakeholder input.

Uses of 2,4,6-TTBP may be grouped into four general categories: (1) Domestic manufacture and use as an intermediate/reactant in processing at chemical facilities; (2) use in formulations and mixtures for fuel treatment in refineries and fuel facilities; (3) use in formulations intended for the maintenance or repair of motor vehicles and machinery at small commercial operations and for retail sale, and (4) use in formulations

and mixtures for liquid lubricant and grease additives/antioxidants additives. EPA summarizes below these uses and its conclusions regarding the exposures and the practicability of reducing such exposures.

i. Manufacture and use as an intermediate/reactant.

SI Group is currently the only large volume domestic manufacturer of 2,4,6-TTBP. Historical CDR data indicate that in the 1986 to 1998 reporting years, the aggregate range of production of 2,4,6-TTBP was between one and 10 million pounds per year and increased to a range of 10 to 50 million pounds per year in reporting years 2002 and 2006. The range of production in 2012, 2013, 2014, and 2015 was confidential business information (CBI) in the 2016 CDR (Ref. 6). There have not been any indications of substantial importation of 2,4,6-TTBP into the United States from other countries.

2,4,6-TTBP is predominantly created in chemical reactions as a co-product with a closely related alkylphenol, 2,6 di(tert-butyl)phenol (2,6–DTBP). Neither chemical can be effectively produced commercially without co-production of the other. The chemical is produced as a mixture with its co-products, primarily 2,6–DTBP, at a concentration of approximately 85% 2,6–DTBP and 12% 2,4,6-TTBP. (Ref. 7, EPA–HQ–OPPT–2019–0080–0537). SI Group notes that while the reaction profile for this trans-alkylation process can be shifted based on temperature of the reaction and ratio of isobutylene to phenol, there is no feasible way to eliminate the production of 2,4,6-TTBP in this reaction chemistry.

Approximately 94% of the 2,4,6-TTBP produced by SI Group is consumed by the company in internal chemical processes as a feedstock for further production of other alkylphenol chemicals. This quantity of the chemical is not sold to other chemical processors; it is used by SI Group itself. 2,4,6-TTBP has value as a chemical intermediate in the production of dialkylphenol chemicals. Moreover, SI Group reports it is not possible to significantly suppress the formation of 2,4,6-TTBP without severely constraining the yield of other desired dialkylphenol products, therefore its manufacture has impacts beyond the commercial use of 2,4,6-TTBP itself. The production of other dialkylphenol products, including alternative antioxidants, is therefore a benefit of ongoing 2,4,6-TTBP manufacture.

As noted, approximately 94% of the 2,4,6-TTBP produced by SI Group is consumed by the company in internal processes, being used as a feedstock for further production of alkylphenol chemical products. The chemical reactions that use 2,4,6-TTBP as a chemical feedstock consume (destroy) the feedstock during the process, on site within the facility. An additional 4% of 2,4,6-TTBP produced by SI Group, which is in excess of what it requires for chemical feedstock use, is sold as a waste fuel for energy use. This excess material stream containing 2,4,6-TTBP is used as a waste fuel for energy value, which is burned and destroyed during use (Ref. 8). A hydrocarbon, 2,4,6-TTBP has a high energy value and can be sold as a fuel. (The remaining 2% manufactured is used as a fuel additive, discussed later in this document.)

SI Group notes that in the course of normal operations, the manufacturing stream of the 2,4,6-TTBP containing product is as a liquid, eliminating the possibility of fugitive and stack air (dust) emissions and therefore inhalation or exposure to dust (EPA–HQ–OPPT–2018–0314–0018). Based on the low vapor pressure of 2,4,6-TTBP, 6.6×10^{-4} mg Hg, EPA expects minimal chance of exposure by inhalation of vapor from such liquid (Ref. 4). Dermal exposure resulting from manufacturing and processing conditions of use at chemical production facilities is expected to be minimal due to use of specified engineering controls and required personal protective equipment (PPE) identified by the SI Group. For example, at the manufacturer/processing facilities, required worker PPE consists of nitrile gloves, chemical-resistant slicker suits, chemical resistant boots, respirators with face shield and hard hats; workers are trained and monitored in the correct use of their PPE. Sampling during production is accomplished using controlled sampling spigots, which prevent aerosol formation, splashing and spillage, minimizing potential worker exposure. Controlled sampling spigots are also used for transfer activities (loading and unloading) (EPA–HQ–OPPT–2018–0314–0018).

EPA has not identified releases, or potential releases from SI Group's operations, that are posing an exposure to the environment and that can be targeted for reduction with practicable measures under TSCA section 6(a). Similarly, EPA has not identified exposure or potential exposures to workers (or the general population from chemical facility production and use) that can be targeted for reduction with specific measures in this rule. As discussed in Unit II.F., EPA believes that in industrial settings worker protection measures used by employers reduce exposures to the extent practicable and EPA has determined that it is not practicable to regulate worker exposures in this rule through engineering or process controls or PPE requirements.

The production and use of 2,4,6-TTBP as a chemical intermediate has significance for other alkylphenol chemical products beyond the immediate uses of 2,4,6-TTBP itself, as a result of the difficulty in commercially producing these other chemicals without generating or using 2,4,6-TTBP (EPA–HQ–OPPT–2018–0314–0018), EPA did not propose to prohibit the manufacture of 2,4,6-TTBP or processing and use of 2,4,6-TTBP as a chemical intermediate. During the public comment period, EPA received no specific information addressing these issues as it might related to 2,4,6-TTBP chemical facility operations. EPA therefore is not imposing any additional regulatory controls for the manufacture of 2,4,6-TTBP for any use.

ii. Use for fuel treatment in refineries and fuel facilities.

As noted, of the 2,4,6-TTBP it produces, SI Group itself consumes 94% as a chemical intermediate and sells off another 4% as waste fuel. The remaining 2% of 2,4,6-TTBP produced by SI Group is sold for use in fuel as an antioxidant. The chemical is sold in a mixture with its co-products, primarily 2,6–DTBP, at a concentration of approximately 85% 2,6–DTBP and 12% 2,4,6-TTBP (primarily two proprietary chemical mixtures, Isonox® 133 and Ethanox® 4733) (Ref. 7). SI Group also stated that it does not sell, supply, or distribute into commerce 2,4,6-TTBP in a pure (neat) form.

Most of SI Group's antioxidant product goes to use at refineries: After refining, petroleum products such as fuels quickly begin to degrade due to oxidation. A small portion of its sales volume goes to processors of aftermarket fuel treatment products (discussed in the next section). SI Group does not sell its mixtures containing 2,4,6-TTBP directly to consumers. The majority of the 2,4,6-TTBP mixtures sold are blended into the fuel at the refinery or soon after at tank farms prior to commercial distribution of the fuel. Once blended into fuel, the resultant concentration of 2,4,6-TTBP in fuel is low, in the five to 50 ppm range.

As summarized in the proposed rule, the 2,4,6-TTBP mixture is a widely used antioxidant for jet, automotive, and marine fuels. Antioxidant additives are essential to the storage and transport of fuel, as without them, fuel quickly begins to degrade and form harmful sludge and varnish. The 2,4,6-TTBP mixtures are the primary antioxidants

used in aviation, marine, and automotive fuel streams in the United States. Many current performance specifications for fuel require their use; including for specialty fuels for aviation and the military. The Aerospace Industries Association identified critical uses of 2,4,6-TTBP as a fuel additive/antioxidant in formulations designed to meet specific technical performance requirements that are documented in a number of engineering specifications over the service life of complex aerospace products (EPA–HQ–OPPT–2016–0734–0010). The American Petroleum Institute also confirmed that their members use 2,4,6-TTBP as an antioxidant in gasoline, diesel, and aviation fuels at concentrations of between five and 50 parts per million to reduce gasoline deposits in engines and subsequently reduce emissions (EPA–HQ–OPPT–2016–0734–0006). With respect to use as an antioxidant in the general fuel supply, EPA has received comment supporting the beneficial properties of 2,4,6-TTBP as an antioxidant component blended in fuel. SI Group identified numerous U.S. military and ASTM standards that its proprietary blended products containing 2,4,6-TTBP satisfy for the antioxidant requirements in fuel (Ref. 8), notably jet fuel that is supplied to and used by the U.S. military. Although particular specifications do not list 2,4,6-TTBP by CASRN or trade name, 2,4,6-TTBP is the preferred antioxidant component for fuel standards due to its chemical reaction potential and physical property characteristics (Ref. 8 and 9). According to the manufacturers and processors, any substitution of 2,4,6-TTBP with another alkylphenol or antioxidant compound would materially change the performance characteristics of that fuel and compliance with mandatory reference standards could not be assured (Ref. 9). Introducing a new jet fuel component into use involves the fuel component supplier, engine manufacturers, airplane makers and regulators in a complicated process that may take several years and involve significant cost. New fuel additives must be tested and approved to ensure they would have no negative impact on engine safety, durability or performance (Ref. 8).

Once blended into fuel, the resultant concentration of 2,4,6-TTBP in fuel is low, in the five to 50 ppm range. Treated fuel is distributed through the nation's fuel supply chain (pipeline or vehicle transportation, storage and distribution to end points such as airports, gas stations and military facilities). 2,4,6-TTBP, a hydrocarbon, is destroyed (burned) as the fuel to which it is added is consumed during end use (Ref. 7).

SI Group typically ships its product to refineries in tankers or other large containers. Fugitive air releases of 2,4,6-TTBP are expected to be minimal (due to the low vapor pressure) from unloading and transfer operations. Releases may possibly occur from spills and leaks from loading operations, but exposure would be addressed at these industrial sites through spill control measures. Waste from equipment cleaning with organic cleaning solutions is anticipated to be collected for incineration. Water releases are possible from equipment and general area cleaning with aqueous cleaning solutions. Dermal exposure to 2,4,6-TTBP to workers may occur from transfer and fuel loading operations; however, dermal exposure at fuel production facilities is expected to be minimal due to the required use of engineering controls and personal protective equipment (PPE) noted above (EPA–HQ–OPPT–2018–0314–0018). Refineries, fuel distribution and fuel storage facilities also operate with the same or similar engineering controls, PPE (gloves, slickers, boots, respirators, etc.), worker training, leak detection and spill control measures; vapor recovery systems are used during distribution and storage (EPA–HQ–OPPT–2016–0734–0006), similar to procedures used at the manufacturing facility. Once blended into fuel, the resultant concentration of 2,4,6-TTBP in fuel is low, in the five to 50 ppm range, limiting the exposure resulting from handling and spills or leaks.

EPA has not identified releases, or potential releases from the use of 2,4,6-TTBP for fuel treatment at refineries and fuel facilities that can be targeted for reduction with practicable measures under TSCA section 6(a). Similarly, EPA has not identified exposure or potential exposures to workers (or the general population from refinery and fuel facility use) that can be targeted for reduction with practicable measures under TSCA section 6(a). As discussed in Unit II.F., EPA believes that in industrial settings worker protection measures used by employers reduce exposures to the extent practicable and EPA has determined that it is not practicable to regulate worker exposures in this rule through additional engineering or process controls or PPE requirements.

The benefit to continuing the use of existing antioxidants containing 2,4,6-TTBP is a result of the necessity of antioxidants to the nation's fuel supply and the difficulties inherent in removing 2,4,6-TTBP in terms of standards and performance specifications. Given the absence of and difficulty with identifying and adopting alternatives, EPA did not propose to prohibit the manufacturing, processing, or distribution for use of 2,4,6-TTBP as an additive at refineries and fuel facilities.

iii. Formulations intended for the maintenance or repair of motor vehicles and machinery.

SI Group does not sell its Isonox or Ethanox mixtures directly to consumers. However, a portion (approximately 6%) of the 2,4,6-TTBP mixtures SI Group sells for use in fuels are sold to processors who blend and distribute antioxidant products that are intended to be added to the fuel tanks/systems in vehicles or machinery by repair shops or the owner/operators of the equipment themselves. These fuel stabilizer products, which contain a percentage of Isonox or Ethanox as an antioxidant component, are sold to consumers at various retail locations, as well as online. These additives are typically sold in small bottles containing up to 32 ounces; gallon containers are available through some retailers. Specialty products are also sold for cleaning fuel injectors or use in 2-stroke engines (pre-blended with oil).

Regarding the retail sale of fuel additives and fuel injector cleaners, EPA was unable to find any specifications or standards for retail fuel antioxidants or additives that explicitly require the use of 2,4,6-TTBP. As discussed in Unit III.B, EPA has identified a number of substitute chemicals and substitute products in the Exposure and Use Assessment for this rule for this specific use.

Use of retail fuel additive products which are sold in small containers to mechanics and consumers to service cars, boats, small engines, etc., present opportunities for release and dermal exposure during transfer activities if users are unprotected. Use of the product involves pouring it from the bottle either into a fuel storage container, such as a gas can that is used to refill equipment such as lawn mowers, or it may be poured directly into the fuel tank of the lawn equipment, or car, boat, etc.

EPA believes that the general public does not routinely use PPE while using this product in these mundane activities, and has not received special training in the handling of the product. No PPE is specified for the use of retail fuel additive products and EPA has no information to indicate that the general public takes any further protective measures when adding this product to

fuel containers. Similarly, EPA received no comment that workers who use these fuel additive products, such as mechanics or lawn care workers, routinely use PPE that would provide protection against chemical exposure, such as nitrile gloves, slickers or respirators, while using these products, or have received any special training in the handling of the products or use of PPE with the product. Therefore, this scenario is in contrast to the assumed use of PPE in industrial settings discussed in Unit II.C.1.i and II.C.1.ii. As discussed in Unit II.F., while EPA assumes compliance with other federal requirements, including the OSHA standards and regulations, it would be difficult to support broadly applicable and safe additional measures for each specific activity without a risk evaluation and in the limited time for issuance of this regulation under TSCA section 6(h), but imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations. Such regulations would not be practicable.

Spillage may occur when the product is being poured into fuel tanks and storage cans. Retail product containers may also leak during transportation, handling, storage and disposal. After use by mechanics and consumers, used retail product containers are disposed of in the municipal solid waste stream without special handling. If released to the indoor environment, 2,4,6-TTBP could partition to particulates and dust based on its chemical relationship with organic carbon compared to that of air. If released into a sanitary sewer system or storm water system, 2,4,6-TTBP would likely transport to nearby wastewater treatment plants due to relative mobility in water due to high water solubility and low Koc (soil organic carbon/water partitioning coefficient).

EPA believes these identified releases and potential releases can be targeted for reduction with practicable measures under TSCA section 6(a). Accordingly, EPA proposed to prohibit the distribution in commerce of 2,4,6-TTBP in formulations intended for the maintenance or repair of motor vehicles and machinery through a container size restriction. EPA is finalizing these regulations, with changes based on public comments discussed elsewhere in this notice.

iv. Oil/lubricant uses.

The Agency is addressing the use of 2,4,6-TTBP in liquid lubricant and grease additives/antioxidants. Although EPA has not identified users of 2,4,6-TTBP for liquid lubricant and grease additives/antioxidants, it found indications of current use, and a manufacturer has reported that it is aware that some customers may use its products for this end use, although it does not actively market products with 2,4,6-TTBP for lubricant applications.

Other countries have reported that 2,4,6-TTBP is, or has been, used as an additive in oils and lubricants (EPA–HQ–OPPT–2016–0734–0002). SI Group states that it does not actively market products containing 2,4,6-TTBP for lubricant applications, but that it is aware that some customers may use these products in lubricant applications (Ref. 8). Regarding the use of 2,4,6-TTBP as an antioxidant additive in oil and lubricants, EPA was unable to find any specifications or standards for oil, lubricant, or grease additives that require the use of 2,4,6-TTBP. No commenters during this rulemaking identified uses without substitutes.

While no releases were specifically identified, EPA believes potential for exposure can be targeted for reduction with practicable measures under TSCA section 6(a). Given this and the general availability of substitutes, EPA is prohibiting the use of 2,4,6-TTBP in oil and lubricant additives.

2. Health Effects, Exposure and TSCA section 6(h)(1) findings.

Exposure information for 2,4,6-TTBP is detailed in EPA's Exposure and Use Assessment (Ref. 4). Based on reasonably available information, EPA did not identify any studies with extractable 2,4,6-TTBP data in drinking water or any studies with detectable levels of 2,4,6-TTBP in soil, sludge/biosolids, or vegetation/diet. Additionally, EPA did not identify any studies with detectable levels of 2,4,6-TTBP in human blood (serum), other human organs, aquatic invertebrates, aquatic vertebrates, terrestrial invertebrates, birds, or terrestrial mammals.

2,4,6-TTBP is toxic to aquatic plants, aquatic invertebrates, and fish. Data indicate the potential for liver and developmental effects. The studies presented in the document entitled ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals (Hazard Summary) (Ref. 10) demonstrate these hazardous endpoints. EPA did not perform a systematic review or a weight of the scientific evidence assessment for the hazard characterization of these chemicals. As a result, this hazard characterization is not definitive or comprehensive. Other hazard information on these chemicals may exist in addition to the studies summarized in the Hazard Summary that could alter the hazard characterization. In the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1), 2,4,6-TTBP scored moderate (2) for hazard (based on toxicity following chronic exposure including liver effects); moderate (2) for exposure (based on its wide use in consumer products, presence in indoor environments, and estimation to have moderate releases to the environment); and high (3) for persistence and bioaccumulation (based on moderate environmental persistence and high bioaccumulation potential). The overall screening score for 2,4,6-TTBP was high (7).

Taking all this into account, EPA determines that 2,4,6-TTBP meets the TSCA section 6(h)(1)(A) criteria. In addition, EPA determines, in accordance with TSCA section 6(h)(1)(B), that, based on the Exposure and Use Assessment and other reasonably available information, exposure to 2,4,6-TTBP is likely under the conditions of use to the general population, to a potentially exposed or susceptible subpopulation, or to the environment. EPA's determination is based on the opportunities for exposure to 2,4,6-TTBP including the potential for consumer exposures.

D. EPA's Proposed Rule Under TSCA Section 6(h) for 2,4,6-TTBP

In the proposed rule (84 FR 36728), EPA proposed to restrict all distribution in commerce of 2,4,6-TTBP and products containing 2,4,6-TTBP in containers with a volume of less than 55 gallons. This was intended to effectively prevent use of 2,4,6-TTBP as a retail fuel additive or fuel injector cleaner by consumers and small commercial operations. Exposures to humans and the environment would be reduced by eliminating retail uses of 2,4,6-TTBP that have a higher potential for releases. EPA believed that this proposal intentionally would not impact use of this chemical in the nation's fuel supply system (*i.e.,* at refineries and bulk petroleum storage facilities), where the distribution, transfer, blending, and general end use of 2,4,6-TTBP-containing blends/mixtures is managed through highly-regulated engineering controls designed to mitigate environmental and human health exposures. EPA proposed a 55-gallon threshold based on a belief that much, if not all use of 2,4,6-TTBP containing blends/mixtures at refineries and petroleum storage facilities are sourced in quantities larger than 55 gallons at a time; and are typically sourced by the tanker or batch load in quantities over

500 gallons at a time. EPA also sought comment on the optimal container size limit to impose, *e.g.,* for instance, whether a 35-gallon container size would impact industrial use less while also preventing the sale of retail products with 2,4,6-TTBP.

EPA proposed to define 2,4,6-TTBP to mean the chemical substance 2,4,6-tris(tert-butyl)phenol (CASRN 732–26–3) at any concentration above 0.01% by weight. EPA stated its belief that this concentration limit would distinguish between products which contain 2,4,6-TTBP as a functional additive and those in which it may be present in low concentrations as a byproduct or impurity, noting that 2,4,6-TTBP is a co-product and byproduct present in other alkylphenols, including other antioxidants that are potential substitutes for it.

EPA also proposed to prohibit all processing and distribution in commerce of 2,4,6-TTBP for use as an additive in oils and lubricants. There are numerous available substitutes for this use of 2,4,6-TTBP. To support this provision, EPA proposed a definition of oil and lubricant additive for this rule to mean any intentional additive to a product of any viscosity intended to reduce friction between moving parts, whether mineral oil or synthetic base, including engine crankcase oils and bearing greases.

Regarding the timing of these prohibitions, EPA stated in the proposed rule that at that time it had no information indicating a compliance date of 60 days after publication of the final rule is not practicable for the activities that would be prohibited, or that additional time is needed for products to clear the channels of trade.

EPA proposed for recordkeeping that after 60 days following the date of publication of the final rule, distributors of 2,4,6-TTBP and products containing 2,4,6-TTBP must maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate 2,4,6-TTBP is not distributed in containers with a volume less than 55 gallons or for use as an oil and lubricant additive. These records would have to be maintained for a period of three years from the date the record is generated.

E. Public Comments and Other Public Input

The proposed rule provided a 60-day public comment period, with an additional 30-day extension granted. (84 FR 50809, September 26, 2019). The comment period closed on October 28, 2019. EPA received a total of 48 comments, with three commenters sending multiple submissions with attached files, for a total of 58 submissions on the proposal for all the PBT chemicals. This includes the previous request for a comment period extension (EPA–HQ–OPPT–2019–0080–0526). Two commenters submitted confidential business information (CBI) or copyrighted documents with information regarding economic analysis and market trends. Copies of all the non-CBI documents, or redacted versions without CBI are available in the docket for this action. EPA also communicated with companies, and other stakeholders to identify and verify uses of 2,4,6-TTBP. These interactions and comments further informed EPA's understanding of the current status of uses for 2,4,6-TTBP. Public comments and stakeholder meeting summaries are available in the public docket at EPA–HQ–OPPT–2019–0080.

In this preamble, EPA has responded to the major comments relevant to the 2,4,6-TTBP final rule. Of the comment submissions, 12 directly addressed EPA's proposed regulation of 2,4,6-TTBP. EPA's more comprehensive responses to comments related to this final action are in the Response to Comments document (Ref. 5).

F. Activities Not Directly Regulated by This Rule

EPA proposed not to use its TSCA section 6(a) authorities to directly regulate occupational exposures in industrial settings. As explained in the proposed rule, as a matter of policy, EPA assumes compliance with federal and state requirements, such as worker protection standards, unless case-specific facts indicate otherwise. The Occupational Safety and Health Administration (OSHA) has not established a permissible exposure limit (PEL) for 2,4,6-TTBP. However, under section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), each employer has a legal obligation to furnish to each of its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm. The OSHA Hazard Communication Standard at 29 CFR 1910.1200 requires chemical manufacturers and importers to classify the hazards of chemicals they produce or import, and all employers to provide information to employees about hazardous chemicals to which they may be exposed under normal conditions of use or in foreseeable emergencies. The OSHA standard at 29 CFR 1910.134(a)(1) requires the use of feasible engineering controls to prevent atmospheric contamination by harmful substances. Other provisions of 29 CFR 1910.134 require the use of respirators where effective engineering controls are not feasible and spell out details of the required respiratory protection program. The OSHA standard at 29 CFR 1910.132(a) requires the use of personal protective equipment (PPE) when workers are exposed to chemical and other hazards; 29 CFR 1910.133 requires the use of eye and face protection when employees are exposed to hazards from, among other things, liquid chemicals; and 29 CFR 1910.138 requires the use of PPE to protect employees' hands from, among other hazards, skin absorption of harmful substances. The provisions of 29 CFR 1910.132(d) and (f) address hazard assessment, PPE selection, and training with respect to PPE required under 29 CFR 1910.133, 29 CFR 1910.138, and certain other standards. EPA assumes that employers will require, and workers will use, appropriate PPE consistent with OSHA standards, taking into account employer-based assessments, in a manner sufficient to prevent occupational exposures that are capable of causing injury.

EPA assumes compliance with other federal requirements, including OSHA standards and regulations. EPA does not read TSCA section 6(h)(4) to direct EPA to adopt potentially redundant or conflicting requirements. Not only would it be difficult to support broadly applicable and safe additional measures for each specific activity without a risk evaluation and in the limited time for issuance of this regulation under TSCA section 6(h), but imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations. Such regulations would not be practicable. Rather, where EPA has identified worker exposures and available substitutes, EPA is finalizing measures to reduce those exposures, *e.g.,* by prohibiting the sale of 2,4,6-TTBP in the small containers that contribute to potential exposures for workers in smaller commercial establishments, as well as to consumers. While some commenters agreed with EPA's approach, others thought that EPA should establish worker protection requirements for those uses not regulated under the final rule. EPA disagrees with those commenters who thought that EPA should establish specific worker protection requirements. Information provided to EPA before and during the public comment period on the proposed rule indicates that employers are using engineering and

process controls and providing appropriate personal protective equipment (PPE) to their employees consistent with these requirements. EPA received no information on 2,4,6-TTBP to the contrary. Further, EPA has not conducted a risk evaluation on 2,4,6-TTBP or any of the five PBT chemicals. Without a risk evaluation and given the time allotted for this rulemaking, EPA cannot identify additional engineering or process controls or PPE requirements that would be appropriate to each chemical-specific circumstance. For these reasons, EPA has determined that it is not practicable to regulate worker exposures in this rule through engineering or process controls or PPE requirements.

Under a newly created general provisions section at 40 CFR 751.401(b), EPA is listing three activities to which the prohibitions and restrictions under the PBT regulations at subpart E of 40 CFR 751 do not apply in general, unless otherwise specified in the individual chemical regulations.

The first activity is distribution in commerce of any chemical substance, or products and articles that contain the chemical substance, that has previously been sold or supplied to an end user, *i.e.,* an individual or entity that purchased or acquired the finished good for purposes other than resale. An example of this is a consumer who resells a product they no longer intend to use through the internet or donates a used article to charity. EPA does not believe it practicable to attempt to regulate such activity, given the small quantities involved in end user resale relative to overall sales, the multitude of potentially affected persons, the difficulties of making consumers and other end users aware of potential compliance obligations, and the difficulties the Agency would have enforcing such resale prohibitions on the general public and other end users.

The second activity is disposal of any chemical substance, or products and articles that contain the chemical substance, including importation, processing and distribution-in-commerce for purposes of disposal. EPA explained in the proposed rule the basis of its determination that, as a general matter, disposal is adequately regulated under the authority of the Resource Conservation and Recovery Act (RCRA) which governs the disposal of hazardous and non-hazardous wastes, and it is not practicable to impose additional requirements under TSCA on the disposal of the PBT chemicals in the proposed rule. (84 FR 36744.) EPA received a number of comments on this aspect of its proposal. Some commenters agreed with EPA's proposed determination that it is not practicable to regulate disposal, while others disagreed. Comments specific to other PBT chemicals, are addressed in those chemicals' final rule notices. More information on the comments received and EPA's responses can be found in the Response to Comments document (Ref. 5). One commenter noted that, while EPA proposed to not regulate disposal of the PBT chemicals under TSCA, the effect of EPA's proposed prohibition on manufacturing, processing, and distribution in commerce would prohibit the processing and distribution in commerce of the PBTs and articles and products containing the PBT chemicals for disposal. EPA did not intend such an effect, and is including a general provision in the final regulatory text in the new section 40 CFR 751.401(b) to address disposal of any chemical substance, or products and articles that contain the chemical substance, including importation, processing and distribution in commerce for purposes of disposal. In regard to the disposal of 2,4,6-TTBP, use of the chemical as a feedstock, use as a waste fuel, and use as a fuel additive all result in the destruction of the chemical through combustion. This final rule will ultimately eliminate releases from the use of 2,4,6-TTBP-containing retail fuel additive products which are sold in small containers, such as spillage which may occur when the product is poured into fuel tanks or fuel cans, as well as releases from the disposal of used small containers that held those products in the municipal solid waste stream.

EPA also received comments regarding the use of PBT chemicals in research and development and lab use. The final activity addressed under newly established 40 CFR 751.401(b) is the manufacturing, processing, distribution in commerce and use of any chemical substance, or products and articles that contain the chemical substance, for research and development, as defined in new 40 CFR 751.403. *Research and Development* is defined in new 40 CFR 751.403 to mean laboratory and research use only for purposes of scientific experimentation or analysis, or chemical research on, or analysis of, the chemical substance, including methods for disposal, but not for research or analysis for the development of a new product, or refinement of an existing product that contains the chemical substance. This will allow, for example, for samples of environmental media containing PBTs, such as contaminated soil and water, to be collected, packaged and shipped to a laboratory for analysis. Laboratories also must obtain reference standards containing PBTs to calibrate their equipment, otherwise they may not be able to accurately quantify these chemical substances in samples being analyzed. However, research to develop new products that use PBTs subject to subpart E of 40 CFR 751, or the refinement of existing uses of those chemicals, is not included in this definition, and those activities remain potentially subject to the chemical specific provisions in subpart E of 40 CFR 751. EPA believes it is not practicable to limit research and development activity as defined, given the critical importance of this activity to the detection, quantification and control of these chemical substances.

III. Provisions of This Final Rule

A. Scope and Applicability

EPA carefully considered all public comments related to the proposal. This rule finalizes EPA's proposal to prohibit all distribution in commerce of 2,4,6-TTBP and products containing 2,4,6-TTBP in small containers, and prohibit all processing and distribution in commerce of 2,4,6-TTBP, and products containing 2,4,6-TTBP, for use as an oil or lubricant additive, with changes being made from the proposal to the container size limit, the concentration limit for 2,4,6-TTBP, and the compliance date for the prohibitions.

1. Container size.

In the proposed rule, EPA solicited comment from the public on the optimal container size limit to impose: Specifically, whether a 35-gallon container size would impact industrial use less than a 55-gallon container size while also preventing the sale of retail products with 2,4,6-TTBP. Two comments were received on this issue. SI Group recommended EPA adopt a 35-gallon size limit, commenting that: ''Industrial users of chemicals occasionally ship materials in the non-standard 55-gallon drum size. This slight decrease in container size will not impact the intent or outcome of the original proposal—consumer access to 2,4,6-TTBP will be restricted'' (EPA–HQ–OPPT–2019–0080–0537). API stated that: ''A 35-gallon container size would be more appropriate, because it would impact industrial use less while also preventing the commercial and retail sale of products with 2,4,6-TTBP.'' Based on this information EPA is adopting a 35-gallon container size limit in the final regulation, which will still reduce the exposure to consumers to the same extent (EPA–HQ–OPPT–2019–0080–0539).

2. Concentration limit for 2,4,6-TTBP.

EPA proposed to define 2,4,6-TTBP to mean the chemical substance 2,4,6-tris(tert-butyl)phenol (CASRN 732–26–3) at any concentration above 0.01% by weight for the purpose of distinguishing between products which contain 2,4,6-TTBP as a functional additive and those in which it may be present in low concentrations as a byproduct or impurity, noting that 2,4,6-TTBP is a co-product and byproduct present in other alkylphenols, including other antioxidants that are potential substitutes for it.

In response to EPA's concentration proposal to distinguish between products that contain 2,4,6-TTBP as a functional additive and those with low concentrations as a byproduct or impurity, SI Group (EPA–HQ–OPPT–2019–0080–0537) provided more detailed information:

- Impurity levels of 2,4,6-TTBP are typically very low, but may range up to 0.3%. SI Group's engineering staff recently conducted modeling studies of its processes and the output suggests the company is unable to decrease impurity levels of 2,4,6-TTBP with current manufacturing operations.
- These models indicate there is no way to achieve a zero residual value for 2,4,6-TTBP as an impurity due to numerous factors.
- The hindered phenolic antioxidant 2,6-di-tert-4-secbutylphenol contains an average 2,4,6-TTBP impurity concentration of 0.3%, the highest in SI's portfolio. This substance is the predominant antioxidant technology utilized in automotive brake fluid in the United States.

Given these detailed comments from the manufacturer of 2,4,6-TTBP, EPA believes adopting a 0.3% concentration limit in the final regulation will better achieve the distinction between functional additives and impurities EPA seeks to establish, and thereby avoid unintended and unassessed impacts on other alkylphenols used in products such as brake fluid. For clarity, EPA is stating this concentration limit within the prohibitions for 2,4,6-TTBP under 40 CFR 751.409(a) in the final regulation; EPA believes this will reduce opportunity for the concentration limit to be overlooked by readers of the regulation.

3. Compliance date for the prohibitions.

The proposed rule did not delay the compliance date beyond the rule's effective date; the processing and distribution bans would come into effect 60 days after publication of the final rule notice. EPA stated in the proposed rule that at that time it had no information indicating that a compliance date of 60 days after publication of the final rule is not practicable for the activities that would be prohibited, or that additional time is needed for products to clear the channels of trade. The phrases ''as soon as practicable'' and ''reasonable transition period'' as used in TSCA section 6(d)(1) are undefined, and the legislative history on TSCA section 6(d) is limited. Given the ambiguity in the statute, for purposes of this expedited rulemaking, EPA presumed a 60-day compliance date was ''as soon as practicable,'' unless there was support for a lengthier period of time on the basis of reasonably available information, such as information submitted in comments on the Exposure and Use Assessment or in stakeholder dialogues. Such a presumption is consistent with the general effective date often adopted for rulemakings and ensures the compliance schedule is ''as soon as practicable,'' particularly in the context of the TSCA section 6(h) rules for chemicals identified as persistent, bioaccumulative and toxic, and given the expedited timeframe for issuing a TSCA section 6(h) proposed rule did not allow time for collection and assessment of new information separate from the comment opportunities during the development of and in response to the proposed rule. Such presumption also allows for submission of information from the sources most likely to have the information that will affect an EPA determination on whether or how best to adjust the compliance deadline to ensure that the chosen final compliance deadline is both ''as soon as practicable'' and provides a ''reasonable transition period.''

On this issue, SI Group provided comment and recommended a 5-year delay in implementation, commenting that ''. . . there could be significant implications to the current aftermarket fuel additives and oil/lubricant value chains with enactment of this rule and the very short time for implementation. Complying with this rule will likely require a considerable amount of time given the requirements of Federal, State, standardization bodies, Original Equipment Manufacturers (OEMs), and brand holders in reformulating and requalifying products as well as managing current inventory'' (EPA–HQ–OPPT–2019–0080–0537). EPA also received comment on this issue from Gold Eagle Company, which identifies itself as the maker of the #1 selling fuel stabilizer in the United States, and produces several brands of fuel stabilizer under various brand names; it commented that ''over 100 OEMs [original equipment manufacturers] endorse this fuel stabilizer in their owners manual and/or sell the product in their dealerships, or buy a private label product from Gold Eagle.'' (EPA–HQ–OPPT–2019–0080–0533). It states that 2,4,6-TTBP is an essential component of its fuel stabilizers; that it has used the same antioxidant chemistry since 1988; that evaluated alternative antioxidant chemistries do not provide equivalent fuel stability; and that ''even if an effective substitute could be found, ASTM approval would likely take about six years.'' (EPA–HQ–OPPT–2019–0080–0533). Gold Eagle comments that an alternative antioxidant must be evaluated using ASTM D525 Fuel Stability test referenced in ASTM D4814, Standard Specification for Automotive Spark-Ignition Engine Fuel, used to test refinery gasoline for compliance to fuel specifications for automotive use.

Overall, EPA considers these comments to have considerable merit. EPA does not agree with Gold Eagle on the availability of substitute antioxidants for use in fuel additive products; EPA has identified alternative fuel additive products without 2,4,6-TTBP as an active ingredient that are available and can be substituted for fuel additive products with 2,4,6-TTBP that will be removed from the market (Ref. 3). EPA therefore concludes that it is possible for Gold Eagle to reformulate its products to remove the 2,4,6-TTBP component and replace it with other antioxidants. However, EPA does agree with the assertion that it will take time to develop new formulations for various product lines, test them and obtain required approvals. Additionally, as a predominant supplier, Gold Eagle has a complex supply network and relationships with many other companies that supply its product, sell it under other brand names, or endorse its use in their equipment; EPA acknowledges that Gold Eagle's modifications to the formulation of its product line may require it to engage with these customers and business partners to assure them that its products provide similar performance, a process that will also take time. EPA also agrees with the comment that managing existing inventory will require time. Like other basic automotive supplies, such as engine oil and windshield wiper fluid, aftermarket fuel additive products are widely available nationally at varied retail outlets, such as auto parts stores, hardware stores, general retail outlets, gas stations and convenience stores. Unopened product is stable and may be

stored for several years in the distribution system or on a store shelf before final sale to customers. Products that are unsold as of the compliance date would have to be pulled from the shelf and disposed of. A sudden removal of product from the shelves might also create temporary or spot shortages of fuel additives. Gold Eagle will also incur costs, if it is required to cease sales of its fuel additive products because it can replace them with reformulated products without 2,4,6-TTBP before the compliance date. If its products are off the market for several years, sales losses could be significant.

In consideration of these comments and the issues that they raise, especially in regard to potential unquantified potential costs and market disruption with provision of these needed products, EPA does not believe it is practicable to implement this prohibition without a delay in the compliance date. However, Gold Eagle expresses some uncertainty about its six-year estimate and does not establish the reasoned basis to support that a six-year estimate is ''as soon as practicable,'' compared to the five-year period estimated by SI Group. Therefore, EPA is delaying the compliance date for the prohibition on distribution of 2,4,6-TTBP and products containing 2,4,6-TTBP in any container with a volume of less than 35 gallons for any use, as well as processing and distribution in commerce of 2,4,6-TTBP for use in oil and lubricant additives and of 2,4,6-TTBP-containing oil and lubricant additives, for five years, to give the producers of fuel additives containing 2,4,6-TTBP sufficient time to reformulate their products, requalify them with the necessary entities and clear non-compliant inventory from their distribution chains.

In this final rule, EPA is also establishing a new subpart E of 40 CFR 751 for TSCA section 6(h) PBT chemical provisions, including general provisions at 40 CFR 751.401 as discussed in Unit II.F. of this document, and definitions applicable to subpart E at 40 CFR 751.403. Terms defined in 40 CFR 751.403 include *article, product,* and *research and development.* These definitions are intended to respond to comments requesting additional clarity on the regulatory provisions. (Note the definitions of article and product are not used in 40 CFR 751.409.)

EPA is requiring that distributors of 2,4,6-TTBP and products containing 2,4,6-TTBP must maintain ordinary business records, such as invoices and bills-of-lading, related to compliance with the prohibitions and restrictions in this regulation. These records must be maintained for a period of three years from the date the record is generated. EPA revised this language slightly from the proposal to improve clarity.

B. TSCA Section 6(c)(2) Considerations

1. Health effects, exposure, and environmental effects.

2,4,6-TTBP is toxic to aquatic plants, aquatic invertebrates, and fish. Data indicate the potential for liver and developmental effects. The studies presented in the Hazard Summary (Ref. 10) demonstrate these hazardous endpoints. These hazard statements are not based on a systematic review of the available literature and information may exist that could refine the hazard characterization.

Additional information about 2,4,6-TTBP health effects, use, and exposure is in Unit II.C. and is further detailed in the Hazard Summary (Ref. 10), and information on use and exposure is also in Unit II.C. and is further detailed in EPA's Exposure and Use Assessment (Ref. 4).

2. The value of the chemical substance or mixture for various uses.

2,4,6-TTBP has value as a chemical intermediate in the production of dialkylphenol chemicals. With respect to use as an antioxidant in the general fuel supply, antioxidant additives are essential to the storage and transport of fuel, as without them, fuel quickly begins to degrade and form harmful sludge and varnish. The 2,4,6-TTBP mixtures are the primary antioxidants used in aviation, marine, and automotive fuel streams in the United States. Many current performance specifications for fuel require their use, including for specialty fuels for aviation and the military. Antioxidants are also an important component in retail fuel additives and fuel injector cleaners, which are used for engines maintenance. Similarly, antioxidants are also used in oil and lubricants to prevent degradation of the product.

3. The reasonably ascertainable economic consequences of the rule.

i. Overview of cost methodology. EPA has evaluated the potential costs of the final rule and primary alternative regulatory actions for this chemical. Costs of the final rule were estimated based on the assumption that under regulatory limitations on 2,4,6-TTBP, manufactures and processors that use the regulated chemical would switch to available alternative chemicals to manufacture the product, or to products that do not contain the chemical. For 2,4,6-TTBP, costs were assessed based on product substitutes where product information was more substantial than information on chemical substitutes alone.

Substitution costs were estimated on the industry level using the price differential between the cost of the chemical and identified substitutes. Costs for rule familiarization and recordkeeping were estimated based on burdens estimated for other similar rulemakings. Costs were annualized over a 25-year period. Other potential costs include, but are not limited to, those associated with testing, reformulation, imported articles, and some portion of potential revenue loss. However, these costs are discussed only qualitatively, due to lack of data availability to estimate quantified costs. More details of this analysis are presented in the Economic Analysis (Ref. 3), which is in the public docket for this action.

ii. Estimated costs of this final rule. Total quantified annualized industry costs for the final rule is $5.6 million at 3% discount rate and $4.9 million at 7% discount rate annualized over 25 years. Total annualized Agency costs associated with implementation of the final rule were based on EPA's best judgment and experience with other similar rules. For the final regulatory action, EPA estimates it will require 0.5 FTE at $77,600 per year (Ref. 3).

4. Benefits.

As discussed in Unit II.A., while EPA reviewed hazard and exposure information for the PBT chemicals, this information did not provide a basis for EPA to develop scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present a risk of injury to health or the environment. Benefits were not quantified due to the lack of risk estimates. A qualitative discussion of the potential benefits associated with the proposed and alternative actions for each chemical is provided. 2,4,6-TTBP is persistent and bioaccumulative, and has been associated with liver toxicity and reproductive and developmental effects in mammals. Under the final regulatory action, 2,4,6-TTBP and products containing 2,4,6-TTBP at concentrations above 0.3% would be prohibited for distribution in containers less than 35 gallons and would be prohibited in processing and distribution for use as an additive to oil/lubricants. Therefore, the rule is expected to reduce the exposure to humans and the environment, by reducing the potential for consumer exposures to 2,4,6-TTBP and potential occupational exposure in certain industries, where workers are unprotected, as well as potential releases to the environment from

consumer and small commercial operations use.

5. Cost effectiveness, and effect on national economy, small business, and technological innovation.

With respect to the cost effectiveness of the final regulatory action and the primary alternative regulatory action, EPA is unable to perform a traditional cost-effectiveness analysis of the actions and alternatives for the PBT chemicals. As discussed in the proposed rule, the cost effectiveness of a policy option would properly be calculated by dividing the annualized costs of the option by a final outcome, such as cancer cases avoided, or to intermediate outputs such as tons of emissions of a pollutant curtailed. Without the supporting analyses for a risk determination, EPA is unable to calculate either a health-based or environment-based denominator. Thus, EPA is unable to perform a quantitative cost-effectiveness analysis of the final and alternative regulatory actions. However, by evaluating the practicability of the final and alternative regulatory actions, EPA believes that it has considered elements related to the cost effectiveness of the actions, including the cost and the effect on exposure to the PBT chemicals of the final and alternative regulatory actions.

EPA considered the anticipated effect of this rule on the national economy and concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 3). EPA analyzed the expected impacts on small business and found that no small entities are expected to experience impacts of more than 1% of revenues (Ref. 3). Finally, EPA has determined that this rule is unlikely to have significant impacts on technological innovation.

6. Consideration of alternatives.

EPA conducted a screening level analysis of two possible substitutes for 2,4,6-TTBP based on the TSCA Work Plan Chemicals: Methods Document (Ref. 2). One alternative antioxidant suitable as a fuel additive is 2,4-dimethyl-6-tert-butylphenol, CASRN 1879–09–0, and the other is 2,6-di-tert-butyl-p-cresol, also known as butylated hydroxytoluene or BHT, CASRN 128–37–0. Both chemicals have a lower bioaccumulation potential than 2,4,6-TTBP, but equivalent or higher scores for persistence, environmental hazard and human health hazard (Ref. 11). EPA did not assess the hazard of the chemical mixtures in commercial products containing 2,4,6-TTBP, nor did it assess the hazard of substitute products that do not contain 2,4,6-TTBP, so no conclusions as to the relative hazard of product substitutes can be drawn.

Based on a screening level analysis of likely alternatives, as noted previously, EPA believes that there are readily available substitutes for the retail fuel additives, as well as oil and lubricant additives containing 2,4,6-TTBP. EPA believes that the overwhelming predominance in the marketplace of oil and lubricant products that do not contain 2,4,6-TTBP is itself sufficient evidence of the availability of those substitute chemicals or products. While EPA did not identify the specific alternative chemicals used in each product, for the Economic Analysis (Ref. 3), EPA was able to determine 35 product substitutes exist for retail fuel stabilizer products and 15 product substitutes exist for retail fuel injector cleaner products (for purposes of the analysis, product substitutes are considered those that serve the same purpose but do not contain 2,4,6-TTBP).

C. TSCA Section 26(h) Considerations

In accordance with TSCA section 26(h) and taking into account the requirements of TSCA section 6(h), EPA has used scientific information, technical procedures, measures, and methodologies that are fit for purpose and consistent with the best available science. For example, EPA based its determination that human and environmental exposures are likely with 2,4,6-TTBP in the Exposure and Use Assessment (Ref. 4) discussed in Unit II.A.2, which underwent a peer review and public comment process, as well as using best available science and methods sufficient, to make that determination. The extent to which the various information, procedures, measures, and methodologies, as applicable, used in EPA's decision making have been subjected to independent verification or peer review is adequate to justify their use, collectively, is in the record for this rule. Additional information on the peer review and public comment process, such as the peer review plan, the peer review report, and the Agency's Response to Comments document, are in the public docket for this action (EPA–HQ–OPPT–2019–0080). In addition, in accordance with TSCA section 26(i) and taking into account the requirements of TSCA section 6(h), EPA has made scientific decisions based on the weight of the scientific evidence.

IV. References

The following is a list of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. All records in docket EPA–HQ–OPPT–2019–0080 are part of the record for this rulemaking. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. TSCA Work Plan for Chemical Assessments: 2014 Update. October 2014. *https://www.epa.gov/assessingand-managing-chemicals-under-tsca/tsca-work-plan-chemical-ssessments-2014-update.* Accessed March 1, 2019.
2. EPA. TSCA Work Plan Chemicals: Methods Document. *https://www.epa.gov/sites/production/files/2014-03/documents/work_plan_methods_document_web_final.pdf.* Accessed March 1, 2019.
3. EPA. Economic Analysis for Regulation of 2,4,6-Tris(tert-butyl)phenol (2,4,6-TTBP) Under TSCA Section 6(h). December 2020.
4. EPA. Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals. December 2020.
5. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); Response to Public Comments. December 2020.
6. EPA. Public Database 2016 Chemical Data Reporting. Washington, DC: US Environmental Protection Agency, Office of Pollution Prevention and Toxics.
7. EPA. Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: 2,4,6-TTBP. August 2017. (EPA–HQ–OPPT–2016–0739–0003).
8. SI Group. Comments for the economic impact of 2,4,6-tri-tert-butylphenol (2,4,6-TTBP); letter from Kevin M. Kransler to Doug Parsons, EPA. December 21, 2018.
9. EPA. Afton Chemical conference call with U.S. EPA, regarding 2,4,6-TTBP chemical uses. July 28, 2017.
10. EPA. Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals. December 2020.
11. EPA. Persistence, Bioaccumulation, Environmental Hazard and Human Health Hazard Rating for Alternatives to PBT Chemicals Proposed for Regulation. April 2019.
12. Keweenaw Bay Indian Community. Re: Notification of Consultation and Coordination on a Rulemaking Under the Toxic Substances Control Act: Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h). September 25, 2018.
13. Harper, Barbara and Ranco, Darren, in collaboration with the Maine Tribes. Wabanaki Traditional Cultural Lifeways Exposure Scenario. July 9, 2009.

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket for this action as required by section 6(a)(3)(E) of Executive Order 12866.

EPA prepared an economic analysis of the potential costs and benefits associated with this action. A copy of this economic analysis *Economic Analysis for Regulation of 2,4,6-Tris(tert-butyl)phenol (2,4,6-TTBP) Under TSCA Section 6(h)* (Ref. 3) is in the docket and is briefly summarized in Unit III.B.3.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is considered a regulatory action under Executive Order 13771 (82 FR 9339, February 3, 2017). Details on the estimated costs of this final rule can be found in the Economic Analysis (Ref. 3), which is briefly summarized in Unit III.B.3.

C. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2599.02 and OMB Control No. 2070–0213. A copy of the ICR is available in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

Respondents/affected entities: Entities potentially affected by paperwork requirements of this final rule include one manufacture and nine processors.

Respondent's obligation to respond: Mandatory.

Estimated number of respondents: 10.

Frequency of response: On occasion.

Total estimated burden: Five hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $393(per year), includes $0 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act (RFA)

This action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are small businesses that process, or distribute-in-commerce 2,4,6-TTBP. In total, three small businesses are expected to be affected by the rule. Of the small entities assessed, none (0%) are expected to incur impacts of 1% (or greater) of their revenue. Because only three small businesses are directly impacted and impacts are less than 1% for all small entities, EPA presumes no significant economic impact on a substantial number of small entities (no SISNOSE). Details of this analysis are presented in the Economic Analysis (Ref. 3).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and would not significantly or uniquely affect small governments. The final rule is not expected to result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (when adjusted annually for inflation) in any one year. Accordingly, this final rule is not subject to the requirements of sections 202, 203, or 205 of UMRA. The total quantified annualized social costs for this final rule under are approximately $5.6 million at a 3% discount rate and $4.9 million at a 7% discount rate, which does not exceed the inflation-adjusted unfunded mandate threshold of $160 million.

F. Executive Order 13132: Federalism

This action does not have federalism implications because it is not expected to have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications because it is not expected to have substantial direct effects on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this final rule.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA consulted with tribal officials during the development of this action. EPA consulted with representatives of Tribes via teleconference on August 31, 2018, and September 6, 2018, concerning the prospective regulation of the five PBT chemicals under TSCA section 6(h). Tribal members were encouraged to provide additional comments after the teleconferences. EPA received two comments from the Keweenaw Bay Indian Community (Ref. 12) and Maine Tribes (Ref. 13).

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866. Although the action is not subject to Executive Order 13045, the Agency considered the risks to infants and children under EPA's Policy on Evaluating Health Risks to Children. EPA did not perform a risk assessment or risk evaluation of 2,4,6-TTBP, however available data indicate the potential for reproductive and developmental effects from 2,4,6-TTBP. More information can be found in the Exposure and Use Assessment (Ref. 4) and the ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 10). This regulation will reduce the exposure to 2,4,6-TTBP for the general population and for susceptible subpopulations such as workers and children.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. While this action regulates a fuel additive, because the restrictions are limited to fuel additives purchased and used by consumers, it will not significantly affect the nation's fuel supply.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve any technical standards. Therefore, NTTAA section 12(d), 15 U.S.C. 272 *note,* does not apply to this action.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Economic Analysis (Ref. 3), which is in the public docket for this action.

L. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 751

Environmental protection, Chemicals, Export Notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Andrew Wheeler,

Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR part 751 is amended as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Add and reserve subpart D.

■ 3. Add subpart E, consisting of §§ 751.401 through 751.413, to read as follows:

Subpart E—Persistent, Bioaccumulative, and Toxic Chemicals

Sec.
751.401 General.
751.403 Definitions.
751.405 [Reserved].
751.407 [Reserved].
751.409 2,4,6-TTBP.
751.411 [Reserved].
751.413 [Reserved].

§ 751.401 General.

(a) This subpart establishes prohibitions and restrictions on the manufacturing, processing, and distribution in commerce of persistent, bioaccumulative, and toxic chemicals in accordance with TSCA section 6(h), 15 U.S.C 2605(h).

(b) Unless otherwise specified in this subpart, prohibitions and restrictions of this subpart do not apply to the following activities:

(1) Distribution in commerce of any chemical substance, or any product or article that contains the chemical substance, that has previously been sold or supplied to an end user, *i.e.,* any person that purchased or acquired the finished good for purposes other than resale. An example of an end user is a consumer who resells a product they no longer intend to use or who donates an article to charity.

(2) Disposal of any chemical substance, or any product or article that contains the chemical substance, as well as importation, processing and distribution in commerce of any chemical substance or any product or article that contains the chemical substance for purposes of disposal.

(3) Manufacturing, processing, distribution in commerce, and use of any chemical substance, or any product or article that contains the chemical substance, for research and development, as defined in § 751.403.

§ 751.403 Definitions.

The definitions in subpart A of this part apply to this subpart unless otherwise specified in this section.

2,4,6-TTBP means the chemical substance 2,4,6-tris(tert-butyl)phenol (CASRN 732–26–3).

2,4,6-TTBP oil and lubricant additives means any 2,4,6-TTBP-containing additive to a product of any viscosity intended to reduce friction between moving parts, whether mineral oil or synthetic base, including engine crankcase and gear oils and bearing greases. 2,4,6-TTBP oil and lubricant additive does not include hydraulic fluid and other oils whose primary purpose is not friction reduction.

Article means a manufactured item:

(1) Which is formed to a specific shape or design during manufacture,

(2) Which has end use function(s) dependent in whole or in part upon its shape or design during end use, and

(3) Which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the article, and that result from a chemical reaction that occurs upon end use of other chemical substances, mixtures, or articles; except that fluids and particles are not considered articles regardless of shape or design.

Product means the chemical substance, a mixture containing the chemical substance, or any object that contains the chemical substance or mixture containing the chemical substance that is not an article.

Research and Development means laboratory and research use only for purposes of scientific experimentation or analysis, or chemical research on, or analysis of, the chemical substance, including methods for disposal, but not for research or analysis for the development of a new product, or refinement of an existing product that contains the chemical substance.

§ 751.405 Reserved]

§ 751.407 Reserved]

§ 751.409 2,4,6-TTBP.

(a) *Prohibitions.* (1) After January 6, 2026, all persons are prohibited from all distribution in commerce of 2,4,6-TTBP, at any concentration above 0.3 percent by weight, in containers with a volume less than 35 gallons.

(2) After January 6, 2026, all persons are prohibited from all processing and distribution in commerce of 2,4,6-TTBP oil and lubricant additives at any concentration above 0.3 percent by weight.

(b) *Recordkeeping.* After January 6, 2026, distributors of 2,4,6-TTBP must maintain ordinary business records, such as invoices and bills-of-lading, related to compliance with the

prohibitions, restrictions, and other provisions of this section. These records must be maintained for a period of three years from the date the record is generated.

§ 751.411 [Reserved]

§ 751.413 [Reserved]

[FR Doc. 2020–28690 Filed 1–5–21; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2019–0080; FRL–10018–87]

RIN 2070–AK34

Decabromodiphenyl Ether (DecaBDE); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a rule under the Toxic Substances Control Act (TSCA) to address its obligations under TSCA for decabromodiphenyl ether (decaBDE) (CASRN 1163–19–5), which EPA has determined meets the requirements for expedited action under of TSCA. This final rule prohibits all manufacture (including import), processing, and distribution in commerce of decaBDE, or decaBDE-containing products or articles, with some exclusions. These requirements will result in lower amounts of decaBDE being manufactured, processed, distributed in commerce, used and disposed, thus reducing the exposures to humans and the environment.

DATES: This final rule is February 5, 2021. For purposes of judicial review and 40 CFR 23.5, this rule shall be promulgated at 1 p.m. eastern standard time on January 21, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0080, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

Please note that due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Clara Hull, Existing Chemicals Risk Management Division, Office of Pollution Prevention and Toxics (7404T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: 202–564–3954; email address: *hull.clara@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture (including import), process, distribute in commerce, or use decabromodiphenyl ether (decaBDE) and decaBDE-containing products and articles, especially wire and cable rubber casings, textiles, electronic equipment casings, building and construction materials, and imported articles such as aerospace and automotive parts. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Nuclear Electric Power Generation (NAICS Code 221113);
- Power and Communication Line and Related Structures Construction (NAICS Code 237130);
- Nonwoven Fabric Mills (NAICS Code 313230);
- Fabric Coating Mills (NAICS Code 313320);
- All Other Basic Organic Chemical Manufacturing (NAICS Code 325199);
- Paint and Coating Manufacturing (NAICS Code 325510);
- Custom Compounding of Purchased Resins (NAICS Code 325991);
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS Code 325998);
- Unlaminated Plastics Film and Sheet (except Packaging) Manufacturing (NAICS Code 326113);
- Laminated Plastics Plate, Sheet (except Packaging), and Shape Manufacturing (NAICS Code 326130);
- Urethane and Other Foam Product (except Polystyrene) Manufacturing (NAICS Code 326150);
- All Other Plastics Product Manufacturing (NAICS Code 326199);
- Copper Rolling, Drawing, Extruding, and Alloying (NAICS Code 331420);
- Computer and Peripheral Equipment Manufacturing (NAICS Code 3341);
- Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing (NAICS Code 334220);
- Other Communications Equipment Manufacturing (NAICS Code 334290);
- Audio and Video Equipment Manufacturing (NAICS Code 334310);
- Other Communication and Energy Wire Manufacturing (NAICS Code 335929);
- Current-Carrying Wiring Device Manufacturing (NAICS Code 335931);
- Motor Vehicle Manufacturing (NAICS Code 3361), *e.g.,* automobile, aircraft, ship, and boat manufacturers and motor vehicle parts manufacturers;
- Other Motor Vehicle Parts Manufacturing (NAICS Code 336390);
- Aircraft Manufacturing (NAICS Code 336411);
- Guided Missile and Space Vehicle Manufacturing (NAICS Code 336414);
- Surgical Appliance and Supplies Manufacturing (NAICS Code 339113);
- Doll, Toy, and Game Manufacturing (NAICS Code 33993);
- Automobile and Other Motor Vehicle Merchant Wholesalers (NAICS Code 423110);
- Motor Vehicle Supplies and New Parts Merchant Wholesalers (NAICS Code 423120);
- Hotel Equipment and Supplies (except Furniture) Merchant Wholesalers (NAICS Code 423440);
- Household Appliances, Electric Housewares, and Consumer Electronics Merchant Wholesalers (NAICS Code 423620);
- Sporting and Recreational Goods and Supplies Merchant Wholesalers (NAICS Code 423910);
- Toy and Hobby Goods and Supplies Merchant Wholesalers (NAICS Code 423920);

- Other Chemical and Allied Products Merchant Wholesalers (NAICS Code 424690);
- New Car Dealers (NAICS Code 441110);
- Boat Dealers (NAICS Code 441222);
- Automotive Parts and Accessories Stores (NAICS Code 441310);
- Furniture Stores (NAICS Code 442110);
- Household Appliance Stores (NAICS Code 443141);
- Electronics Stores (NAICS Code 443142);
- All Other Home Furnishing Stores (NAICS Code 442299);
- Children's and Infant's Clothing Stores (NAICS Code 448130);
- Hobby, Toy, and Game Stores (NAICS Code 451120);
- General Merchandise Stores (NAICS Code 452);
- Electronic Shopping and Mail-Order Houses (NAICS Code 454110);
- Aircraft Maintenance and Repair Services (NAICS Code 488190);
- Traveler Accommodations (NAICS Code 7211);
- General Automotive Repair (NAICS Code 811111).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT**.

B. What is the Agency's authority for taking this action?

Section 6(h) of TSCA, 15 U.S.C. 2601 *et seq.,* directs EPA to issue a final rule under TSCA section 6(a) on certain persistent, bioaccumulative, and toxic (PBT) chemical substances. More specifically, EPA must take action on those chemical substances identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1) that, among other factors, EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the TSCA Work Plan Chemicals: Methods Document (Ref. 2). DecaBDE (CASRN 1163–19–5) is one such chemical substance. Other chemical substances are being addressed through separate **Federal Register** notices. For the purposes of this final rule, these specific chemical substances are hereinafter collectively referred to as the PBT chemicals. This final rule is final agency action for purposes of judicial review under TSCA section 19(a).

C. What action is the Agency taking?

EPA published a proposed rule on July 29, 2019, to address the five PBT chemicals EPA identified pursuant to TSCA section 6(h) (84 FR 36728; FRL–9995–76). After publication of the proposed rule, EPA determined to address each of the five PBT chemicals in separate final actions. This final rule prohibits the manufacture (including import) and processing of decaBDE, and products and articles to which decaBDE has been added effective 60 days after publication of the final rule, and distribution in commerce of products and articles to which decaBDE has been added one year after the effective date of the rule. Different compliance dates or exclusions from the date of publication of this prohibition include:

- 18 months for any manufacture, processing and distribution in commerce of decaBDE for use in curtains in the hospitality industry, and the curtains to which decaBDE has been added.
- Two years for any processing and distribution in commerce of decaBDE for use in wire and cable insulation in nuclear power generation facilities, and the decaBDE-containing wire and cable insulation.
- Three years for any manufacture, processing and distribution in commerce of decaBDE for use in parts installed in and distributed as part of new aerospace vehicles, and the parts to which decaBDE has been added for such vehicles. After the end of their service lives for import, processing, and distribution in commerce of aerospace vehicles manufactured before January 7, 2024 that contain decaBDE in any part. After the end of their service lives for manufacture, processing, and distribution in commerce of decaBDE for use in replacement parts for aerospace vehicles, and the replacement parts to which decaBDE has been added for such vehicles.
- After the end of their service lives, or 2036, whichever is earlier, for manufacture, processing, and distribution in commerce of decaBDE for use in replacement parts for motor vehicles, and the replacement parts to which decaBDE has been added for such vehicles.
- After the end of their service lives for distribution in commerce of plastic shipping pallets manufactured prior to March 8, 2021 that contain decaBDE.
- Exclusion for processing and distribution in commerce for recycling of decaBDE-containing plastic products and articles (*i.e.,* the plastic to be recycled is from products and articles that were originally made with decaBDE), and for decaBDE-containing products or articles made from such recycled plastic, where no new decaBDE is added during the recycling or production process.

Persons manufacturing, processing, and distributing in commerce decaBDE or decaBDE-containing products and articles are required to maintain, for three years from the date the record is generated, ordinary business records related to compliance with this rule that include the name of the purchaser, and list the products or articles. Excluded from the recordkeeping requirement are persons processing and distributing in commerce for; recycling of plastic that contains decaBDE, those products and articles containing decaBDE from recycled plastic as long as no new decaBDE was added during the recycling process, and plastic shipping pallets manufactured prior to the effective date of the rule. These records must include a statement that the decaBDE, or the decaBDE-containing products and articles, are in compliance with 40 CFR 751.405(a) and be made available to EPA within 30 calendar days upon request.

D. Why is the Agency taking this action?

EPA is issuing this final rule to fulfill EPA's obligations under TSCA section 6(h) to take timely regulatory action on PBT chemicals, including decaBDE, ''to address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and to reduce exposure to the substance to the extent practicable.'' Consistent with that requirement, the Agency is finalizing this rule to reduce exposures to decaBDE to the extent practicable.

E. What are the estimated incremental impacts of this action?

EPA has evaluated the potential costs of these restrictions and prohibitions and the associated reporting and recordkeeping requirements. The ''Economic Analysis for Final Regulation of Decabromodiphenyl ether (decaBDE) under TSCA section 6(h)'' (Economic Analysis) (Ref. 3), is available in the docket and is briefly summarized here.

- *Benefits.* EPA was not able to quantify the benefits of reducing the potential for human and environmental exposures to decaBDE. As discussed in more detail in Unit II.A., EPA did not perform a risk evaluation for decaBDE, nor did EPA develop quantitative risk estimates. Therefore, the Economic Analysis (Ref. 3) qualitatively discusses the benefits of reducing the exposure under the final rule for decaBDE.
- *Costs.* Total quantified annualized social costs for this final rule are approximately $157,000 (at both 3%

and 7% discount rates). Quantified costs were developed for rule familiarization, product substitution, and recordkeeping. Potential unquantified costs and are those associated with testing, reformulation, importation of articles, foregone profits, and indirect costs. The limited data available for those costs prevents EPA from constructing a quantitative assessment.

• *Small entity impacts.* This final rule would impact approximately 17 small businesses of which none are expected to incur cost impacts of 1% of their revenue or greater.

• *Environmental Justice.* This final rule may increase the level of protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population or children and other downstream receptors such as recreational fishers.

• *Effects on State, local, and Tribal governments.* This final rule does not have any significant or unique effects on small governments, or federalism or tribal implications.

F. Children's Environmental Health

Executive Order 13045 applies if the regulatory action is economically significant and concerns an environmental health risk or safety risk that may disproportionately affect children. While the action is not subject to Executive Order 13045, the Agency's Policy on Evaluating Health Risks to Children (*https://www.epa.gov/children/epas-policy-evaluating-risk-children*) is to consider the risks to infants and children consistently and explicitly during its decision making process. This final rule will reduce the exposures to decaBDE that could occur from activities now prohibited under this final rule for the general population and for potentially exposed or susceptible subpopulations such as children. More information can be found in the Exposure and Use Assessment (Ref. 4).

II. Background

A. History of This Rulemaking

TSCA section 6(h) requires EPA to take expedited regulatory action under TSCA section 6(a) for certain PBT chemicals identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1). As required by the statute, EPA issued a proposed rule to address five persistent, bioaccumulative, and toxic (PBT) chemicals identified pursuant to TSCA section 6(h) (84 FR 36728, July 29, 2019). The statute required that this be followed by promulgation of a final rule no later than 18 months after the proposal. While EPA proposed regulatory actions on each chemical substance in one proposal, in response to public comments (EPA–HQ–OPPT–2019–0080–0544), (EPA–HQ–OPPT–2019–0080–0553), (EPA–HQ–OPPT–2019–0080–0556), (EPA–HQ–OPPT–2019–0080–0562) requesting these five actions be separated, EPA is finalizing five separate actions. EPA intends for the five separate final rules to publish in the same issue of the **Federal Register**. The details of the proposal for decaBDE are described in more detail in Unit II.D.

Under TSCA section 6(h)(1)(A), the subject chemical substances subject to expedited action are those that:

• EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the 2012 TSCA Work Plan Chemicals: Methods Document or a successor scoring system;

• Are not a metal or a metal compound; and

• Are chemical substances for which EPA has not completed a TSCA Work Plan Problem Formulation, initiated a review under TSCA section 5, or entered into a consent agreement under TSCA section 4, prior to June 22, 2016, the date that the Frank R. Lautenberg Chemical Safety for the 21st Century Act was enacted.

In addition, in order for a chemical substance to be subject to expedited action, TSCA section 6(h)(1)(B) states that EPA must find that exposure to the chemical substance under the conditions of use is likely to the general population or to a potentially exposed or susceptible subpopulation identified by the Administrator (such as infants, children, pregnant women, workers or the elderly), or to the environment on the basis of an exposure and use assessment conducted by the Administrator. TSCA section 6(h)(2) further provides that the Administrator shall not be required to conduct risk evaluations on chemical substances that are subject to TSCA section 6(h)(1).

Based on the criteria set forth in TSCA section 6(h), EPA proposed to determine that five chemical substances meet the TSCA section 6(h)(1)(A) criteria for expedited action, and decaBDE is one of these five chemical substances. In addition, in accordance with the statutory requirements to demonstrate that exposure to the chemical substance is likely under the conditions of use, EPA conducted an Exposure and Use Assessment for decaBDE. As described in the proposed rule, EPA conducted a review of available literature with respect to decaBDE to identify, screen, extract, and evaluate reasonably available information on use and exposures. This information is in the document entitled ''Exposure and Use Assessment of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 4). Based on this review, which was subject to peer review and public comment, EPA proposed to find that exposure to decaBDE is likely, based on information detailed in the Exposure and Use Assessment.

B. Other Provisions of TSCA Section 6

1. EPA's approach for implementing TSCA section 6(h)(4).

TSCA section 6(h)(4) requires EPA to issue a final TSCA section 6(a) rule to ''address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and reduce exposure to the substance to the extent practicable.'' EPA reads this text to require action on the chemical, not specific conditions of use. The approach EPA takes is consistent with the language of TSCA section 6(h)(4) and its distinct differences from other provisions of TSCA section 6 for chemicals that are the subject of required risk evaluations. First, the term ''condition of use'' is only used in TSCA section 6(h) in the context of the TSCA section 6(h)(1)(B) finding relating to likely exposures under ''conditions of use'' to ''the general population or to a potentially exposed or susceptible subpopulation . . . or the environment.'' In contrast to the risk evaluation process under TSCA section 6(b), this TSCA section 6(h)(1)(B) threshold criterion is triggered only through an Exposure and Use Assessment regarding the likelihood of exposure and does not require identification of every condition of use (Ref. 4). As a result, EPA collected all the information it could on the use of each chemical substance, without regard to whether any chemical activity would be characterized as ''known, intended or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of,'' and from that information created use profiles and then an Exposure and Use Assessment to make the TSCA section 6(h)(1)(B) finding for at least one or more ''condition of use'' activities where some exposure is likely. EPA did not attempt to precisely classify all activities for each chemical substance as a ''condition of use'' and thus did not attempt to make a TSCA section

6(h)(1)(B) finding for all chemical activities summarized in the Exposure and Use Assessment. Second, TSCA section 6 generally requires a risk evaluation under TSCA section 6(b) for chemicals based on the identified conditions of use. However, pursuant to TSCA section 6(h)(2), for chemical substances that meet the criteria of TSCA section 6(h)(1), a risk evaluation is neither required nor contemplated to be conducted for EPA to meet its obligations under TSCA section 6(h)(4). Rather, as noted in Unit II.B.3., if a previously prepared TSCA risk assessment exists, EPA would have authority to use that risk assessment to ''address risks'' under TSCA section 6(h)(4), but even that risk assessment would not necessarily be focused on whether an activity is ''known, intended or reasonably foreseen,'' as those terms were not used in TSCA prior to the 2016 amendments and a preexisting assessment of risks would have had no reason to use such terminology or make such judgments. It is for this reason EPA believes that the TSCA section 6(h)(4) ''address risk'' standard refers to the risks the Administrator determines ''are presented *by the chemical substance*'' and makes no reference to ''conditions of use.'' Congress did not contemplate or require a risk evaluation identifying the conditions of use as defined under TSCA section 3(4). The kind of analysis required to identify and evaluate the conditions of use for a chemical substance is only contemplated in the context of a TSCA section 6(b) risk evaluation, not in the context of an expedited rulemaking to address PBT chemicals. Similarly, the TSCA amendments require EPA to ''reduce exposure *to the substance* to the extent practicable,'' without reference to whether the exposure if found ''likely'' pursuant to TSCA section 6(h)(1)(B).

Taking this into account, EPA reads its TSCA section 6(h)(4) obligation to apply to the chemical substance generally, thus requiring EPA to address risks and reduce exposures to the chemical substance without focusing on whether the measure taken is specific to an activity that might be characterized as a ''condition of use'' as that term is defined in TSCA section 3(4) and interpreted by EPA in the Risk Evaluation Rule, 82 FR 33726 (July 20, 2017). This approach ensures that any activity involving a TSCA section 6(h) PBT chemical, past, present or future, is addressed by the regulatory approach taken. Thus, under this final rule, manufacturing, processing, and distribution in commerce activities that are not specifically excluded are prohibited. The specified activities with particular exclusions are those which EPA determined were not appropriate to regulate under the TSCA section 6(h)(4) standard. Consistently, based on the Exposure and Use Assessment, activities associated with decaBDE that may no longer be occurring, such as domestic manufacture of the chemical substance or production of plastic enclosure for electronics, are addressed by this rule and thus the prohibitions adopted in this rule reduce the exposures that will result with resumption of past activities or the initiation of similar or other activities in the future. Therefore, EPA has determined that prohibiting these activities will reduce exposures to the extent practicable. The approach taken for this final rule is limited to implementation of TSCA section 6(h) and is not relevant to any other action under TSCA section 6 or other TSCA statutory actions.

2. *EPA's interpretation of practicable.*

The term ''practicable'' is not defined in TSCA. EPA interprets this requirement as generally directing the Agency to consider such factors as achievability, feasibility, workability, and reasonableness. In addition, EPA's approach to determining whether particular prohibitions or restrictions are practicable is informed in part by certain other provisions in TSCA section 6, such as TSCA section 6(c)(2)(A) which requires the Administrator to consider health effects, exposure, and environmental effects of the chemical substance; benefits of the chemical substance; and the reasonably ascertainable economic consequences of the rule. In addition, pursuant to TSCA section 6(c)(2)(B), in selecting the appropriate TSCA section 6(a) regulatory approach, the Administrator is directed to ''factor in, to the extent practicable'' those same considerations.

EPA received comments on the proposed rule regarding this interpretation of ''practicable.'' EPA has reviewed these comments and believes the interpretation described previously within this Unit is consistent with the intent of TSCA and has not changed that interpretation. EPA's interpretation of an ambiguous statutory term receives deference. More discussion on these comments is in the Response to Comments document for this rulemaking (Ref. 5).

3. *EPA did not conduct a risk evaluation or assessment.*

As EPA explained in the proposed rule, EPA does not interpret the ''address risk'' language to require EPA to determine, through a risk assessment or risk evaluation, whether risks are presented. EPA believes this reading gives the Administrator the flexibility Congress intended for issuance of expedited rules for PBTs and is consistent with TSCA section 6(h)(2) which makes clear a risk evaluation is not required to support this rulemaking.

EPA received comments on the proposed rule regarding its interpretation of TSCA section 6(h)(4) and regarding EPA's lack of risk assessment or risk evaluation of decaBDE. A number of commenters asserted that while EPA was not compelled to conduct a risk evaluation, EPA should have conducted a risk evaluation under TSCA section 6(b) regardless. The rationales provided by the commenters for such a risk assessment or risk evaluation included that one was needed for EPA to fully quantify the benefits to support this rulemaking, and that without a risk evaluation, EPA would not be able to determine the benefits, risks, and cost effectiveness of the rule in a meaningful way. As described by the commenters, EPA would therefore not be able to meet the TSCA section 6(c)(2) requirement for a statement of these considerations. Regarding the contradiction between the mandate in TSCA section 6(h) to expeditiously issue a rulemaking and the time needed to conduct a risk evaluation, some commenters argued that EPA would have had enough time to conduct a risk evaluation and issue a proposed rule by the statutory deadline.

EPA disagrees with the commenters' interpretation of EPA's obligations with respect to chemicals subject to TSCA section 6(h)(4). TSCA section 6(h)(4) provides that EPA shall: (1) ''Address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance'' and (2) ''reduce exposure to the substance to the extent practicable.'' With respect to the first requirement, that standard is distinct from the ''unreasonable risk'' standard for all other chemicals for which a section 6(a) rule might be issued. EPA does not believe that TSCA section 6(h) contemplates a new evaluation of any kind, given that evaluations to determine risks are now addressed through the TSCA section 6(b) risk evaluation process and that TSCA section 6(h)(2) explicitly provides that no risk evaluation is required. Moreover, it would have been impossible to prepare a meaningful evaluation under TSCA and subsequently develop a proposed rule in the time contemplated for issuance of a proposed rule under TSCA section 6(h)(1). Although EPA does not believe the statute contemplates a new

evaluation of any kind for these reasons, EPA reviewed the hazard and exposure information on the five PBT chemicals EPA had compiled. However, while this information appropriately addresses the criteria of TSCA section 6(h)(1)(A) and (B), it did not provide a basis for EPA to develop sufficient and scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present an identifiable risk of injury to health or the environment.

Rather than suggesting a new assessment is required, EPA reads the ''address risk'' language in TSCA section 6(h)(4) to contemplate reliance on an existing EPA assessment under TSCA, similar to a risk assessment that may be permissibly used under TSCA section 26(l)(4) to regulate the chemical under TSCA section 6(a). This interpretation gives meaning to the ''address risk'' phrase, without compelling an evaluation contrary to TSCA section 6(h)(2), and would allow use of an existing determination, or development of a new determination based on such an existing risk assessment, in the timeframe contemplated for issuance of a proposed rule under TSCA section 6(h). However, there were no existing EPA assessments of risk for any of the PBT chemicals. Thus, because EPA had no existing EPA risk assessments or determinations of risk, the regulatory measures addressed in this final rule focus on reducing exposures ''to the extent practicable.''

In sum, because neither the statute nor the legislative history suggests that a new evaluation is compelled to identify and thereby provide a basis for the Agency to ''address risks'' and one could not be done prior to preparation and timely issuance of a proposed rule, and no existing TSCA risk assessment exists for any of the chemicals, EPA has made no risk determination finding for any of the PBT chemicals. Instead, EPA implements the requirement of TSCA section 6(h)(4) by reducing exposures of each PBT chemical ''to the extent practicable.''

For similar reasons, EPA does not believe that TSCA section 6(c)(2) requires a quantification of benefits, much less a specific kind of quantification. Under TSCA section 6(c)(2)(A)(iv), EPA must consider and publish a statement, based on reasonably available information, on the reasonably ascertainable economic consequences of the rule, but that provision does not require quantification, particularly if quantification is not possible. EPA has reasonably complied with this requirement by including a quantification of direct costs and a qualitative discussion of benefits in each of the preambles to the final rules. EPA was unable to quantify the indirect costs associated with the rule. More discussion on these issues raised in the comments is in the Response to Comments document (Ref. 5).

4. *Replacement parts and articles.*

In the preamble to the proposed rule, EPA explained that it did not read provisions of TSCA section 6 that conflict with TSCA section 6(h) to apply to TSCA section 6(h) rules. Specifically, TSCA sections 6(c)(2)(D) and (E) require a risk finding pursuant to a TSCA section 6(b) risk evaluation to regulate replacement parts and articles. Yet, TSCA section 6(h) neither compels nor contemplates a risk evaluation to precede or support the compelled regulatory action to ''address the risks . . .'' and ''reduce exposures to the substance to the extent practicable''. TSCA section 6(h)(2) makes clear no risk evaluation is required, and the timing required for conducting a risk evaluation is not consistent with the timing compelled for issuance of a proposed rule under TSCA section 6(h). Moreover, even assuming a prior risk assessment might allow a risk determination under the TSCA section 6(h)(4) ''address risk'' standard, such assessment would still not satisfy the requirement in TSCA section 6(c)(2)(D) and (E) for a risk finding pursuant to a TSCA section 6(b) risk evaluation. Because of the clear conflict between these provisions, EPA determined that those provisions of TSCA section 6(c) that assume the existence of a TSCA section 6(b) risk evaluation do not apply in the context of this TSCA section 6(h) rulemaking. Instead, EPA resolves this conflict in these provisions by taking into account the TSCA section 6(c) considerations in its determinations as to what measures ''reduce exposure to the substance to the extent practicable''.

Commenters contended that TSCA section 6(c)(2)(D) and (E) bar a TSCA section 6(h) rule in the absence of a risk evaluation, representing Congress's recognition of the special burdens associated with regulating replacement parts and articles, including the difficulty of certifying newly designed replacement parts for automobiles and aircraft, and the difficulty importers face in knowing what chemicals are present in the articles they import. As noted earlier in this Unit and further discussed in the Response to Comment document, while EPA determined that provisions of TSCA section 6(c)(2)(D) and (E) do not apply because they conflict with the requirements of TSCA section 6(h), EPA interpreted the ''practicability'' standard in TSCA section 6(h)(4) to reasonably contemplate the considerations embodied by TSCA section 6(c)(2)(D) and (E). As a result, EPA disagrees with any suggestion that the clear conflict between Congress' mandates in TSCA section 6(h) and TSCA section 6(c)(2)(D) and (E) must be read to bar regulation of replacement parts and articles made with chemicals that Congress believed were worthy of expedited action under TSCA section 6(h) and in the absence of a risk evaluation. The statute does not clearly communicate that outcome. Instead, Congress left ambiguous how best to address the conflict in these provisions, and EPA's approach for taking into consideration the TSCA section 6(c)(2)(D) and (E) concepts in its TSCA section 6(h)(4) ''practicability'' determinations is a reasonable approach. In addition, with respect to comments that TSCA section 6(c)(2)(D) and (E) were intended to address Congress's concerns regarding burdens associated with regulation of replacement parts and articles, EPA agrees that these concerns are relevant and takes them into account in its implementation of the TSCA section 6(h)(4) mandate, with respect to the circumstances for each chemical. Finally, EPA does not believe that Congress intended, through the article provisions incorporated into the TSCA amendments, to absolve importers of the duty to know what they are importing. Importers can and should take steps to determine whether the articles they are importing contain chemicals that are prohibited or restricted. Therefore, as discussed earlier in this Unit and in the Response to Comment document, EPA is continuing to interpret TSCA sections 6(c)(2)(D) and 6(c)(2)(E) to be inapplicable to this rulemaking. While this interpretation has not changed, EPA has reviewed the practicability of regulating replacement parts and articles in accordance with the statutory directive in TSCA section 6(h)(4) to reduce exposures to the PBT chemicals to the extent practicable. This is discussed further in Unit III.A.

C. DecaBDE Overview, Health Effects, and Exposure

DecaBDE is used as an additive flame retardant in plastic enclosures for televisions, computers, audio and video equipment, textiles and upholstered articles, wire and cables for communication and electronic equipment, and other applications (Ref. 6). DecaBDE is also used as a flame retardant for multiple applications for aerospace and automotive vehicles, including replacement parts for aircraft and cars (Refs. 7, 8). Exposure

information for decaBDE is detailed in EPA's Exposure and Use Assessment (Ref. 4), and the proposal. There is potential for exposure to decaBDE under the conditions of use at all stages of its lifecycle (*i.e.,* manufacturing, processing, use (industrial, commercial, and consumer), distribution, and disposal) of the chemical (Ref 4). DecaBDE was produced and released at higher levels in the past but continues to be released. Releases from manufacturing and processing are declining over time, as are releases associated with use, disposal, and recycling (Ref. 4).

Exposure assessments on decaBDE have been conducted by EPA (including industry-supplied information as part of the Voluntary Children's Chemical Evaluation Program), the National Academy of Sciences, and international governments. These assessments describe exposure potential for polybrominated diphenyl ethers (PBDEs), including decaBDE, through a variety of pathways. Adult and child exposures occur via dust ingestion, dermal contact with dust, and dietary exposures (such as dairy consumption). Household consumer products have been identified as the main source of PBDEs (including decaBDE) in house dust. The next highest exposure pathways included dairy ingestion, and inhalation of indoor air (via dust). Infant and child exposures occur via breastmilk ingestion and mouthing of hard plastic toys and fabrics. Occupational exposures for breastfeeding women were highest in women engaged in activities resulting in direct contact with decaBDE (Ref. 4).

DecaBDE is toxic to aquatic invertebrates, fish, and terrestrial invertebrates. Data indicate the potential for developmental, neurological, and immunological effects, general developmental toxicity and liver effects in mammals. There was some evidence of genotoxicity and carcinogenicity. The studies presented in the document entitled ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals (Hazard Summary) (Ref. 9) demonstrate these hazardous endpoints. EPA did not perform a systematic review or a weight of the scientific evidence assessment for the hazard characterization of these chemicals. As a result, this hazard characterization is not definitive or comprehensive. Other hazard information on these chemicals may exist in addition to the studies summarized in the Hazard Summary that could alter the hazard characterization. In the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1), decaBDE scored high (3) for hazard (based on developmental effects in mammals and aquatic toxicity); high (3) for exposure (based on its use in textiles, plastics, and polyurethane foam; and information reported to the 2012 and 2016 Chemical Data Reporting (CDR) and the 2017 Toxics Release Inventory (TRI))(Ref. 10,11,12); and high (3) for persistence and bioaccumulation (based on high environmental persistence and high bioaccumulation potential). The overall screening score for decaBDE was high (9).

Taking all this into account, and the discussion in Response to Comments Document and in this preamble, EPA determines in this final rule that decaBDE meets the TSCA section 6(h)(1)(A) criteria. In addition, EPA determines, in accordance with TSCA section 6(h)(1)(B), that, based on the Exposure and Use Assessment and other reasonably-available information, exposure to decaBDE is likely under the conditions of use to the general population, to a potentially exposed or susceptible subpopulation, or the environment. EPA's determination is based on the opportunities for exposure throughout the lifecycle of decaBDE, including the potential for consumer exposures. EPA did not receive any comments with information to call the exposure finding into question.

D. EPA's Proposed Rule Under TSCA Section 6(h) for decaBDE

In the proposed rule (84 FR 36728), EPA proposed to prohibit the manufacture (including import), processing, and distribution in commerce of decaBDE, and articles and products to which decaBDE has been added. Proposed compliance dates or exclusions from the date of publication of the prohibition included:

- 18 months for any manufacture, processing and distribution in commerce of decaBDE for use in curtains in the hospitality industry, and the curtains to which decaBDE has been added.
- Three years for manufacture, processing and distribution in commerce of decaBDE for use in parts installed in and distributed as part of new aerospace vehicles, and the parts to which decaBDE has been added for such vehicles.
- The exclusion from prohibitions for manufacturing (including import), processing, and distribution in commerce for use in replacement parts for motor and aerospace vehicles, and the replacement parts to which decaBDE has been added for such vehicles.
- The exclusion from prohibitions for processing and distribution in commerce for recycling of plastic that contains decaBDE, (*i.e.,* the plastic to be recycled is from products and articles that were originally made with decaBDE), so long as no new decaBDE is added during the recycling process.
- The exclusion from processing and distribution in commerce of finished products and articles made from plastic recycled from products and articles containing decaBDE, where no new decaBDE was added during the production of the products and articles.

In addition, EPA proposed to require that all persons who manufacture, process, or distribute in commerce decaBDE and decaBDE-containing products and articles maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions and restrictions. EPA proposed that these records would have to be maintained for a period of three years from the date the record is generated with an exclusion for persons processing and distributing in commerce for recycling of plastic that contains decaBDE, and those products or articles containing decaBDE from recycled plastic, as long as no new decaBDE was added during the recycling process.

E. Public Comments and Other Public Input

The proposed rule provided a 60-day public comment period, with a 30-day extension provided. (Ref. 5) The comment period closed on October 28, 2019. EPA received a total of 48 comments, with three commenters sending multiple submissions with attached files, for a total of 58 submissions on the proposal for all the PBT chemicals. This includes the previous request for a comment period extension (EPA–HQ–OPPT–2019–0080–0526). Two commenters submitted confidential business information (CBI) or copyrighted documents with information regarding economic analysis and market trends. Copies of all the non-CBI documents, or redacted versions without CBI, are available in the docket for this action. EPA also communicated with companies, and other stakeholders to identify and verify uses of decaBDE. These interactions and comments further informed EPA's understanding of the current status of uses for decaBDE. Public comments and stakeholder meeting summaries are available in the public docket at EPA–HQ–OPPT–2019–0080.

In this preamble, EPA has responded to the major comments relevant to the decaBDE final rule. Of the comment

submissions, 27 directly addressed EPA's proposed regulation of decaBDE. Additional discussion related to this final action can be found in the Response to Comments document (Ref. 5).

F. Activities Not Directly Regulated by This Rule

EPA is not regulating all activities or exposures to decaBDE, even though the Exposure and Use Assessment (Ref. 4) identified potential for exposures under many conditions of use. One such activity is disposal. EPA generally presumes compliance with federal and state laws and regulations, including, for example, Resource Conservation and Recovery Act (RCRA) and its implementing regulations and state laws, as well as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act (SDWA). As described in the proposed rule, regulations promulgated under the authority of the RCRA govern the disposal of hazardous and non-hazardous wastes. Although decaBDE is not a listed hazardous waste under RCRA, it is subject to the requirements applicable to solid waste under Subtitle D of RCRA. This means there is a general prohibition on open dumping (which includes a prohibition on open burning). Wastes containing this chemical that do not otherwise meet the criteria for hazardous waste would be disposed of in municipal solid waste landfills (MSWLFs), industrial nonhazardous, or, in a few instances construction/demolition landfills. Non-hazardous solid waste is regulated under Subtitle D of RCRA, and states play a lead role in ensuring that the federal requirements are met. The requirements for MSWLFs include location restrictions, composite liners, leachate collection and removal systems, operating practices, groundwater monitoring, closure and post-closure care, corrective action provisions, and financial assurance. Industrial waste (non-hazardous) landfills and construction/demolition waste landfills are primarily regulated under state regulatory programs, and in addition they must meet the criteria set forth in federal regulations, which may include requirements such as siting, groundwater monitoring and corrective action depending upon what types of waste are accepted. Disposal by underground injection is regulated under both RCRA and SDWA. In view of this comprehensive, stringent program for addressing disposal, EPA proposed that it is not practicable to impose additional requirements under TSCA on the disposal of the PBT chemicals, including decaBDE.

EPA received a number of comments on this aspect of its proposal. Some commenters agreed with EPA's proposed determination that it is not practicable to regulate disposal, while others disagreed. However, in EPA's view establishing an entirely new disposal program for decaBDE-containing wastes would be expensive and difficult to establish and administer. In addition, imposing a requirement to treat these wastes as if they were listed as hazardous wastes would have impacts on hazardous waste disposal capacity and be very expensive for states and local governments as well as for affected industries. Therefore, EPA has determined that it is not practicable to further regulate decaBDE-containing wastes for disposal. More information on the comments received and EPA's responses can be found in the Response to Comments document (Ref. 5). One commenter, the Institute of Scrap Recycling Industries, Inc. (ISRI) (EPA–HQ–OPPT–2019–0080–0559) noted that while EPA proposed to not regulate disposal of the PBT chemicals under TSCA, the effect of EPA's proposed prohibition on manufacturing, processing, and distribution in commerce would prohibit the processing and distribution in commerce of the PBTs and products and articles containing the PBT chemicals for disposal. EPA did not intend such an effect, and has added an exclusion in the final regulatory text for processing and distribution in commerce for disposal.

EPA also proposed not to use its TSCA section 6(a) authorities to regulate commercial use of products and articles containing the PBT chemicals, such as televisions and computers, because such regulation would not be practicable. It would be extremely burdensome, necessitating the identification of products containing decaBDE, and the disposal of countless products and articles, that would have to be replaced. If EPA prohibited the continued commercial use of these items, widespread economic impacts and disruption in the channels of trade would occur while the prohibited items were identified and replaced. While some commenters agreed with EPA's proposed determination that it is not practicable to regulate commercial use, and others disagreed, for the reasons noted in the proposal and discussed further in the Response to Comments document (Ref. 5), EPA continues to believe that prohibiting or otherwise restricting the continued commercial use of products and articles containing decaBDE would result in extreme burdens in exchange for what in most cases will be low exposure reductions. For example, as discussed in the Exposure and Use Assessment, releases from articles are expected to be minimal because decaBDE is entrained in the articles and is not expected to volatize or migrate readily under normal use (Ref. 4). Thus, EPA concludes that it is impracticable to prohibit or otherwise restrict the continued commercial use of decaBDE-containing products and articles.

EPA also proposed not to use its TSCA section 6(a) authorities to directly regulate occupational exposures. As explained in the proposed rule, as a matter of policy, EPA assumes compliance with federal and state requirements, such as worker protection standards, unless case-specific facts indicate otherwise. The Occupational Safety and Health Administration (OSHA) has not established a permissible exposure limit (PEL) for decaBDE. However, under section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), each employer has a legal obligation to furnish to each of its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm. The OSHA Hazard Communication Standard at 29 CFR 1910.1200 requires chemical manufacturers and importers to classify the hazards of chemicals they produce or import, and all employers to provide information to employees about hazardous chemicals to which they may be exposed under normal conditions of use or in foreseeable emergencies. The OSHA standard at 29 CFR 1910.134(a)(1) requires the use of feasible engineering controls to prevent atmospheric contamination by harmful substances and requires the use of the use of respirators where effective engineering controls are not feasible. The OSHA standard at 29 CFR 1910.134(c) details the required respiratory protection program. The OSHA standard at 29 CFR 1910.132(a) requires the use of personal protective equipment (PPE) by workers when necessary due to a chemical hazard; 29 CFR 1910.133 requires the use of eye and face protection when employees are exposed to hazards including liquid chemicals; and 29 CFR 1910.138 requires the use of PPE to protect employees' hands including from skin absorption of harmful substances. The provisions of 29 CFR 1910.132(d) and (f) address hazard assessment, PPE selection, and training with respect to PPE required under 29 CFR 1910.133,

1910.135, 1910.136, 1910.138, and 1910.140. EPA assumes that employers will require, and workers will use, appropriate PPE consistent with OSHA standards, taking into account employer-based assessments, in a manner sufficient to prevent occupational exposures that are capable of causing injury.

EPA assumes compliance with other federal requirements, including OSHA standards and regulations. EPA does not read TSCA section 6(h)(4) to direct EPA to adopt potentially redundant or conflicting requirements. Not only would it be difficult to support broadly applicable and safe additional measures for each specific activity without a risk evaluation and in the limited time for issuance of this regulation under TSCA section 6(h), but imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations. Such regulations would not be practicable. Rather, where EPA has identified worker exposures and available substitutes, EPA is finalizing measures to reduce those exposures. As discussed in the proposed rule, EPA assumes that the worker protection methods used by employers, including in response to existing OSHA standards, in addition to the regulatory measures taken for each chemical, meaningfully reduce the potential for occupational exposures. Although some commenters agreed with this approach, others thought that EPA should establish worker protection requirements for those uses that would be allowed to continue under the final rule. Information provided to EPA before and during the public comment period on the proposed rule indicates that employers are using engineering and process controls and providing appropriate personal protective equipment (PPE) to their employees consistent with these requirements, and EPA received no information on decaBDE to suggest this is not the case. Further, EPA has not conducted a risk evaluation on decaBDE or any of the five PBT chemicals. Without a risk evaluation and given the time allotted for this rulemaking, EPA cannot identify additional engineering or process controls or PPE requirements that would be appropriate to each chemical-specific circumstance. For these reasons, EPA has determined that it is not practicable to regulate worker exposures in this rule through engineering or process controls or PPE requirements.

EPA received comments regarding the use of PBT chemicals in research and development and lab use. Lab use is addressed under newly established 40 CFR 751.401(b) as the manufacturing, processing, distribution-in-commerce and use of any chemical substance, or products and articles that contain the chemical substance, for research and development, as defined in new 40 CFR 751.403. Research and Development is defined in new 40 CFR 751.403 to mean laboratory and research use only for purposes of scientific experimentation or analysis, or chemical research on, or analysis of, the chemical substance, including methods for disposal, but not for research or analysis for the development of a new product, or refinement of an existing product that contains the chemical substance. This will allow, for example, for samples of environmental media containing PBTs, such as contaminated soil and water, to be collected, packaged and shipped to a laboratory for analysis. Laboratories also must obtain reference standards containing PBTs to calibrate their equipment, otherwise they may not be able to accurately quantify these chemical substances in samples being analyzed. However, research to develop new products that use PBTs subject to 40 CFR part 751 subpart E, or the refinement of existing uses of those chemicals, is not included in this definition, and those activities remain potentially subject to the chemical specific provisions in 40 CFR part 751 subpart E. EPA believes it is not practicable to limit research and development activity as defined, given the critical importance of this activity to the detection, quantification and control of these chemical substances.

Finally, EPA received comments regarding requirements for resale of decaBDE-containing products and articles, as well as products and articles containing other PBT chemicals undergoing TSCA section 6(h) rulemaking. One commenter stated that because the proposed definition of ''person'' includes ''any natural person,'' the proposed prohibitions would seem to apply to anyone selling products or articles containing decaBDE at a garage or yard sale. (EPA–HQ–OPPT–2019–0080–0559) EPA did not intend to impose these final decaBDE regulations on yard sales or used product or article sales and has added language in 40 CFR 751.401 to clarify this. The prohibition and recordkeeping requirements in this final rule exclude decaBDE-containing products and articles that have previously been sold or supplied to an end user, *i.e.,* any person who purchased or acquired the finished good for purposes other than resale.

III. Provisions of This Final Rule

A. Scope and Applicability

EPA carefully considered all public comments and information received related to the proposal. This rule finalizes with some modifications EPA's proposal to prohibit the manufacturing and processing of decaBDE, and products and articles that contain decaBDE, except for the following exclusions and delayed compliance dates from the date of publication of the prohibition:

- One year for distribution in commerce of products and articles containing decaBDE.
- 18 months for any manufacture, processing and distribution in commerce of decaBDE for use in curtains in the hospitality industry, and the curtains to which decaBDE has been added.
- Two years for any processing and distribution in commerce of decaBDE for wire and cable insulation in nuclear power generation facilities, and the decaBDE-containing wire and cable insulation.
- Three years for any manufacture, processing and distribution in commerce of decaBDE for use in parts installed in and distributed as part of new aerospace vehicles, and the parts to which decaBDE has been added for such vehicles. After the end of their service lives for import, processing, and distribution in commerce of aerospace vehicles manufactured before three years after the effective date of the rule that contain decaBDE in any part. After the end of their service lives for manufacture, processing, and distribution in commerce for use in replacement parts for aerospace vehicles, and the replacement parts to which decaBDE has been added for such vehicles.
- After the end of their service lives, or 2036, whichever is earlier, for manufacture, processing, and distribution in commerce for use in replacement parts for motor vehicles, and the replacement parts to which decaBDE has been added for such vehicles.
- After the end of their service lives for distribution in commerce of plastic shipping pallets manufactured prior to publication of the final rule, that contain decaBDE.
- The exclusion for processing and distribution in commerce for recycling of decaBDE-containing plastic products and articles (*i.e.,* the plastic to be recycled is from product and articles that were originally made with decaBDE), and for decaBDE containing products and articles made from such

recycled plastic, where no new decaBDE is added during the recycling or production process.

Affected persons manufacturing, processing, and distributing in commerce decaBDE or decaBDE-containing products and articles are required to maintain, for three years from the date the record is generated, ordinary business records related to compliance with the restrictions, prohibitions, and other requirements, with an exclusion for persons processing and distributing in commerce for; recycling of plastic that contains decaBDE, those products and articles containing decaBDE from recycled plastic as long as no new decaBDE was added during the recycling process, and plastic shipping pallets manufactured prior to the effective date of the rule. These records must include a statement of compliance with this final rule and be made available to EPA within 30 calendar days upon request.

1. General prohibition and exclusions.

EPA received comments supporting and opposing the proposed general prohibition on manufacture, processing and distribution in commerce of decaBDE and products and articles containing decaBDE. A few commenters suggested a total ban would be practicable instead of the proposed prohibition with exclusions. EPA disagrees, and believes that this rule prohibits the manufacture, processing and distribution in commerce for use of decaBDE to the extent practicable, reducing any potential activities involving the chemical as a whole, while allowing for several industries to safely finish and replace their applications of the chemical substance. However, even these uses of decaBDE are not unlimited and therefore are expected to decline until they cease completely. EPA may review these particular practicability determinations in the future. The prohibition on manufacture, processing and distribution in commerce for all but excluded activities is expected to result in the reduced potential for exposures. The practicability of prohibiting an excluded activity is further discussed in this Unit and in the Response to Comment document.

2. Hospitality curtains.

As described in the proposed rule, with respect to curtains used in the hospitality industry, EPA understands that most of the industry has moved away from using decaBDE as a flame retardant. However, EPA is aware of one small business that is still using decaBDE while it searches for a replacement flame retardant. EPA believes that 18 months from the date of publication of the final rule, rather than an immediate compliance date from manufacturing, processing, and distribution in commerce, is the soonest practicable date for the small business to find a substitute.

3. Aviation and automotive replacement parts and new aviation parts.

As described in the proposed rule, aerospace and automotive vehicles have included parts made with decaBDE, and in many cases decaBDE has been used to meet various flame-retardant standards. Based on comments received, all production of new automotive vehicles with decaBDE-containing parts will have ceased prior to the effective date for this rule; aerospace vehicles will cease such production within a 3-year timeframe. However, the decaBDE-containing parts originally produced for such automotive or for such aerospace vehicles may require replacement parts to meet flame-retardancy standards through the end of the service lifves of the vehicles. Any transition to alternatives for those replacement parts will require verification to meet these standards.

Imposing immediate restrictions on replacement parts for those vehicles could increase costs and safety concerns, but, as noted in this Unit, without meaningful exposure reductions. As a result, in this final rule, EPA is adopting an alternative compliance deadline of 2036 for motor vehicles and the end of the service lives for aerospace vehicles from the prohibition on the manufacture (including import), processing, and distribution in commerce of decaBDE for use in aerospace or automotive replacement parts, and the replacement parts that contain decaBDE. The manufacture (including import), processing, and distribution in commerce of decaBDE for use in new automotive parts will be prohibited, as discussed further in this Unit, and the manufacture (including import), processing, and distribution in commerce of decaBDE for use in new aerospace parts will be prohibited three years after publication of the final rule. For the purpose of this rule, replacement parts are those parts designed before the rule promulgation date to replace parts already made with decaBDE. Thus, for example, this exclusion does not allow replacement parts containing decaBDE to be manufactured, processed or distributed in commerce to replace parts that were not previously designed to contain decaBDE.

EPA's alternative compliance deadline for replacement parts for these vehicles results from several considerations. Article components containing decaBDE for finished parts in automobiles and aircraft have limited releases. (Exposure and Use Assessment). In addition to limited releases, and therefore limited exposures, as further discussed in the proposed rule and in the Response to Comment document, identifying and adopting appropriate substitutes for use in replacement parts for these vehicles can be a complex and time-consuming process. Further, the scope of this alternative compliance deadline is limited. For automotive vehicles, the scope is limited only to those parts intended to replace decaBDE-containing parts for automotive vehicles already produced; no new parts may be produced for new automotive vehicles under this alternative deadline. For aerospace vehicles, the scope is similarly limited to only those parts intended to replace decaBDE-containing parts for aerospace vehicles produced before the 3-year compliance deadline for such vehicles. That means those aerospace parts and the vehicles will have already been designed and in the production process; no newly designed parts may be produced using decaBDE even during the 3-year alternative compliance period, and after the 3-year compliance period only replacement parts, as defined earlier in the Unit, will be permitted. Finally, the compliance deadlines in each case are consistent with comments provided, *e.g.,* identifying 15 years as the needed period for retaining replacement parts for automotive vehicles, and identifying the aerospace vehicle service life as the needed period for retaining replacement parts for aerospace vehicles. (Ref. 7, EPA–HQ–OPPT–2019–0080–0542) Such compliance deadlines also align with the specified exemption for use of decaBDE in parts for such vehicles in the Stockholm Convention. For the use of replacement parts for automotive vehicles, for example, EPA is not aware of any decaBDE-containing parts that are outside the scope of the replacement parts listed in Annex A, Part IX of the Stockholm Convention (Ref. 13). In the case of aerospace vehicles, the timeframe provided in this final rule is actually narrower (more restrictive) than the timeframe provided by the Stockholm Convention. These examples support that the market for replacement parts containing decaBDE will have diminished by the compliance dates in this rule. Three commenters requested EPA change its statutory interpretation

to exempt these replacement parts using the replacement parts provision under TSCA section 6(c)(2)(D) instead of a practicability determination under TSCA section 6(h); however, for the reasons stated in Unit II.B., EPA is continuing to interpret TSCA section 6(c)(2)(D) to be inapplicable to this rulemaking. Other commenters challenged a complete exclusion for replacement parts, as discussed in Unit III.A.1. EPA agrees it is practicable to impose the specified alternative compliance deadline for the prohibition on the manufacture, processing and distribution in commerce of decaBDE for use in replacement parts.

In addition, as noted in the proposed rule and according to comments received from various industries, including the Aerospace Industries Association (AIA) (Ref. 5), the aerospace industry expects to have phased out its use of decaBDE in new aircraft products by the end of 2023. As a result, EPA is finalizing its proposed compliance date to allow the manufacture, processing and distribution in commerce for use of decaBDE and products and articles containing decaBDE, for use in new parts produced through 2023. In addition, the manufacture, processing and distribution in commerce of decaBDE for use in replacement parts intended for aerospace vehicles will continue to be allowed until the end of the service lives of the vehicles. However, this compliance deadline does not allow the manufacture, processing or distribution in commerce of decaBDE for parts that are newly designed for such new aerospace vehicles. This compliance deadline is based on comments received indicating the intent to phase-out use of decaBDE in parts for aerospace vehicles already designed, but which specify the need for replacement parts for the service lives of the vehicles to avoid the high cost of identifying appropriate and safe alternatives for vehicles already designed and in production, but for a limited period of time. (EPA–HQ–OPPT–2019–0080–0542) The deadline for new parts also is more restrictive than the Stockholm Convention's specific exemption for use of decaBDE in parts for those aerospace vehicles with designs approved by 2022, and thus further supports that the market for parts containing decaBDE for these vehicles will have diminished by the compliance date in this rule. For similar reasons, EPA is also not prohibiting the manufacture (including import), processing and distribution in commerce of whole aircraft manufactured within that specified compliance deadline and containing those new parts with decaBDE. With respect to motor vehicles, comments received from automotive industries, including the Motor Equipment and Manufacturers Association (MEMA) (EPA–HQ–OPPT–2019–0080–0547) indicate that the automotive industry will have phased out use of decaBDE for newly produced motor vehicles by the effective date of this final rule and therefore the final rule prohibits any manufacture, processing or distribution in commerce of decaBDE for any use in motor vehicles manufactured after the effective date of the rule.

Thus, for all the reasons noted, the prohibitions and compliance deadlines adopted in this final rule for the aerospace and automotive industries will reduce exposures to the extent practicable as required under TSCA section 6(h)(4) and will do so as ''soon as practicable'' pursuant to TSCA section 6(d)(1)(D), while allowing a reasonable transition time as contemplated by TSCA section 6(d)(1)(E).

4. Recycling and recycled products and articles.

EPA received submissions from 14 environmental groups that recommended EPA remove the exclusions for recycling. Commenters disagreed that it would be overly burdensome and not practicable to impose restrictions on the recycling of decaBDE containing plastic of products and articles that may contain decaBDE. The commenters cited and attached the Stockholm Convention 2015 Report of the Persistent Organic Pollutants Review Committee on the work of its eleventh meeting: Risk Management Evaluation on decabromodiphenyl ether (commercial mixture, c-decaBDE) (Ref. 13), which did not include recycling exemptions.

EPA recognizes the importance and impact of recycling, which contributes to American prosperity and the protection of our environment. EPA believes that it would be overly burdensome and not practicable to impose restrictions on the recycling of plastics that may contain decaBDE, or on the use of recycled plastic in plastic articles, because the decaBDE is typically present in such articles at low levels (Ref. 14). Because these articles typically contain low levels of decaBDE and taking into account the significant prohibitions being adopted in this rulemaking that are in alignment or more stringent than requirements under the Stockholm Convention and the general movement to use of substitutes, EPA expects the amount of recycled plastic that contains decaBDE from recycled plastic to significantly decline over time. In contrast, banning the recycling of plastics containing decaBDE would require this decaBDE-containing plastic to be identified through prohibitively expensive and complicated testing, and separated from other types of plastic before recycling, which is usually done manually. EPA believes it would be difficult to make plastic sorting for this purpose to be cost-effective, and that it would be overly burdensome and not practicable to prohibit recycling of decaBDE-containing plastic in the United States at this time. Further discussion on the burdens with prohibiting recycling are in the Response to Comments document (Ref. 5).

5. Plastic shipping pallets.

EPA received a comment from a company requesting to continue to process and distribute in commerce their existing inventory of plastic shipping pallets that contain decaBDE previously added as a flame retardant. (EPA–HQ–OPPT–2019–0080–0535) Although the company ceased its use of decaBDE in the manufacture of new pallets prior to 2013, those previously manufactured pallets are still in use and being rented for use. This final rule allows such continued rental and use until the end of the service lives of the pallet, at which point it may be recycled into new plastic pallets consistent with 40 CFR 751.405(b). No new decaBDE may be added during this recycling process. Based on the comment received, EPA has added a delayed compliance date for the continued distribution in commerce of such pallets.

6. Wire and cable insulation.

EPA requested comment from companies still processing and using wire and cable insulation containing decaBDE despite phase-out initiatives and the availability of relatively inexpensive substitutes. One commenter responded that while alternatives were available, they would need more time to successfully test and qualify an alternative chemical to decaBDE to meet the Institute of Electrical and Electronics Engineers (IEEE) 383 standard for instrumentation and power cable insulation for nuclear power plants. (EPA–HQ–OPPT–2019–0080–0583) Considering the unique safety certifications to qualify and approve an alternative chemical for this use, EPA has added a compliance delay of two years for the prohibition on the manufacture, processing and distribution in commerce of decaBDE for use in wire and cable insulation and of decaBDE containing wire and cable insulation.

7. Compliance Dates for the Prohibition.

The proposed rule did not delay the compliance date beyond the rule's effective date; the processing and distribution bans would come into effect 60 days after publication of the final rule notice. EPA stated in the proposed rule that at that time it had no information indicating that a compliance date of 60 days after publication of the final rule is not practicable for the activities that would be prohibited, or that additional time is needed for products to clear the channels of trade. The phrases ''as soon as practicable'' and ''reasonable transition period'' as used in TSCA section 6(d)(1) are undefined, and the legislative history on TSCA section 6(d) is limited. Given the ambiguity in the statute, for purposes of this expedited rulemaking, EPA presumed a 60-day compliance date was ''as soon as practicable,'' unless there was support for a lengthier period of time on the basis of reasonable available information, such as information submitted in comments on the Exposure and Use Assessment or in stakeholder dialogues. Such a presumption ensures the compliance schedule is ''as soon as practicable,'' particularly in the context of the TSCA section 6(h) rules for chemicals identified as persistent, bioaccumulative and toxic, and given the expedited timeframe for issuing a TSCA section 6(h) proposed rule did not allow time for collection and assessment of new information separate from the comment opportunities during the development of and in response to the proposed rule. Such presumption also allows for submission of information from the sources most likely to have the information that will affect an EPA determination on whether or how best to adjust the compliance deadline to ensure that the final compliance deadline is both ''as soon as practicable'' and provides a ''reasonable transition period.''

EPA received public comments regarding the 60-day compliance date for the prohibition in the proposed rule. Many commenters stated that this date would be unrealistic and requested that EPA phase in the compliance deadlines for the bans on importation or distribution of products and articles containing decaBDE over a longer period following promulgation of the final rule. In addition, commenters requested that EPA allow products and articles containing decaBDE that are manufactured and imported prior to the compliance deadlines to be distributed thereafter without restriction and that this would be needed to prevent an untold number of lawfully manufactured and imported products and articles from suddenly becoming unsaleable, which would result in significant costs for retailers and importers. Other commenters supported the compliance date.

However, in response to retail and business commenters requesting additional time given complex supply chains and the need to educate downstream users, EPA is extending the compliance date for distribution in commerce to one year after publication of the final rule. Extending the compliance date for one year will, as commenters note, allow additional time for products and articles containing decaBDE that were produced prior to the effective date for the prohibition on manufacture and processing to clear channels of trade. However, EPA is not extending the compliance date for manufacture or processing of these products and articles containing decaBDE, and therefore is not extending the compliance date for import which under TSCA section 3 is a subset of manufacture activities. Unless reasonably available information otherwise supports that it is not practicable to impose a 60-day compliance deadline for manufacture, which includes import, or for processing of decaBDE and decaBDE-containing products and articles, for purposes of meeting EPA's obligations under TSCA section 6(h), EPA presumes a compliance date of 60 days is ''as soon as practicable.'' EPA received only general comments taking the position, without support, that the 60-day compliance period for the prohibition on manufacture or processing is not practicable. Specified exclusions to the manufacturing compliance date are described in Unit I.C.

8. Recordkeeping.

EPA is requiring that all persons who manufacture, process, or distribute in commerce decaBDE and products and articles containing decaBDE maintain ordinary business records, such as invoices and bills-of-lading, related to compliance with the prohibitions and restrictions. EPA revised this language slightly from the proposal to improve clarity. These records will have to be maintained for a period of three years from the date the record is generated, beginning on March 8, 2021. Exempted from the recordkeeping requirement are persons processing and distributing in commerce for recycling of decaBDE containing plastic products or articles and decaBDE containing products or articles made from such recycled plastic as long as no new decaBDE is added during the recycling process, and persons distributing in commerce until the end of their service life plastic shipping pallets manufactured prior to the publication of the final rule. EPA requested comment on alternative recordkeeping requirements that could help ensure compliance with the decaBDE prohibitions, particularly for importers and others who do not produce articles. After reviewing the comments received, EPA has decided to include two additional requirements to help ensure compliance (EPA–HQ–OPPT–2019–0080–0539; –0542; –0546; –0549). First, the records that are kept must include a statement that the decaBDE, or the decaBDE-containing products and articles, are in compliance with 40 CFR 751.405(a). The statement need not be included on every business record, such as every invoice or bill of lading, although regulated entities may certainly choose to reformat their documents to include the statement. Importers of replacement automobile parts that contain decaBDE who, for example, import from the same suppliers over and over, need only have a single statement for each part or each supplier. Finally, EPA is adding a requirement that the records kept pursuant to this final rule be made available to EPA within 30 calendar days upon request to ensure that EPA can review records in a timely manner.

B. TSCA Section 6(c)(2) Considerations

1. Health effects, exposure, and environmental effects.

DecaBDE is toxic to aquatic invertebrates, fish, and terrestrial invertebrates. Data indicate the potential for developmental, neurological, and immunological effects, general developmental toxicity and liver effects in mammals. Additionally, toxicological studies indicated evidence of genotoxicity and evidence of carcinogenicity. These hazard statements are not based on a systematic review of the available literature and information may exist that could refine the hazard characterization. Additional information about decaBDE's health effects, use, and exposure is in Unit II.C. and is further detailed in EPA's Hazard Summary (Ref. 9) and Exposure and Use Assessment (Ref. 4).

2. The benefits of the chemical substance or mixture for various uses.

DecaBDE is a brominated flame retardant that has been added to plastics, textiles, and other materials. When fire occurs, decaBDE and other PBDEs, are part of vapor-phase chemical reactions that interfere with the combustion process, thus delaying ignition and inhibiting the spread of fire. DecaBDE has been considered an

economical flame retardant because relatively small quantities are necessary to be effective (Ref 4).

3. The reasonably ascertainable economic consequences of the rule.

i. *Overview of cost methodology.* EPA has evaluated the potential costs of the final action for decaBDE. Costs of the final rule were estimated based on the assumption that under regulatory limitations on decaBDE, processors that use decaBDE in their products would switch to available alternative chemicals to manufacture the product, or to products that do not contain decaBDE. For decaBDE, the costs were assessed based on chemical substitutes only. Substitution costs were estimated on the industry level using the price differential between the cost of the chemical and identified substitutes. Costs for rule familiarization and recordkeeping were estimated based on burdens estimated for other similar rulemakings. Costs were annualized over a 25-year period. Other potential costs include, but are not limited to, those associated with testing, reformulation, distribution, imported articles, and some portion of potential revenue loss. However, these costs are discussed only qualitatively, due to lack of data availability to estimate quantified costs. More details of this analysis are presented in the Economic Analysis (Ref. 3).

ii. *Estimated costs of this final rule.* Total quantified annualized industry costs for the final rule are $2,012 at the 3% discount rate and $2,100 at the 7% discount rate annualized over 25 years. Total annualized Agency costs associated with implementation of the final rule were based on EPA's best judgment and experience with other similar rules. For the final regulatory action, EPA estimated it will require 1 FTE at $155,152 per year (Ref. 3).

Total quantified annualized social costs for the final rule are estimated to be $157,000 at both 3% and 7% discount rate. As described earlier in Unit III.B.3., potential costs such as testing, reformulation, release prevention, and imported articles, could not be quantified due to lack of data availability to estimate quantified costs. These costs are discussed qualitatively in the Economic Analysis (Ref. 3).

iii. *Benefits.* As discussed in Unit II.A., while EPA reviewed hazard and exposure information for the PBT chemicals, this information did not provide a basis for EPA to develop scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present a risk of injury to health or the environment. Benefits were not quantified due to the lack of risk estimates. A qualitative discussion of the potential benefits associated with the final action for decaBDE is provided. DecaBDE is persistent and bioaccumulative and has been associated with developmental neurological effects, developmental immunological effects, general developmental toxicity, and thyroid and liver effects in mammals, as well as with toxicity in aquatic organisms. Under this final rule, manufacturing, processing and distribution in commerce will be prohibited, except for specific exclusions and different compliance dates as detailed in Unit I.C. With reduced manufacturing, processing and distribution of decaBDE and decaBDE-containing products and articles, EPA anticipates that this regulation will result in a phase-out of decaBDE use overall, and therefore a reduced presence of decaBDE in products and articles. These impacts will result in the decreased potential for exposures to workers in the industrial sectors that currently use decaBDE, and the decreased potential for releases of decaBDE to the environment, including through disposal activities. With decreased potential for releases to the environment and reduced presence in products and articles, there will also be decreased potential for exposures for the general population or potentially exposed or susceptible subpopulations. Thus, the final regulatory action will have benefits for the environment, general population, and potentially exposed or susceptible subpopulations, and benefits to health for workers. Substitute chemicals should be carefully selected to realize benefits to human health and the environment because there are numerous potential substitutes for decaBDE.

iv. *Cost effectiveness, and effect on national economy, small business, and technological innovation.* With respect to the cost effectiveness of the final regulatory action and the primary alternative regulatory action, EPA is unable to perform a traditional cost-effectiveness analysis of the actions and alternatives for the PBT chemicals. As discussed in the proposed rule, the cost effectiveness of a policy option would properly be calculated by dividing the annualized costs of the option by a final outcome, such as cancer cases avoided, or to intermediate outputs such as tons of emissions of a pollutant curtailed. Without the supporting analyses for a risk determination, EPA is unable to calculate either a health-based or environment-based denominator. Thus, EPA is unable to perform a quantitative cost-effectiveness analysis of the final and alternative regulatory actions. However, by evaluating the practicability of the final and alternative regulatory actions, EPA believes that it has considered elements related to the cost effectiveness of the actions, including the cost and the effect on exposure to the PBT chemicals of the final and alternative regulatory actions.

EPA considered the anticipated effect of this rule on the national economy and concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 3). EPA analyzed the expected impacts on small business and found that no small entities are expected to experience impacts of more than 1% of revenues (Ref. 3). Finally, EPA has determined that this rule is unlikely to have significant impacts on technological innovation, although the rule may create some incentives for chemical manufacturers to develop new chemical alternatives to decaBDE.

4. Consideration of alternatives.

EPA believes that there are viable substitutes that may be used as an alternative to decaBDE. In January 2014, EPA's Design for the Environment (DfE) published an alternatives assessment for decaBDE (Ref. 15). EPA identified 29 potential functional, viable alternatives to decaBDE for use in select polyolefins, styrenics, engineering thermoplastics, thermosets, elastomers, or waterborne emulsions and coatings (Ref. 15).

C. TSCA Section 26(h) Considerations

In accordance with TSCA section 26(h) and taking into account the requirements of TSCA section 6(h), EPA has used scientific information, technical procedures, measures, and methodologies that are fit for purpose and consistent with the best available science. EPA based its determination that human and environmental exposures to decaBDE are likely in the Exposure and Use Assessment (Ref. 4) discussed in Unit II.A.2., which underwent a peer review and public comment process, as well as using best available science and methods sufficient to make that determination. The extent to which the various information, procedures, measures, and methodologies, as applicable, used in EPA's decision making have been subject to independent verification or peer review is adequate to justify their use, collectively, in the record for this rule. Additional information on the peer review and public comment process, such as the peer review plan, the peer review report, and the Agency's Response to Comments document, are in the public docket for this action (EPA–HQ–OPPT–2018–0314). In

addition, in accordance with TSCA section 26(i), and taking into account the requirements of TSCA section 6(h), EPA has made scientific decisions based on the weight of the scientific evidence.

IV. References

The following is a list of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. TSCA Work Plan for Chemical Assessments: 2014 Update. October 2014. *https://www.epa.gov/assessingand-managing-chemicals-under-tsca/tsca-work-plan-chemical-ssessments-2014-update.* Accessed March 1, 2019.
2. EPA. TSCA Work Plan Chemicals: Methods Document. February 2012. *https://www.epa.gov/sites/production/files/2014-03/documents/work_plan_methods_document_web_final.pdf.* Accessed March 1, 2019.
3. EPA. Economic Analysis for Final Regulation of Decabromodiphenyl ether (DecaBDE) Final Rule Under TSCA Section 6(h). July 2020.
4. EPA. Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals. December 2020.
5. EPA Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under TSCA 6(H) Response to Comments. December 2020. (Docket EPA–HQ–OPPT–2019–0080).
6. EPA. Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Decabromodiphenyl ether. August 2017. (EPA–HQ–OPPT–2016–0724–0002).
7. Stakeholder Comment from Auto Alliance. February 2018.
8. Stakeholder Comment from iGPS. January 2018.
9. EPA. Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals. December 2020.
10. EPA. Public Database 2012 Chemical Data Reporting. Washington, DC: US Environmental Protection Agency, Office of Pollution Prevention and Toxics.
11. EPA. Public Database 2016 Chemical Data Reporting. Washington, DC: US Environmental Protection Agency, Office of Pollution Prevention and Toxics.
12. EPA. Toxics Release Inventory (TRI) Basic Plus Data Files. 2017.
13. United Nations Environmental Program Stockholm Convention on Persistent Organic Pollutants (2015). Risk profile on decabromodiphenyl ether. Report of the Persistent Organic Pollutants Review Committee on the work of its eleventh meeting.
14. Norwegian Environmental Agency. (2015) Final Report. Literature Study—DecaBDE in Waste Streams.
15. EPA. An Alternatives Assessment for the Flame Retardant Decabromodiphenyl Ether (DecaBDE). January 2014. *https://www.epa.gov/sites/production/files/2014-05/documents/decabde_final.pdf.* Accessed March 1, 2019.
16. Keweenaw Bay Indian Community. Re: Notification of Consultation and Coordination on a Rulemaking Under the Toxic Substances Control Act: Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h). September 25, 2018.
17. Harper, Barbara and Ranco, Darren, in collaboration with the Maine Tribes. Wabanaki Traditional Cultural Lifeways Exposure Scenario. July 9, 2009.

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866 (58 FR 51,735 (Oct. 4, 1993)) and Executive Order 13563 (76 FR 3821 (Jan. 21, 2011)). Any changes made in response to OMB recommendations have been documented in the docket for this action as required by section 6(a)(3)(E) of Executive Order 12866.

EPA prepared an economic analysis of the potential costs and benefits associated with this action. A copy of this economic analysis, *Economic Analysis for Final Regulation of Decabromodiphenyl ether (DecaBDE) under TSCA Section 6(h),* (Ref. 3) is in the docket and is briefly summarized in Unit III.B.3.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is considered a regulatory action under Executive Order 13771 (82 FR 9339 (Feb. 3, 2017)). Details on the estimated costs of this final rule can be found in the Economic Analysis (Ref. 3), which is briefly summarized in Unit III.B.3.

C. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to OMB under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2599.02 and OMB Control No. 2070–0213. A copy of the ICR is available in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

Affected persons manufacturing, processing, and distributing in commerce decaBDE or decaBDE-containing products and articles are expected to familiarize themselves with the rule and are required to maintain, for three years from the date the record is generated, ordinary business records related to compliance with the restrictions, prohibitions, and other requirements, with an exclusion for persons processing and distributing in commerce for; recycling of plastic that contains decaBDE, those products and articles containing decaBDE from recycled plastic as long as no new decaBDE was added during the recycling process, and plastic shipping pallets manufactured prior to the effective date of the rule.

Respondents/affected entities: Entities potentially affected by paperwork requirements of this final rule include 17 importers, 26 processors, and five distributors. The total number of respondents is 46, given that two entities are both importers and processors.

Respondent's obligation to respond: Mandatory. (40 CFR 751.407).

Estimated number of respondents: 46.

Frequency of response: On occasion.

Total estimated burden: 39 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $3,014 (per year), includes $0 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40

CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are small businesses that manufacture/import, process, or distribute decaBDE. In total, 17 small businesses are expected to be affected by the final action. Of the 17 small entities assessed, none (0%) are expected to experience negative impacts of more than 1% of revenues. Because only 17 small businesses are directly impacted and negative impacts are less than 1% for all small entities, EPA presumes no significant economic impact on a substantial number of small entities (no SISNOSE). Details of this analysis are presented in the Economic Analysis (Ref. 3).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and would not significantly or uniquely affect small governments. The final rule is not expected to result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (when adjusted annually for inflation) in any one year. Accordingly, this final rule is not subject to the requirements of sections 202, 203, or 205 of UMRA. The total quantified annualized social costs for this the final rule are approximately $157,000 (at both 3% and 7% discount rates), which does not exceed the inflation-adjusted unfunded mandate threshold of $160 million.

F. Executive Order 13132: Federalism

This action does not have federalism implications because it is not expected to have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications because it is not expected to have substantial direct effects on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this final rule.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA consulted with tribal officials during the development of this action. EPA consulted with representatives of Tribes via teleconference on August 31, 2018, and September 6, 2018, concerning the prospective regulation of the five PBT chemicals under TSCA section 6(h).

Tribal members were encouraged to provide additional comments after the teleconferences. EPA received two comments from the Keweenaw Bay Indian Community and Maine Tribes (Ref. 16, 17).

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866. Although the action is not subject to Executive Order 13045, the Agency considered the risks to infants and children under EPA's Policy on Evaluating Health Risks to Children. EPA did not perform a risk assessment or risk evaluation of decaBDE, however available data indicate exposure to decaBDE may disproportionately affect children, and information indicates decaBDE is a neurodevelopment toxicant and has been detected in breastmilk. More information can be found in the Exposure and Use Assessment (Ref. 4) and the ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 9). This regulation will reduce the exposure to decaBDE for the general population and for potentially exposed or susceptible subpopulations such as workers and children.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not been designated by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget as a significant energy action.

J. National Technology Transfer and Advancement Act (NTTAA)

Because this action does not involve any technical standards, NTTAA section 12(d), 15 U.S.C. 272 note, does not apply to this action.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Economic Analysis (Ref. 3), which is in the public docket for this action. EPA believes that the restrictions in on decaBDE in this final rule will reduce the potential for exposure in the United States over time, thus benefitting all communities including environmental justice communities.

L. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 751

Environmental protection, Chemicals, Export Notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Andrew Wheeler,
Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR part 751 is amended as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.403 by adding in alphabetical order the term ''*DecaBDE*'' to read as follows:

Subpart E—Persistent, Bioaccumulative, and Toxic Chemicals

§ 751.403 Definitions.

* * * * *

DecaBDE means the chemical substance decabromodiphenyl ether (CASRN 1163–19–5).

* * * * *

■ 3. Add § 751.405 to read as follows:

§ 751.405 DecaBDE.

(a) *Prohibition.* (1) *General.* Except as provided in paragraphs (a)(2) and (b) of this section, all persons are prohibited from all manufacturing and processing of decaBDE or decaBDE-containing products or articles after March 8, 2021, and all persons are prohibited from all distribution in commerce of decaBDE or decaBDE-containing products or articles after January 6, 2022.

(2) *Phase-in of Prohibitions for Specific Uses of decaBDE and decaBDE-containing Products or Articles.* (i) After July 6, 2022, all persons are prohibited from all manufacturing, processing, and distribution in commerce decaBDE for use in curtains in the hospitality industry, and the curtains to which decaBDE has been added.

(ii) After January 6, 2023, all persons are prohibited from all processing and distribution in commerce of decaBDE for use in wire and cable insulation in nuclear power generation facilities, and decaBDE-containing wire and cable insulation.

(iii) After January 8, 2024, all persons are prohibited from all manufacturing, processing, and distribution in commerce of decaBDE for use in parts installed in and distributed as part of new aerospace vehicles, and the parts to which decaBDE has been added for such vehicles. After the end of the aerospace vehicles service lives, all persons are prohibited from all importing, processing, and distribution in commerce of aerospace vehicles manufactured before January 8, 2024 that contain decaBDE in any part. After the end of the aerospace vehicles service lives, all persons are prohibited from all manufacture, processing and distribution in commerce of decaBDE for use in replacement parts for aerospace vehicles, and the replacement parts to which decaBDE has been added for such vehicles.

(iv) After the end of the vehicles service lives or 2036, whichever is earlier, all persons are prohibited from all manufacture, processing and distribution in commerce of decaBDE for use in replacement parts for motor vehicles, and the replacement parts to which decaBDE has been added for such vehicles.

(v) After the end of the pallets' service life, all persons are prohibited from all distribution in commerce of plastic shipping pallets that contain decaBDE and were manufactured prior March 8, 2021.

(b) *Exclusions to the Prohibition.* Processing and distribution in commerce for recycling of decaBDE-containing plastic from products or articles and decaBDE-containing products or articles made from such recycled plastic, where no new decaBDE is added during the recycling or production processes is not subject to the prohibition in paragraph (a) of this section.

(c) *Recordkeeping.* (1) After March 8, 2021, all persons who manufacture, process, or distribute in commerce decaBDE or decaBDE-containing products or articles must maintain ordinary business records, such as invoices and bills-of-lading related to compliance with the prohibitions, restrictions, and other provisions of this section.

(i) These records must be maintained for a period of three years from the date the record is generated.

(ii) These records must include a statement that the decaBDE or the decaBDE-containing products or articles are in compliance with 40 CFR 751.405(a).

(iii) These records must be made available to EPA within 30 calendar days upon request.

(2) The recordkeeping requirements in paragraph (c)(1) do not apply to the activities described in paragraphs (a)(2)(v) and (b) of this section.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2019–0080; FRL–10018–88]

RIN 2070–AK58

Phenol, Isopropylated Phosphate (3:1) (PIP 3:1); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a rule under the Toxic Substances Control Act (TSCA) to address its obligations under TSCA for phenol, isopropylated phosphate (3:1) (PIP (3:1)) (CASRN 68937–41–7), which EPA has determined meets the requirements for expedited action under TSCA. This final rule prohibits the processing and distribution of PIP (3:1) and PIP (3:1)-containing products, with specified exclusions, and prohibits the release of PIP (3:1) to water during manufacturing, processing, and distribution. This final rule also requires commercial users to follow existing regulations and best practices to prevent the release to water of PIP (3:1) and products containing PIP (3:1) during use. These requirements will result in lower amounts of PIP (3:1) being manufactured, processed, distributed in commerce, used and disposed, thereby reducing exposures to humans and the environment.

DATES: This final rule is effective February 5, 2021. For purposes of judicial review and 40 CFR 23.5, this rule shall be promulgated at 1 p.m. eastern standard time on January 21, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0080, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

Please note that due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Ingrid Feustel, Existing Chemical Risk Management Division, Office of Pollution Prevention and Toxics (7404T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW,

Washington, DC 20460–0001; telephone number: (202) 564–3199; email address: *feustel.ingrid@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture (including import), process, distribute in commerce, or use phenol, isopropylated phosphate (3:1) (PIP (3:1)) or products containing PIP (3:1), especially flame retardants in plastics or functional fluids in aircraft and industrial machinery. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Petroleum Refineries (NAICS Code 324110);
- Petroleum Lubricating Oil and Grease Manufacturing (324191);
- Paint and Coating Manufacturing (NAICS Code 32510)
- All Other Basic Organic Chemical Manufacturing (NAICS Code 325199);
- Plastics Material and Resin Manufacturing (NAICS Code 325211):
- Adhesive Manufacturing (NAICS Code 325520);
- Polish and Other Sanitation Good Manufacturing (NAICS Code 325612);
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS Code 325998);
- Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (NAICS Code 333415);
- Other Communications Equipment Manufacturing (NAICS Code 334290);
- Automobile Manufacturing (NAICS Code 336111);
- Other Motor Vehicle Parts Manufacturing (NAICS Code 336390);
- Automobile and Other Motor Vehicle Merchant Wholesalers (NAICS Code 423110);
- Other Chemical and Allied Products Merchant Wholesalers (NAICS Code 424690);
- New Car Dealers (NAICS Code 441110);
- Research and Development in the Physical, Engineering, and Life Sciences (NAICS Code 541710);

If you have any questions regarding the applicability of this action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT.**

B. What is the Agency's authority for taking this action?

Section 6(h) of TSCA, 15 U.S.C. 2601 *et seq.,* directs EPA to issue a final rule under TSCA section 6(a) on certain persistent, bioaccumulative, and toxic (PBT) chemical substances. More specifically, EPA must take action on those chemical substances identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1) that, among other factors, EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the TSCA Work Plan Chemicals: Methods Document (Ref. 2). PIP (3:1) (CASRN 68937–41–7) is one such chemical substance. This final rule is final agency action for purposes of judicial review under TSCA section 19(a).

C. What action is the Agency taking?

EPA published a proposed rule on July 29, 2019, to address the five PBT chemicals EPA identified pursuant to TSCA section 6(h) (84 FR 36728; FRL–9995–76). After publication of the proposed rule, EPA determined to address each of the five PBT chemicals in separate final actions. This final rule prohibits the processing and distribution in commerce of PIP (3:1) and products containing PIP (3:1) except for the following:

- Processing and distribution in commerce for use in hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements;
- Processing and distribution in commerce for use in lubricants and greases;
- Processing and distribution in commerce for use in new and replacement parts for the automotive and aerospace industry, and the distribution in commerce of those parts to which PIP (3:1) has been added;
- Processing and distribution in commerce for use as an intermediate in a closed system to produce cyanoacrylate adhesives;
- Processing and distribution in commerce for use as an adhesive and sealant until January 6, 2025, after which such activity is prohibited;
- Processing and distribution in commerce for use in specialized engine filters for locomotive and marine applications;
- Processing for recycling and distribution in commerce for the recycling of PIP (3:1) containing plastic provided no new PIP (3:1) is added during the recycling process;
- Processing and distribution in commerce of articles and products made from recycled PIP (3:1)-containing plastic provided no new PIP (3:1) is added during the recycling process or to the articles and products made from the recycled plastic; and
- Processing and distribution in commerce of PIP (3:1) for use in photographic printing articles and PIP (3:1)-containing photographic printing articles until January 1, 2022.

This final rule also prohibits releases to water for from manufacture, processing, distribution in commerce, and commercial uses that are permitted to occur, as outlined in the preceding bullets.

Persons manufacturing, processing, and distributing in commerce PIP (3:1) and products containing PIP (3:1) are required to notify their customers of these prohibitions on processing and distribution, and the prohibition on releases to water via Safety Data Sheet (SDS) or labeling.

Persons manufacturing, processing, and distributing in commerce PIP (3:1) are required to maintain, for three years from the date the record was generated, ordinary business records related to compliance with the restrictions, prohibitions, and other requirements set forth in this rule. These records must include a statement that the PIP (3:1), or the PIP (3:1)-containing products or articles, are in compliance with 40 CFR 751.407(a) and be made available to EPA within 30 calendar days upon request.

D. Why is the Agency taking this action?

EPA is issuing this final rule to fulfill EPA's obligations under TSCA section 6(h) to take timely regulatory action on PBT chemicals, including PIP (3:1), ''to address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and to reduce exposure to the substance to the extent practicable.'' As required by the statute, the Agency is finalizing this rule to reduce exposure to PIP (3:1) to the extent practicable.

E. What are the estimated incremental impacts of this action?

EPA has evaluated the potential costs of these restrictions and prohibitions and the associated reporting and recordkeeping requirements. The

''Economic Analysis for Regulation of Phenol, Isopropylated Phosphate (3:1) (PIP (3:1)) under TSCA section 6(h)'' (Economic Analysis) (Ref. 3), is available in the docket and is briefly summarized here.

• *Benefits.* EPA was not able to quantify the benefits of reducing human and environmental exposures to PIP (3:1). As discussed in more detail in Unit II.A., EPA did not perform a risk evaluation for PIP (3:1), nor did EPA develop quantitative risk estimates. Therefore, the Economic Analysis (Ref. 3) qualitatively discusses the benefits of reducing exposure under the final rule for PIP (3:1), as summarized in Unit III.B.2.

• *Costs.* Total quantified annualized social costs for this final rule are approximately $23.8 million at a 3% discount rates, and $23.0 million at a 7% discount rate. Potential unquantified costs are those associated with testing, reformulation, importation of articles, foregone profits, and indirect costs. The limited data available for those costs prevents EPA from constructing a quantitative assessment.

• *Small entity impacts.* This final rule will impact approximately four small businesses of which none are expected to incur cost impacts of 1% or greater of their revenue.

• *Environmental Justice.* This final rule will increase the level of protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population or children.

• *Effects on State, local, and Tribal governments.* This final rule does not have any significant or unique effects on small governments, or federalism or tribal implications.

F. Children's Environmental Health

Executive Order 13045 applies if the regulatory action is economically significant and concerns an environmental health risk or safety risk that may disproportionately affect children. While the action is not subject to Executive Order 13045, the Agency's Policy on Evaluating Health Risks to Children (*https://www.epa.gov/children/epas-policy-evaluating-risk-children*) is to consider the risks to infants and children consistently and explicitly during its decision making process. This final rule will reduce the exposures to PIP (3:1) that could occur from activities now prohibited under this final rule for the general population and for potentially exposed or susceptible subpopulations such as children. More information can be found in the Exposure and Use Assessment (Ref. 4).

II. Background

A. History of This Rulemaking

TSCA section 6(h) requires EPA to take expedited regulatory action under TSCA section 6(a) for certain PBT chemicals identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1). As required by the statute, EPA issued a proposed rule to address five persistent, bioaccumulative, and toxic (PBT) chemicals identified pursuant to TSCA section 6(h) (84 FR 36728 (July 29, 2019)). The statute required that this be followed by promulgation of a final rule no later than 18 months after the proposal. While EPA proposed regulatory actions on each chemical substance in one proposal, in response to public comments (EPA–HQ–OPPT–2019–0080–0544), (EPA–HQ–OPPT–2019–0080–0553), (EPA–HQ–OPPT–2019–0080–0556), (EPA–HQ–OPPT–2019–0080–0562) requesting these five actions be separated, EPA is finalizing five separate actions to individually address each of the PBT chemicals. EPA intends for the five separate final rules to publish in the same issue of the **Federal Register**. More discussion on these comments is in the response to comments document which is available in the docket. The details of the proposal for PIP (3:1) are described in more detail in Unit II.D.

Under TSCA section 6(h)(1)(A), chemical substances subject to expedited action are those that:

• EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the 2012 TSCA Work Plan Chemicals: Methods Document or a successor scoring system;

• Are not a metal or a metal compound; and

• Are chemical substances for which EPA has not completed a TSCA Work Plan Problem Formulation, initiated a review under TSCA section 5, or entered into a consent agreement under TSCA section 4, prior to June 22, 2016, the date that TSCA was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. 114–182, 130 Stat. 448).

In addition, in order for a chemical substance to be subject to expedited action, TSCA section 6(h)(1)(B) states that EPA must find that exposure to the chemical substance under the conditions of use is likely to the general population or to a potentially exposed or susceptible subpopulation identified by the Administrator (such as infants, children, pregnant women, workers, including occupational nonusers, consumers, or the elderly), or to the environment on the basis of an exposure and use assessment conducted by the Administrator. TSCA section 6(h)(2) further provides that the Administrator shall not be required to conduct risk evaluations on chemical substances that are subject to TSCA section 6(h)(1).

Based on the criteria set forth in TSCA section 6(h), EPA proposed to determine that five chemical substances meet the TSCA section 6(h)(1)(A) criteria for expedited action, and PIP (3:1) is one of these five chemical substances. In addition, and in accordance with the statutory requirements to demonstrate that exposure to the chemical substance is likely under the conditions of use, EPA conducted an Exposure and Use Assessment for PIP (3:1). As described in the proposed rule, EPA conducted a review of available literature with respect to PIP (3:1) to identify, screen, extract, and evaluate reasonably available information on use and exposures. This information is in the document entitled ''Exposure and Use Assessment of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 4). Based on this review, which was subject to peer review and public comment, EPA proposed to find that exposure to PIP (3:1) is likely, based on information detailed in the Exposure and Use Assessment.

B. Other Provisions of TSCA Section 6

1. *EPA's approach for implementing TSCA section 6(h)(4).*

TSCA section 6(h)(4) requires EPA to issue a final TSCA section 6(a) rule to ''address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and reduce exposure to the substance to the extent practicable.'' EPA reads this text to require action on the chemical, not specific conditions of use. The approach EPA takes is consistent with the language of TSCA section 6(h)(4) and its distinct differences from other provisions of TSCA section 6 for chemicals that are the subject of required risk evaluations. First, the term ''condition of use'' is only used in TSCA section 6(h) in the context of the TSCA section 6(h)(1)(B) finding relating to likely exposures under ''conditions of use'' to ''the general population or to a potentially exposed or susceptible subpopulation . . . or the environment.'' In contrast to the risk evaluation process under TSCA section

6(b), this TSCA section 6(h)(1)(B) threshold criterion is triggered only through an Exposure and Use Assessment regarding the likelihood of exposure and does not require identification of every condition of use. As a result, EPA collected all the information it could on the use of each chemical substance, without regard to whether any chemical activity would be characterized as ''known, intended or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of,'' and from that information created use profiles and then an Exposure and Use Assessment (Ref. 4) to make the TSCA section 6(h)(1)(B) finding for at least one or more ''condition of use'' activities where some exposure is likely. EPA did not attempt to precisely classify all activities for each chemical substance as a ''condition of use'' and thus did not attempt to make a TSCA section 6(h)(1)(B) finding for all chemical activities summarized in the Exposure and Use Assessment (Ref. 4). Second, TSCA section 6 generally requires a risk evaluation under TSCA section 6(b) for chemicals based on the identified conditions of use. However, pursuant to TSCA section 6(h)(2), for chemical substances that meet the criteria of TSCA section 6(h)(1), a risk evaluation is neither required nor contemplated to be conducted for EPA to meet its obligations under TSCA section 6(h)(4). Rather, as noted in Unit II.B.3., if a previously prepared TSCA risk assessment exists, EPA would have authority to use that risk assessment to ''address risks'' under TSCA section 6(h)(4), but even that risk assessment would not necessarily be focused on whether an activity is ''known, intended or reasonably foreseen,'' as those terms were not used in TSCA prior to the 2016 amendments and a preexisting assessment of risks would have had no reason to use such terminology or make such judgments. It is for this reason EPA believes that the TSCA section 6(h)(4) ''address risk'' standard refers to the risks the Administrator determines ''are presented by the chemical substance'' and makes no reference to ''conditions of use.'' Congress did not contemplate or require a risk evaluation identifying the conditions of use as defined under TSCA section 3(4). The kind of analysis required to identify and evaluate the conditions of use for a chemical substance is only contemplated in the context of a TSCA section 6(b) risk evaluation, not in the context of an expedited rulemaking to address PBT chemicals.

Similarly, the TSCA amendments require EPA to ''reduce *exposure to the substance* to the extent practicable,'' without reference to whether the exposure if found ''likely'' pursuant to TSCA section 6(h)(1)(B).

Taking all of this into account, EPA reads its TSCA section 6(h)(4) obligation to apply to the chemical substance generally, thus requiring EPA to address risks and reduce exposures to the chemical substance without focusing on whether the measure taken is specific to an activity that might be characterized as a ''condition of use'' as that term is defined in TSCA section 3(4) and interpreted by EPA in the Risk Evaluation Rule, 82 FR 33726 (July 20, 2017). This approach ensures that any activity involving a TSCA section 6(h) PBT chemical, past, present or future, is addressed by the regulatory approach taken. Thus, under this final rule, processing and distribution in commerce activities that are for uses not specifically excluded are prohibited. The specified activities with particular exclusions are those which EPA determined were not appropriate to regulate under the TSCA section 6(h)(4) standard. Consistently, based on the Exposure and Use Assessment, activities associated with PIP (3:1) that are no longer occurring are addressed by this rule and thus the prohibitions adopted in this rule reduce the exposures that will result with resumption of past activities or the initiation of similar or other activities in the future. Therefore, EPA has determined that prohibiting these activities will reduce exposures to the extent practicable. The approach taken for this final rule is limited to implementation of TSCA section 6(h) and is not relevant to any other action under TSCA section 6 or other TSCA statutory actions.

2. EPA's interpretation of practicable.

The term ''practicable'' is not defined in TSCA. EPA interprets this requirement as generally directing the Agency to consider such factors as achievability, feasibility, workability, and reasonableness. In addition, EPA's approach to determining whether particular prohibitions or restrictions are practicable is informed in part by certain other provisions in TSCA section 6, such as TSCA section 6(c)(2)(A), which requires the Administrator to consider health effects, exposure, and environmental effects of the chemical substance; benefits of the chemical substance; and the reasonably ascertainable economic consequences of the rule. In addition, pursuant to TSCA section 6(c)(2)(B), in selecting the appropriate TSCA section 6(a) regulatory approach, the Administrator is directed to ''factor in, to the extent practicable'' those same considerations.

EPA received comments on the proposed rule regarding this interpretation of ''practicable.'' EPA has reviewed these comments and believes the interpretation described previously within this Unit is consistent with the intent of TSCA and has not changed that interpretation. EPA's interpretation of an ambiguous statutory term receives deference. More discussion on these comments is in the Response to Comments document for this rulemaking (Ref. 5).

3. EPA did not conduct a risk evaluation or assessment.

As EPA explained in the proposed rule, EPA does not interpret the ''address risk'' language to require EPA to determine, through a risk assessment or risk evaluation, whether risks are presented. EPA believes this reading gives the Administrator the flexibility Congress intended for issuance of expedited rules for PBTs and is consistent with TSCA section 6(h)(2), which makes clear a risk evaluation is not required to support this rulemaking.

EPA received comments on the proposed rule regarding its interpretation of TSCA section 6(h)(4) and regarding EPA's lack of risk assessment or risk evaluation of PIP (3:1). A number of commenters asserted that while EPA was not compelled to conduct a risk evaluation, EPA should have conducted a risk evaluation under TSCA section 6(b) regardless. The rationales provided by the commenters for such a risk assessment or risk evaluation included that one was needed for EPA to fully quantify the benefits to support this rulemaking, and that without a risk evaluation, EPA would not be able to determine the benefits, risks, and cost effectiveness of the rule in a meaningful way. As described by the commenters, EPA would therefore not be able to meet the TSCA section 6(c)(2) requirement for a statement of these considerations. Regarding the contradiction between the mandate in TSCA section 6(h) to expeditiously issue a rulemaking and the time needed to conduct a risk evaluation, some commenters argued that EPA would have had enough time to conduct a risk evaluation and issue a proposed rule by the statutory deadline.

EPA disagrees with the commenters' interpretation of EPA's obligations with respect to chemicals subject to TSCA section 6(h)(4). TSCA section 6(h)(4) provides that EPA shall: (1) ''Address the risks of injury to health or the environment that the Administrator determines are presented by the

chemical substance'' and (2) ''reduce exposure to the substance to the extent practicable.'' With respect to the first requirement, that standard is distinct from the ''unreasonable risk'' standard for all other chemicals for which a section 6(a) rule might be issued. EPA does not believe that TSCA section 6(h) contemplates a new evaluation of any kind, given that evaluations to determine risks are now addressed through the TSCA section 6(b) risk evaluation process and that TSCA section 6(h)(2) explicitly provides that no risk evaluation is required. Moreover, it would have been impossible to prepare a meaningful evaluation under TSCA and subsequently develop a proposed rule in the time contemplated for issuance of a proposed rule under TSCA section 6(h)(1). Although EPA does not believe the statute contemplates a new evaluation of any kind for these reasons, EPA reviewed the hazard and exposure information on the five PBT chemicals EPA had compiled. However, while this information appropriately addresses the criteria of TSCA section 6(h)(1)(A) and (B), it did not provide a basis for EPA to develop sufficient and scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present an identifiable risk of injury to health or the environment.

Rather than suggesting a new assessment is required, EPA reads the ''address risk'' language in TSCA section 6(h)(4) to contemplate reliance on an existing EPA assessment under TSCA, similar to a risk assessment that may be permissibly used under TSCA section 26(l)(4) to regulate the chemical under TSCA section 6(a). This interpretation gives meaning to the ''address risk'' phrase, without compelling an evaluation contrary to TSCA section 6(h)(2) and would allow use of an existing determination, or development of a new determination based on such an existing risk assessment, in the timeframe contemplated for issuance of a proposed rule under TSCA section 6(h). However, there were no existing EPA assessments of risk for any of the PBT chemicals. Thus, because EPA had no existing EPA risk assessments or determinations of risk, the regulatory measures addressed in this final rule focus on reducing exposures ''to the extent practicable.''

In sum, because neither the statute nor the legislative history suggests that a new evaluation is compelled to identify and thereby provide a basis for the Agency to ''address risks'' and one could not be done prior to preparation and timely issuance of a proposed rule, and no existing TSCA risk assessment exists for any of the chemicals, EPA has made no risk determination finding for any of the PBT chemicals. Instead, EPA implements the requirement of TSCA section 6(h)(4) by reducing exposures of each PBT chemical ''to the extent practicable.''

For similar reasons, EPA does not believe that TSCA section 6(c)(2) requires a quantification of benefits, much less a specific kind of quantification. Under TSCA section 6(c)(2)(A)(iv), EPA must consider and publish a statement, based on reasonably available information, on the reasonably ascertainable economic consequences of the rule, but that provision does not require quantification, particularly if quantification is not possible. EPA has reasonably complied with this requirement by including a quantification of direct costs and a qualitative discussion of benefits in each of the preambles to the final rules. EPA was unable to quantify the indirect costs associated with the rule. More discussion on these issues raised in the comments is in the Response to Comments document (Ref. 5).

4. Replacement parts and articles.

In the preamble to the proposed rule, EPA explained that it did not read provisions of TSCA section 6 that conflict with TSCA section 6(h) to apply to TSCA section 6(h) rules. Specifically, TSCA sections 6(c)(2)(D) and (E) require a risk finding pursuant to a TSCA section 6(b) risk evaluation to regulate replacement parts and articles. Yet, TSCA section 6(h) neither compels nor contemplates a risk evaluation to precede or support the compelled regulatory action to ''address the risks. . .'' and ''reduce exposures to the substance to the extent practicable''. TSCA section 6(h)(2) makes clear no risk evaluation is required, and the timing required for conducting a risk evaluation is not consistent with the timing compelled for issuance of a proposed rule under TSCA section 6(h). Moreover, even assuming a prior risk assessment might allow a risk determination under the TSCA section 6(h)(4) ''address risk'' standard, such assessment would still not satisfy the requirement in TSCA section 6(c)(2)(D) and (E) for a risk finding pursuant to a TSCA section 6(b) risk evaluation. Because of the clear conflict between these provisions, EPA determined that those provisions of TSCA section 6(c) that assume the existence of a TSCA section 6(b) risk evaluation do not apply in the context of this TSCA section 6(h) rulemaking. Instead, EPA resolves this conflict in these provisions by taking into account the TSCA section 6(c) considerations in its determinations as to what measures ''reduce exposure to the substance to the extent practicable''.

Commenters contended that TSCA section 6(c)(2)(D) and (E) bar a TSCA section 6(h) rule in the absence of a risk evaluation, representing Congress's recognition of the special burdens associated with regulating replacement parts and articles, including the difficulty of certifying newly designed replacement parts for automobiles and aircraft, and the difficulty importers face in knowing what chemicals are present in the articles they import. As noted in this Unit and further discussed in the Response to Comment document, while EPA determined that provisions of TSCA section 6(c)(2)(D) and (E) do not apply because they conflict with the requirements of TSCA section 6(h), EPA interpreted the ''practicability'' standard in TSCA section 6(h)(4) to reasonably contemplate the considerations embodied by TSCA section 6(c)(2)(D) and (E). As a result, EPA disagrees with any suggestion that the clear conflict between Congress' mandates in TSCA section 6(h) and TSCA section 6(c)(2)(D) and (E) must be read to bar regulation of replacement parts and articles made with chemicals that Congress believed were worthy of expedited action under TSCA section 6(h) and in the absence of a risk evaluation. The statute does not clearly communicate that outcome. Instead, Congress left ambiguous how best to address the conflict in these provisions, and EPA's approach for taking into consideration the TSCA section 6(c)(2)(D) and (E) concepts in its TSCA section 6(h)(4) ''practicability'' determinations is a reasonable approach. In addition, with respect to comments that TSCA section 6(C)(2)(D) and (E) were intended to address Congress's concerns regarding burdens associated with regulation of replacement parts and articles, EPA agrees that these concerns are relevant and takes them into account in its implementation of the TSCA section 6(h)(4) mandate, with respect to the circumstances for each chemical. Finally, EPA does not believe that Congress intended, through the article provisions incorporated into the TSCA amendments, to absolve importers of the duty to know what they are importing. Importers can and should take steps to determine whether the articles they are importing contain chemicals that are prohibited or restricted. Therefore, taking the discussion in this **Federal Register** document and the additional discussion in the Response to Comment document on these issues into account, EPA is continuing to interpret TSCA

sections 6(c)(2)(D) and 6(c)(2)(E) to be inapplicable to this rulemaking. While this interpretation has not changed, EPA has reviewed the practicability of regulating replacement parts and articles in accordance with the statutory directive in TSCA section 6(h)(4) to reduce exposures to the PBT chemicals to the extent practicable. The results of those reviews are in Unit III.A.

C. PIP (3:1) Overview, Health Effects, and Exposure

PIP (3:1) is used as a plasticizer, a flame retardant, an anti-wear additive, or an anti-compressibility additive in hydraulic fluid, lubricating oils, lubricants and greases, various industrial coatings, adhesives, sealants, and plastic articles. As a chemical that can perform several functions simultaneously, sometimes under extreme conditions, it has several distinctive applications. In lubricating oils, PIP (3:1) is a flame retardant, anti-wear additive, anti-compressibility additive, or some combination of the three. In adhesives and sealants, PIP (3:1) is a plasticizer and flame retardant (Ref. 4). PIP (3:1) can also be added to paints, coatings, and plastic components, where it is a plasticizer or flame-retardant additive. In the past, some plastic components to which PIP (3:1) may have been added included those intended for use by children. EPA received comments that PIP (3:1) acts as a flame-retardant gel in filters surrounding engines in some marine and locomotive applications (EPA–HQ–OPPT–2019–0080–0569).

Exposure information for PIP (3:1) is summarized here and is detailed in EPA's Exposure and Use Assessment (Ref. 4), and the proposal. There is potential for exposure to PIP (3:1) under the conditions of use at all stages of its lifecycle (*i.e.,* manufacturing, processing, use (industrial, commercial, and consumer), distribution, and disposal) (Ref. 4). PIP (3:1) is manufactured, processed, distributed, and used domestically. For the 2012 Chemical Data Reporting (CDR) period, data indicate that four sites manufactured (including imported) PIP (3:1) in the United States. For the 2016 CDR period, data indicate nine sites manufactured (including imported) PIP (3:1) in the United States (Refs. 6 and 7). The total volume of PIP (3:1) manufactured (including imported) in the United States was 14,904,236 lbs in 2011; 3,191,017 lbs in 2012; 2,968,861 lbs in 2013; 5,632,272 lbs in 2014; and 5,951,318 in 2015 (Ref. 7).

PIP (3:1) is toxic to aquatic plants, aquatic invertebrates, sediment invertebrates, and fish. Data indicate the potential for reproductive and developmental effects, neurological effects and effects on systemic organs, specifically adrenals, liver, ovary, and heart in mammals. The studies presented in the document entitled ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals (Hazard Summary) (Ref. 8) demonstrate these hazardous endpoints. EPA did not perform a systematic review or a weight of the scientific evidence assessment for the hazard characterization of these chemicals. As a result, this hazard characterization is not definitive or comprehensive. Other hazard information on these chemicals may exist in addition to the studies summarized in the Hazard Summary that could alter the hazard characterization (Ref. 8).

In the 2014 Update to the TSCA Work Plan for Chemical Assessments, PIP (3:1) scored high (3) for hazard (based on neurotoxicity in mammals and aquatic toxicity); high (3) for exposure (based on use as a flame retardant in industrial and consumer products); and high (3) for persistence and bioaccumulation (based on high environmental persistence and high bioaccumulation potential) (Ref. 1). The overall screening score for PIP (3:1) was high (9).

Taking all this into account, and the discussion in Response to Comments document and in this Unit and in Unit III., EPA determines in this final rule that PIP (3:1) meets the TSCA section 6(h)(1)(A) criteria. Comments received pertaining to this finding are discussed further in Unit III.A.1. In addition, EPA determines, in accordance with TSCA section 6(h)(1)(B), that based on the Exposure and Use Assessment and other reasonably available information, exposure to PIP (3:1) is likely under the conditions of use to the general population, to a potentially exposed or susceptible subpopulation, or the environment. EPA's determination is based on the opportunities for exposure throughout the lifecycle of PIP (3:1). EPA did not receive any comments with information to call the exposure finding into question.

D. EPA's Proposed Rule Under TSCA Section 6(h) for PIP (3:1)

In the proposed rule (84 FR 36728), EPA proposed to prohibit the processing and distribution in commerce of PIP (3:1), and products containing the chemical substance except for the following:

- Processing and distribution in commerce for use in aviation hydraulic fluid;
- Processing and distribution in commerce for use in lubricants and greases; and
- Processing and distribution in commerce for use in new and replacement parts for the automotive industry, and the distribution in commerce of those parts to which PIP (3:1) has been added.

EPA proposed to prohibit releases to water from manufacture, processing, distribution in commerce, and commercial use activities that are permitted to occur. EPA also proposed to require persons manufacturing, processing, and distributing PIP (3:1), and products containing PIP (3:1), in commerce to notify their customers of these prohibitions on processing and distribution, and the prohibition on releases to water.

In addition, EPA proposed to require that all persons who manufacture, process, or distribute in commerce PIP (3:1) and articles and products containing PIP (3:1) maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions and restrictions. EPA proposed that these records would have to be maintained for a period of three years from the date the record is generated.

E. Public Comments and Other Public Input

The proposed rule provided a 60-day public comment period, with a 30-day extension provided (Ref. 5). The comment period closed on October 28, 2019. EPA received a total of 48 comments, with three commenters sending multiple submissions with attached files, for a total of 58 submissions on the proposal for all the PBT chemicals. This includes the previous request for a comment period extension (EPA–HQ–OPPT–2019–0080–0526). Two commenters submitted confidential business information (CBI) or copyrighted documents with information regarding economic analysis and market trends. Copies of all the non-CBI documents, or redacted versions without CBI, are available in the docket for this action.

In this preamble, EPA has responded to the major comments relevant to the PIP (3:1) final rule. Of these comment submissions, thirty addressed EPA's proposed regulation of PIP (3:1). Additional discussion related to this final action can be found in the Response to Comments document (Ref. 5).

F. Activities Not Directly Regulated by This Rule

EPA is not regulating all activities or exposures to PIP (3:1), even though the Exposure and Use Assessment (Ref. 4) identified potential for exposures under many conditions of use. One such activity is disposal. EPA generally presumes compliance with federal and state laws and regulations, including, for example, Resource Conservation and Recovery Act (RCRA) and its implementing regulations and state laws, as well as the Clean Air Act, the Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA). As described in the proposed rule, regulations promulgated under the authority of the RCRA govern the disposal of hazardous and non-hazardous wastes. Although PIP (3:1) is not a listed or characteristic hazardous waste under RCRA, it is subject to the requirements applicable to solid waste under Subtitle D of RCRA. This means there is a general prohibition on open dumping (which includes a prohibition on open burning). Wastes containing this chemical that do not otherwise meet the criteria for hazardous waste would be disposed of in municipal solid waste landfills (MSWLFs), industrial nonhazardous, or, in a few instances, construction/demolition landfills. Non-hazardous solid waste is regulated under Subtitle D of RCRA, and states play a lead role in ensuring that the federal requirements are met. The requirements for MSWLFs include location restrictions, composite liners, leachate collection and removal systems, operating practices, groundwater monitoring, closure and post-closure care, corrective action provisions, and financial assurance. Industrial waste (non-hazardous) landfills and construction/demolition waste landfills are primarily regulated under state regulatory programs, and in addition they must meet the criteria set forth in federal regulations, which may include requirements such as siting, groundwater monitoring and corrective action depending upon what types of waste are accepted. Disposal by underground injection is regulated under both RCRA and SDWA. In view of this comprehensive, stringent program for addressing disposal, EPA proposed that it is not practicable to impose additional requirements under TSCA on the disposal of the PBT chemicals, including PIP (3:1).

EPA received a number of comments on this aspect of its proposal. Some commenters agreed with EPA's proposed determination that it is not practicable to regulate disposal, while others disagreed. However, in EPA's view, establishing an entirely new disposal program for PIP (3:1)-containing wastes would be expensive and difficult to establish and administer. In addition, imposing a requirement to treat these wastes as if they were listed as hazardous wastes would have impacts on hazardous waste disposal capacity and be very expensive for states and local governments as well as for affected industries. Therefore, EPA has determined that it is not practicable to further regulate PIP (3:1)-containing wastes for disposal. More information on the comments received and EPA's responses can be found in the Response to Comments document (Ref. 5). One commenter, the Institute of Scrap Recycling Industries, Inc. (ISRI) (EPA–HQ–OPPT–2019–0080–0559), noted that, while EPA proposed to not regulate disposal of the PBT chemicals under TSCA, the effect of EPA's proposed prohibition on manufacturing, processing, and distribution in commerce would prohibit the processing and distribution in commerce of the PBTs and articles and products containing the PBT chemicals for disposal. EPA did not intend such an effect and has added an exclusion in the final regulatory text for processing and distribution in commerce for disposal.

EPA also proposed not to use its TSCA section 6(a) authorities to regulate commercial use of products and articles containing the PBT chemicals, such as televisions and computers, because such regulation would not be practicable. It would be extremely burdensome, necessitating the identification of products containing PIP (3:1), and the disposal of countless products and articles that would have to be replaced. If EPA prohibited the continued commercial use of these items, widespread economic impacts and disruption in the channels of trade would occur while the prohibited items were identified and replaced. Although some commenters agreed with EPA's proposed determination that it is not practicable to regulate commercial use, and others disagreed, for the reasons noted in the proposal and discussed further in the Response to Comments document (Ref. 5), EPA continues to believe that prohibiting or otherwise restricting the continued commercial use of products and articles containing PIP (3:1) would result in extreme burdens in exchange for what in most cases would be minimal exposure reductions. Thus, EPA concludes that it is impracticable to prohibit or otherwise restrict the continued commercial use of PIP (3:1)-containing products.

EPA also proposed not to use its TSCA section 6(a) authorities to directly regulate occupational exposures. As explained in the proposed rule, as a matter of policy, EPA assumes compliance with federal and state requirements, such as worker protection standards, unless case-specific facts indicate otherwise. The OSHA has not established a permissible exposure limit (PEL) for PIP (3:1). However, under section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), each employer has a legal obligation to furnish to each of its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm. The OSHA Hazard Communication Standard at 29 CFR 1910.1200 requires chemical manufacturers and importers to classify the hazards of chemicals they produce or import, and all employers to provide information to employees about hazardous chemicals to which they may be exposed under normal conditions of use or in foreseeable emergencies. The OSHA standard at 29 CFR 1920.134(a)(1) requires the use of feasible engineering controls to prevent atmospheric contamination by harmful substances and requires the use of respirators where effective engineering controls are not feasible. The OSHA standard at 29 CFR 1920.134(c) details the required respiratory protection program. The OSHA standard at 29 CFR 1910.132(a) requires the use of personal protective equipment (PPE) by workers when necessary due to a chemical hazard; 29 CFR 1910.133 requires the use of eye and face protection when employees are exposed to hazards including liquid chemicals; and 29 CFR 1910.138 requires the use of PPE to protect employees' hands including from skin absorption of harmful substances. The provisions of 29 CFR 1910.132(d) and (f) address hazard assessment, PPE selection, and training with respect to PPE required under 29 CFR 1910.133, 1910.135, 1910.136, 1910.138 and 1910.140. EPA assumes that employers will require, and workers will use, appropriate PPE consistent with OSHA standards, taking into account employer-based assessments, in a manner sufficient to prevent occupational exposures that are capable of causing injury.

EPA assumes compliance with other federal requirements, including OSHA standards and regulations. EPA does not read TSCA section 6(h)(4) to direct EPA to adopt potentially redundant or conflicting requirements. Not only

would it be difficult to support broadly applicable and safe additional measures for each specific activity without a risk evaluation and in the limited time for issuance of this regulation under TSCA section 6(h), but imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations. Such regulations would not be practicable. Rather, where EPA has identified worker exposures and available substitutes, EPA is finalizing measures to reduce those exposures. As discussed in the proposed rule, EPA assumes that the worker protection methods used by employers, including in response to existing OSHA regulations, (29 CFR 1910.1200, 29 CFR 1910.132 through 1910.140), in addition to the regulatory measures taken for each chemical, meaningfully reduce the potential for occupational exposures. While some commenters agreed with this approach, others thought that EPA should establish worker protection requirements for those uses that would be allowed to continue under the final rule. Information provided to EPA before and during the public comment period on the proposed rule indicates that employers are using engineering and process controls and providing appropriate personal protective equipment (PPE) to their employees consistent with these requirements, and EPA received no information on PIP (3:1) to suggest this is not the case. Further, EPA has not conducted a risk evaluation on PIP (3:1) or any of other PBT chemicals. Without a risk evaluation and given the time allotted for this rulemaking, EPA cannot identify additional engineering or process controls or PPE requirements that would be appropriate to each chemical-specific circumstance. For these reasons, EPA has determined that it is not practicable to regulate worker exposures in this rule through engineering or process controls or PPE requirements.

EPA received comments regarding the use of PBT chemicals in research and development and lab use. Lab use is addressed under newly established 40 CFR 751.401(b) as the manufacturing, processing, distribution in commerce and use of any chemical substance, or products and articles that contain the chemical substance, for research and development, as defined in new 40 CFR 751.403. *Research and Development* is defined in new 40 CFR 751.403 to mean laboratory and research use only for purposes of scientific experimentation or analysis, or chemical research on, or analysis of, the chemical substance, including methods for disposal, but not for research or analysis for the development of a new product, or refinement of an existing product that contains the chemical substance. This will allow, for example, for samples of environmental media containing PBTs, such as contaminated soil and water, to be collected, packaged and shipped to a laboratory for analysis. Laboratories also must obtain reference standards containing PBTs to calibrate their equipment, otherwise they may not be able to accurately quantify these chemical substances in samples being analyzed. However, research to develop new products that use PBTs subject to 40 CFR part 751, subpart E, or the refinement of existing uses of those chemicals, is not included in this definition, and those activities remain potentially subject to the chemical specific provisions in 40 CFR part 751, subpart E. EPA believes it is not practicable to limit research and development activity as defined, given the critical importance of this activity to the detection, quantification and control of these chemical substances.

Finally, EPA received comments regarding requirements for resale of PIP (3:1)-containing products and articles, as well as products and articles containing other PBT chemicals undergoing Section 6(h) rulemaking. One commenter stated that because the proposed definition of ''person'' includes ''any natural person,'' the proposed prohibitions would seem to apply to anyone selling products or articles containing PIP (3:1) at a garage or yard sale (EPA–HQ–OPPT–2019–0080–0559). EPA did not intend to impose these final PIP (3:1) regulations on yard sales or used product or article sales and has added language in 40 CFR 751.401 to clarify this. The prohibition and recordkeeping requirements in this final rule exclude PIP (3:1)-containing products and articles that have previously been sold or supplied to an end user, *i.e.,* any person who purchased or acquired the finished good for the purposes of resale.

III. Provisions of This Final Rule

A. Scope and Applicability

EPA carefully considered all public comments related to the proposal. This rule finalizes with some modifications EPA's proposal to prohibit the processing and distribution in commerce of PIP (3:1), and products containing the chemical substance. The following are excluded from the prohibition in this final rule:

- Processing and distribution in commerce for use in hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements;
- Processing and distribution in commerce for use in lubricants and greases;
- Processing and distribution in commerce for use in new and replacement parts for the automotive and aerospace industry, and the distribution in commerce of those parts to which PIP (3:1) has been added;
- Processing and distribution in commerce for use as an intermediate in a closed system to produce cyanoacrylate adhesives;
- Processing and distribution in commerce for use as an adhesive and sealant until January 6, 2025, after which such activity is prohibited;
- Processing and distribution in commerce for use in specialized engine filters for locomotive and marine applications;
- Processing for recycling and distribution in commerce for the recycling of PIP (3:1) containing plastic provided no new PIP (3:1) is added during the recycling process;
- Processing and distribution in commerce of articles and products made from recycled PIP (3:1) containing plastic provided no new PIP (3:1) is added during the recycling process or to the articles and products made from the recycled plastic; and
- Processing and distribution in commerce of PIP (3:1) for use in photographic printing articles and PIP (3:1)-containing photographic printing articles until January 1, 2022.

This final rule also prohibits releases to water from manufacture, processing, distribution in commerce, and commercial uses that are permitted to occur, as outlined in the preceding bullets.

Persons manufacturing, processing, and distributing in commerce PIP (3:1) and products containing PIP (3:1) are required to notify their customers of these prohibitions on processing and distribution, and the prohibition on releases to water via Safety Data Sheet (SDS) or labeling.

Persons manufacturing, processing, and distributing in commerce PIP (3:1) are required to maintain, for three years from the date the record is generated, ordinary business records related to compliance with the restrictions, prohibitions, and other requirements set forth in this rule. These records must include a statement of compliance with this final rule and be made available to

EPA within 30 calendar days upon request.

1. Inclusion in TSCA Section 6(h).

In the proposed rule, EPA identified the five chemical substances EPA proposed as meeting the TSCA section 6(h)(1)(A) criteria for expedited action. PIP (3:1) is one of those five substances, with a ''high'' bioaccumulation score. The information EPA collected and reviewed in developing the proposal provided no basis to call into question the scoring for persistence, bioaccumulation, and toxicity performed in 2014 for these five PBT chemicals. Four commenters addressed classification of PIP (3:1) as a PBT, and one specifically took issue with PIP (3:1)'s classification as a PBT under TSCA section 6(h)(1)(A), with a focus on its bioaccumulation properties. Their concerns are described in this final rule and addressed in the Response to Comments for this rulemaking (Ref. 5). While one commenter submitted additional data, these comments and data submitted do not call into question the PIP (3:1) bioaccumulation score identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments for the reasons described in the Response to Comments Document (Ref. 5).

Four commenters indicated that PIP (3:1) is not considered a PBT by the European Chemicals Agency (ECHA), based on information in the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) dossiers; according to the commenters, therefore PIP (3:1) does not meet the TSCA section 6(h)(1)(A) criteria. However, information in the REACH dossiers reflect the results of studies submitted to ECHA, and not necessarily determinations by ECHA. A single study submitted by industry representing results from their particular commercial product is not sufficient justification to call into question whether PIP (3:1) meets the bioaccumulation criterion. Commercial products may contain varying amounts of different isomers which constitute PIP (3:1) thus, a study on a particular commercial product alone for a chemical that may differ between various commercial products, is not adequate to call into question the specified score identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments.

Additionally, PIP (3:1) is a UVCB substance, or a substance of unknown or variable composition, complex reaction and biological materials. In the case of PIP (3:1), it is a substance of unknown or variable composition. The chemical substance PIP (3:1), which is the subject of this regulation, has a variable composition in that mixtures of or containing PIP (3:1) may contain different proportions of isomers of PIP (3:1) or of different chemical congeners. An isomer is defined as ''one of several species (or molecular entities) that have the same atomic composition (molecular formula) but different line formulae or different stereochemical formulae and hence different physical and/or chemical properties'' (Ref. 9). A congener is defined as ''one of two or more substances related to each other by origin, structure, or function'' (Ref. 9). When considering a UVCB substance, the Agency considers whether any isomers or congeners which might be present in a UVCB substance are bioaccumulative and, if so, EPA considers the UVCB substance to be bioaccumulative. In these cases, the Agency has a longstanding approach for chemical evaluation and regulation that considers whether particular isomers or congeners which might be present in an identified substance are, for example, bioaccumulative and, as in this case, if so, EPA considers that identified substance to meet the criterion (Ref. 10). Because PIP (3:1) is a UVCB, and because commercial products may contain varying amounts of different isomers which constitute PIP (3:1), and, as detailed in the 2014 Update to the TSCA Work Plan for Chemical Assessments and the proposed rule, some of those isomers are identified as bioaccumulative, EPA continues to consider PIP (3:1) to be bioaccumulative.

Additionally, EPA does not interpret TSCA section 6(h)(1)(A) to require, as the commenter suggests, a ''fresh look'' at the scores for or issues of toxicity, persistence, or bioaccumulation of the Work Plan chemicals. Requiring EPA to re-evaluate any of these issues would delay what Congress intended to be an expedited rulemaking process. It also suggests a level of analysis not contemplated by Congress or clearly required for this rulemaking given that Congress did not compel risk evaluations for any chemicals meeting the TSCA section 6(h)(1) criteria. The only required additional assessment is the ''exposure and use assessment'' used to make the TSCA section 6(h)(1)(B) finding that exposures are likely under the conditions of use.

To the extent that commenters suggest that EPA used a ''successor scoring system'' (via the use and exposure assessment and hazard summary) to identify the score for the PBT chemicals, that is not the case. The Agency reaffirms that the scores identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments and referenced in the proposed rule are based on the 2012 Methods Document criteria, and EPA's responses to comments are based on those criteria. Because of PIP (3:1)'s status as a UVCB, any study on a single congener or commercial product would need to be considered in the context of all available information that informs the persistence and bioaccumulation of PIP (3:1). To the extent that commenters are suggesting that the statute requires, or that EPA should do an analysis consistent with, a systematic review to re-evaluate the persistence and bioaccumulation score for PIP (3:1), the Agency notes that it views that effort to be a successor scoring system approach. Systematic review or an analysis consistent with systematic review is inconsistent with the criteria and tools referenced in the 2012 TSCA Work Plan Chemicals: Methods Document. If EPA had used a successor scoring system, it would need to rescore the chemicals identified on the 2014 Update to the TSCA Work Plan for Chemical Assessments and the Agency did not do that and has no plans to do that at this time.

One commenter indicated that EPA has not adequately identified the chemical substance. EPA emphasizes that PIP (3:1) has been properly identified as the subject of this rulemaking. To clarify, TSCA section 6(h) requires EPA to issue a proposed rule to address chemicals ''identified'' in the 2014 Update to the TSCA Work Plan for Chemical Assessments and that meet other specified criteria. Chemicals ''identified'' in the 2014 Update to the TSCA Work Plan for Chemical Assessments are specified by chemical name and CASRN. In this case, PIP (3:1) is identified as Phenol, isopropylated phosphate (3:1) (iPTPP) and with CASRN 68937–41–7.

2. Hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements.

In this final rule EPA amends the language in the proposed rule on the exclusion from the processing and distribution in commerce restrictions of PIP (3:1) for use in for aviation hydraulic fluid and of PIP (3:1)-containing aviation hydraulic fluid, to include an exclusion from the prohibition on the processing and distribution in commerce of PIP (3:1) for use in hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S.

Department of Defense specification requirements. As noted in the proposed rule, these requirements remain necessary for the safe operation of commercial and military aircraft.

Five commenters confirmed or elaborated on the degree to which it would be impracticable to replace or reformulate hydraulic fluids containing PIP (3:1). Several of those comments supported the concerns outlined in the proposed rule, namely that aviation fluids are approved by major aircraft manufacturers who work closely with the Federal Aviation Administration (FAA), and any change in formula composition results in a full requalification process. As described in the proposed rule, this process is a joint effort between the fluid manufacturer and aircraft manufacturer, and resulting fluids are subject to extensive laboratory and field testing. At the end of this iterative evaluation process, there is no guarantee that a technically equivalent alternative will be developed (Refs. 3, 11 and 12).

While no comments opposed the exclusion for aviation hydraulic fluid specifically, several commenters opposed the exclusions from the prohibition on processing and distribution outlined in the proposal more broadly, particularly in that the exclusions are not time limited (EPA–HQ–OPPT–2019–0080–0546; –0567; –0570; –0572; –0575). Additional information is available in the Response to Comments document (Ref. 5).

EPA received one comment requesting that hydraulic fluid which may contain PIP (3:1) for other industries, including use specialized, industrial applications that include hydraulic control of valves for certain higher pressure, and more extreme environments, also be excluded from the rule. As explained in the proposal, for industrial hydraulic fluids (excluding aviation), various alternative products not containing PIP (3:1) are already available in commerce. However, to the commenter's point, synthetic hydraulic fluids which contain low levels of PIP (3:1) are certified to military specifications, such as MIL–DTL–32353A (Ref. 13) and represent an emerging technology in hydraulic fluids for various applications important to national security including hydraulic lubricating oils for valves in vessels. To that end, EPA is expanding the exclusion to ensure inclusion of those hydraulic fluids certified to military specifications which may be used in industries other than aviation. To be eligible for this exclusion, the hydraulic fluid must be required to meet military specifications for safety and performance and no alternative chemical is available that meets U.S. Department of Defense specification requirements. To the extent that PIP (3:1) containing hydraulic fluids are certified for turbine hydraulic fluid military specifications, those products would be encompassed by aviation hydraulic fluid.

For hydraulic fluids that are in use by the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available to the end user to meet U.S. Department of Defense specification requirements, their processing and distribution in commerce must be excluded from the prohibition. For the reasons summarized in Unit III.A.2. and supported by the comments and Economic Analysis, the Agency is finalizing the proposed exclusion for processing and distribution in commerce for use in hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements.

3. Lubricants and greases.

EPA is finalizing as proposed the exclusion from the processing and distribution in commerce restrictions of PIP (3:1) for use in lubricants and greases and of PIP (3:1)-containing lubricants and greases. Five commenters confirmed or elaborated on the degree to which it would be impracticable to replace or reformulate lubricants and greases containing PIP (3:1), which, as noted in the proposed rule, are necessary for the safe operation of commercial and military aircraft, as well as some non-aviation uses such as turbines for power generation (EPA–HQ–OPPT–2019–0080–0562; –0536; –0545; –0542; –0539). One commenter did not support the exclusion for PIP (3:1) in lubricants and greases, citing concerns over potential occupational and consumer exposure (EPA–HQ–OPPT–2019–0080–0572). EPA does not expect lubricants and greases containing PIP (3:1) to be available to consumers or workers in non-industrial settings, as lubricants and greases that contain PIP (3:1) are those that need to function in extreme environments, including extreme heat, cold, and high pressure. As mentioned in Unit III.A.2. several commenters oppose the exclusions from the prohibition on processing and distribution outlined in the proposal more broadly, particularly in that the exclusions are not time limited (EPA–HQ–OPPT–2019–0080–0546; –0567; –0570; –0572; –0575). Additional information is available in the Response to Comments document (Ref. 5).

In the proposal, EPA acknowledged the degree to which PIP (3:1) is crucial to the safe and effective performance of lubricants and greases, where it functions as a crucial anti-wear component. The Agency requested comment on the degree to which PIP (3:1) is crucial to the safe and effective performance of lubricants and greases in non-aviation industries. EPA received information from several commenters supporting the lack of alternatives to PIP (3:1) for aviation and non-aviation industries, the mandatory safety standards that are in place for non-aviation lubricants and greases, and the degree to which exposures are minimized. Additional details are in the docket and the Response to Comments document (Ref. 5). For lubricants and greases to be available to the end user, their processing and distribution in commerce must be excluded from the prohibition. For the reasons noted in Unit III.A.3., EPA is finalizing the proposed exclusion for lubricants and greases.

Several commenters requested clarification on the scope of the exclusion for lubricants and greases. One commenter asked if metalworking fluids were within the scope of the exclusion. Two additional commenters requested clarification that brake fluids used in landing gear fall within the scope of lubricants and greases. Another noted that the scope should include lubricants used in marine and rail engine applications. EPA confirms that all the uses outlined in this paragraph, as well as use in aviation and non-aviation lubricants and greases more broadly, are within the scope of those lubricants and greases excluded from the proposed processing and distribution restrictions, as the regulatory definition of lubricants includes any chemical substance used to reduce friction, heat, or wear between moving or adjacent solid surfaces, or that enhance the lubricity of other substances (Ref. 14)

As requested by a commenter, EPA also confirms that, under the final rule, used oils, which fall within the scope of lubricants and greases, may continue to be recycled.

4. New and replacement parts for automobiles.

EPA is finalizing as proposed the exclusion from the proposed processing and distribution in commerce prohibitions of PIP (3:1) for use in new and replacement parts for automobiles and of PIP (3:1)-containing new and replacement parts for automobiles. Numerous commenters confirmed or

elaborated on the degree to which it would be impracticable to replace or reformulate automobile components that contain PIP (3:1).

The rationale given by commenters from industry supported the information outlined in the proposal; namely, PIP (3:1) is used to meet safety standards in new and replacement parts for automobiles and there is currently no feasible alternative.

Three commenters from non-governmental organizations (NGOs) opposed the exclusion, noting that it should be time limited (EPA–HQ–OPPT–2019–0080–0541; –0572; –0575). Two of those NGOs are among commenters mentioned in Unit III.A.2. who oppose the exclusions from the prohibition on processing and distribution outlined in the proposal more broadly, particularly in that the exclusions are not time limited (EPA–HQ–OPPT–2019–0080–0546; –0567; –0570; –0572; –0575). EPA determined that prohibiting the processing and distribution of PIP (3:1) for use in replacement parts is not practicable because PIP (3:1) is used to meet safety standards in new and replacement parts for automobiles and there is currently no feasible alternative. For those same reasons, EPA could not identify a time limit on the exclusion that would be practicable. Additional information is available in the Response to Comments document (Ref. 5).

Requiring the automotive industry to reformulate or redesign replacement parts for vehicle models currently on the market or vehicles no longer being manufactured is not practicable because of the safety concerns recognized in Unit III.A.4. Most importantly, any restriction on new and replacement parts for the automotive industries could increase costs and safety concerns.

5. New and replacement parts for aerospace vehicles.

In addition to the exclusion outlined in Unit III.A.4., in this final rule, EPA is broadening the scope of the exclusion from the proposed processing and distribution in commerce prohibitions to include processing and distribution in commerce of PIP (3:1) for use in new and replacement parts for aerospace vehicles and processing and distribution in commerce of PIP (3:1)-containing new and replacement parts for aerospace vehicles. Numerous commenters noted that many of the same challenges outlined for automobiles apply equally, if not more so, for aerospace vehicles. As noted by the commenters, the aerospace sector faces challenges similar to the automotive industry, including a multi-tiered international supply chain, strict safety standards, and the absence of feasible alternatives for these uses and costs. An airplane may be in use for 20 years and will need replacement parts to maintain airworthiness (EPA–HQ–OPPT–2019–0080–0545). As with the automotive sector, restrictions on new and replacement parts for the aerospace industries could increase costs and safety concerns. Therefore, EPA is finalizing an exclusion from the proposed processing and distribution in commerce prohibitions that includes processing and distribution in commerce of PIP (3:1) for use in new and replacement parts for aerospace vehicles and processing and distribution in commerce of PIP (3:1)-containing new and replacement parts for aerospace vehicles.

6. Adhesives and sealants.

In the proposal, EPA did not exclude processing or distribution in commerce of PIP (3:1) for use in adhesives and sealants or processing or distribution in commerce of PIP (3:1)-containing adhesives and sealants from the prohibitions on processing and distribution, except under those circumstances where an adhesive is part of a new or replacement part for an automobile. EPA received numerous comments requesting clarification or modification of the proposed regulations relative to adhesives. Based on those comments, in the final rule, EPA has added an exclusion from the processing and distribution prohibitions for the processing and distribution of PIP (3:1) when used in a closed system as an intermediate in the production of cyanoacrylate adhesives, and additionally delayed the compliance date for the prohibitions on the processing and distribution in commerce of PIP (3:1) for use in any type of adhesives and sealants and the processing and distribution in commerce of PIP (3:1)-containing adhesives and sealants, from 60 days to four years.

Two commenters identified PIP (3:1)'s use as an intermediate in the production of cyanoacrylate adhesives (EPA–HQ–OPPT–2019–0538; –0558). At the time of proposal, EPA believed there were feasible alternatives to PIP (3:1) for this use. However, EPA received additional information in a public comment to indicate that while some cyanoacrylate adhesives are made without PIP (3:1), PIP (3:1)'s use as an intermediate can be central to achieving properties necessary to meet performance standards for cyanoacrylates used in important applications including medical, military, automotive, and aerospace sectors. PIP (3:1) is not expected to be present in the final product since it is used as an intermediate, and the manufacturing of cyanoacrylate adhesives occurs in a closed system. Therefore, EPA is finalizing an exclusion from the prohibitions for the processing and distribution in commerce of PIP (3:1) for this use because, without a feasible alternative for these applications, it would be impracticable to prohibit.

The proposed rule did not delay the compliance date beyond the rule's effective date; the processing and distribution bans would come into effect 60 days after publication of the final rule notice. EPA stated in the proposed rule that at that time it had no information indicating that a compliance date of 60 days after publication of the final rule is not practicable for the activities that would be prohibited, or that additional time is needed for products to clear the channels of trade. The phrases ''as soon as practicable'' and ''reasonable transition period'' as used in TSCA section 6(d)(1) are undefined, and the legislative history on TSCA section 6(d) is limited. Given the ambiguity in the statute, for purposes of this expedited rulemaking, EPA presumed a 60-day compliance date was ''as soon as practicable,'' unless there was support for a lengthier period of time on the basis of reasonably available information, such as information submitted in comments on the Exposure and Use Assessment or in stakeholder dialogues. Such a presumption ensures the compliance schedule is ''as soon as practicable,'' particularly in the context of the TSCA section 6(h) rules for chemicals identified as persistent, bioaccumulative and toxic, and given the expedited timeframe for issuing a TSCA section 6(h) proposed rule did not allow time for collection and assessment of new information separate from the comment opportunities during the development of and in response to the proposed rule. Such presumption also allows for submission of information from the sources most likely to have the information that will impact an EPA determination on whether or how best to adjust the compliance deadline to ensure that the final compliance deadline chosen is both ''as soon as practicable'' and provides a ''reasonable transition period.''

For the prohibition on the processing and distribution in commerce of PIP (3:1) for use in adhesives and sealants, and the processing and distribution in commerce of PIP (3:1)-containing adhesives and sealants more broadly, EPA is delaying the compliance date of the prohibition for four years. A

commenter noted that the 60-day compliance period does not allow adequate time to transition to alternatives and would effectively ban an adhesive (EPA–HQ–OPPT–2019–0080–0558). PIP (3:1) may act as a flame retardant within a formulation to meet industry flammability standards, and while alternatives are available, time is required to recertify new formulations to the required safety standards. The requested delay is within the bounds of time periods necessary to certify products to performance and safety standards in other sectors, including the automotive sector (EPA–HQ–OPPT–2019–0080–0036). Therefore, EPA agrees that more time is necessary to transition to available alternatives in the adhesives and sealants sector and will extend the compliance date of the restriction to four years from the publication of the final rule, which is ''as soon as practicable'' and provides a ''reasonable transition period,'' pursuant to TSCA section 6(d)(1), while reducing exposure ''to the extent practicable'' as required by TSCA section 6(h)(4).

EPA also clarifies that, regardless of the compliance date for the prohibition on the processing and distribution of PIP (3:1)-containing adhesives and sealants, processing and distribution of PIP (3:1) for use in adhesives and sealants in new or replacement parts for automobiles or aerospace and processing and distribution of such PIP (3:1)-containing adhesives and sealants are excluded from the general prohibition.

7. Specialized engine air filters for marine and locomotive applications.

In the proposal, EPA did not exclude processing or distribution in commerce of PIP (3:1) for use in specialized engine air filters for marine and locomotive applications from the prohibitions on processing and distribution. Based on a public comment (EPA–HQ–OPPT–2019–0080–0569), in this final rule, EPA has added an exclusion from the processing and distribution prohibitions for the processing and distribution of PIP (3:1) when used in specialized engine air filters for marine and locomotive applications and the processing and distribution of such PIP (3:1)-containing engine air filters.

The identified filters clean the combustion air intake for large, heavy duty industrial diesel engines, and prevent abrasive particles from entering the engines. The PIP (3:1) gel within the filters is the only identified substance able to self-extinguish in the event of sparks and to maintain its functionality at freezing temperatures. Based on information received in the comment, EPA believes that it would not be practicable to prohibit processing or distribution of PIP (3:1) for this use, due to the critical role of PIP (3:1) for the functionality of heavy duty industrial diesel engines important to the transportation sector, and the lack of alternatives currently in use or under development.

8. Articles made from recycled plastics.

In the proposed rule, EPA requested comment on the extent to which plastic articles containing PIP (3:1) are recycled and whether the recycling of such plastic, and the manufacture, processing, and distribution in commerce of plastic items made from such recycled plastic, should be specifically excluded from this rule. EPA received numerous comments either supporting or opposing such exclusion, and EPA received no substantive information pertaining to PIP (3:1)'s presence in recycled plastics. Therefore, EPA is excluding articles made from recycled plastics containing PIP (3:1) and to which no PIP (3:1) has been added from the prohibitions in this final rule. This exclusion will allow processing, distribution, and use of PIP (3:1) in recycled products, when no new PIP (3:1) has been added. EPA is excluding from the processing and distribution prohibitions the processing and distribution in commerce of articles and products made from recycled PIP (3:1) containing plastic that has no new PIP (3:1) added during the recycling process or added to the articles and products made from the recycled plastic. A prohibition on these processing and distribution activities would result in potentially very high costs associated with testing and compliance assurance with respect to all articles and, based on reasonably available information at this time, without meaningful exposure reductions. Because PIP (3:1)'s addition to plastics will be prohibited, with a certain exclusion, over time PIP (3:1) will decrease in plastics overall, and, it follows, in recycled plastics. Additional details are in the docket and the Response to Comments document (Ref. 5).

9. Photographic printing articles.

EPA received one comment requesting a TSCA section 6(g) critical use exemption for use of PIP (3:1) in photographic printing articles. PIP (3:1) is used as a solvent in photographic paper with commercial end uses in many sectors. Domestic manufacture and processing of PIP (3:1) for use in photographic printing articles was discontinued in October 2016 (Ref. 15). However, photographic printing articles containing PIP (3:1) are already in the channels of U.S. trade and are intended for import through October 2020, before the required promulgation of the TSCA section 6(h) final rule. As a result, the commenter requests additional time to allow for the continued processing and distribution in commerce of these articles. The commenter expects to cease import of articles containing PIP (3:1) and instead import the same product using an alternative to PIP (3:1) by October 1, 2020, and the shelf life and distribution period of existing stocks of articles is expected to be around 18 months (EPA–HQ–OPPT–2019–0080–0584). Exposure is unlikely during processing and distribution, and an immediate prohibition would require the commenter to dispose of the product all at once thereby increasing the incremental exposure from the disposal of film articles. EPA agrees an immediate prohibition is not practicable. It is costly to require disposal of articles already in the channels of U.S. trade by the time the rule is finalized and made effective, including costs for removal, disposal, and replacement. In addition, such action has potential to increase exposure by concentrating disposals in times and space, as opposed to allowing the articles to complete their natural lifecycle and be disposed of over time. Therefore, EPA adds a compliance date of January 1, 2022, for the prohibition on processing and distribution in commerce of photographic printing articles, in order to allow time to permit existing stocks of articles to clear the channels of trade, which is ''as soon as practicable'' and provides a ''reasonable transition period,'' pursuant to TSCA section 6(d)(1), while reducing exposure ''to the extent practicable'' as required by TSCA section 6(h)(4).

10. Releases to water.

EPA proposed to prohibit releases to water from the manufacturing, processing, distribution in commerce, and commercial use activities that are permitted to occur (*e.g.,* use in hydraulic fluid, use in lubricants and greases, and use in new and replacement parts for the automotive industry). EPA is finalizing this proposal with some modification to accommodate the challenges of preventing releases to water during commercial use. Manufacturing, processing, and distribution of products containing PIP (3:1) takes place in contained environments, and sometimes even closed systems. These products also are used in the field. This is particularly true in the aviation sector. End uses of PIP (3:1) in hydraulic fluids and lubricants and greases are highly regulated, however, inadvertent releases

of PIP (3:1) in the field are possible, for example, in wash-water from airplane parts, which may contain trace amounts of PIP (3:1) (EPA–HQ–OPPT–2019–0080–0542; –0562). Although it is not reasonable to expect all release to be completely prevented during the kind of commercial use activities involving PIP (3:1)-containing products and therefore not practicable to prohibit such release, it is practicable to require best practices and following existing statutes and regulations (*e.g.,* Oil Pollution Act, CWA) applicable to commercial uses (EPA–HQ–OPPT–2019–0080–0562). As a result, EPA maintains that prohibiting, as proposed, releases to water from manufacturing, processing, and distribution in commerce is practicable. However, for commercial use, EPA modifies the final regulation to accommodate the challenge of compliance when unintentional releases of small or de minimis amounts of PIP (3:1)-containing fluid are possible during commercial use. The final rule requires all persons to follow existing regulations and best practices to prevent the release to water of PIP (3:1) and PIP (3:1)-containing products during commercial use. Additionally, administrative and judicial procedures for addressing violations of restrictions under other programs consider good faith efforts to comply, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess releases in the event of a violation.

While in some cases EPA has determined that it is not practicable to exercise its section 6(a) authorities to regulate certain exposures under TSCA section 6(h), outlined in Unit II.F., this is not the case for releases of PIP (3:1) to water for formulated products and end uses. The formulated products and end uses of PIP (3:1) are highly regulated, though unintentional releases are possible. As discussed in this Unit, many regulatory restrictions on releases to water are administered by the EPA (*e.g.,* Oil Pollution Act, CWA). As identified in the 2014 Update to the TSCA Work Plan for Chemical Assessment, PIP (3:1) was rated high (3) for aquatic toxicity, and high (3) for environmental persistence and bioaccumulation. Additionally, PIP (3:1) is used in emerging technologies where there are not yet available alternatives and has increasing production volume in some sectors. As a result, EPA has determined that a restriction on releases to water is appropriate in this case as it emphasizes and codifies the importance of best practices given these circumstances. Based on the above and comments on the proposed rule, EPA therefore maintains that it is practicable to require end users of products which contain PIP (3:1) to follow existing regulations and best practices to prevent the release to water of PIP (3:1) and PIP (3:1)-containing products during commercial use, and that codifying that requirement will highlight the importance of reducing environmental release of chemicals regulated by TSCA section 6(h), and reduce exposures that could occur.

11. Downstream notification.

Persons manufacturing, processing, and distributing PIP (3:1) and products containing PIP (3:1) will be required to notify their customers of these prohibitions on processing, distribution, and releases to water. EPA proposed the method of downstream notification was text inserted in sections 1 and 15 of the safety data sheet (SDS). Several commenters requested clarification on the downstream notification requirements or suggested changes to the proposed requirement. EPA clarifies in this final rule that the downstream notification requirement applies only to those scenarios where a product has an accompanying SDS.

EPA is also including in this final rule, an alternative method of compliance for downstream notification. If a manufacturer, processor, or distributor chooses, they may include specified text on their label, instead of on their SDS. This alternative allows manufacturers, processors, and distributors to choose the manner of notification most appropriate for their customers and is not intended to broaden the scope of persons subject to the requirement.

Lastly, based on comments received, EPA has delayed the compliance date for downstream notification from 60 days to 180 days for processors and distributors from the date of publication, in order to allow adequate time for the notices to make their way through the supply chain. This length of time would allow downstream processors and distributors to gather information from suppliers and incorporate it in SDSs, and is consistent with the grace period offered under the Registration, Evaluation, Authorisation and Restriction of Chemicals regulation in Europe (EPA–HQ–OPPT–2019–0080–0542). Manufacturers (including importers) of PIP (3:1) are still required to implement downstream notification within 60 days from the date of the publication. Excluded from the downstream notification requirement are articles made from recycled plastics as described in Unit III.A.8., as long as no new PIP (3:1) is added during the processing of recycled materials.

12. Recordkeeping.

EPA is requiring that all persons who manufacture, process, or distribute in commerce PIP (3:1) and articles and products containing PIP (3:1) maintain ordinary business records, such as invoices and bills-of-lading, that are related to compliance with the prohibitions and restrictions. EPA revised this language slightly from the proposal to improve clarity. These records will have to be maintained for a period of three years from the date the record is generated, beginning on March 8, 2021. Exempted from the recordkeeping requirement are articles made from recycled plastics, as described in Unit III.A.8., as long as no new PIP (3:1) is added during the processing of recycled materials. EPA requested comment on alternative recordkeeping requirements that could help ensure compliance with the regulatory prohibitions, particularly for importers and others who do not produce articles. After reviewing the comments received, EPA has decided to include two additional requirements to help ensure compliance (EPA–HQ–OPPT–2019–0080–0539; –0542; –0546; –0549). First, the records that are kept must include a statement that the PIP (3:1), or the PIP (3:1)-containing products or articles, are in compliance with 40 CFR 751.407(a). The statement need not be included on every business record, such as every invoice or bill of lading, although regulated entities may certainly choose to reformat their documents to include the statement. For example, importers of replacement automobile parts that contain PIP (3:1) who import from the same suppliers over and over need only have a single statement for each part or each supplier. Finally, EPA is adding a requirement that the records kept pursuant to this final rule be made available to EPA within 30 calendar days upon request to ensure that EPA can review records in a timely manner.

B. TSCA Section 6(c)(2) Considerations

1. Health effects, exposure, and environmental effects.

PIP (3:1) is toxic to aquatic plants, aquatic invertebrates, sediment invertebrates and fish. Data indicate the potential for reproductive and developmental effects, neurological effects and effects on systemic organs, specifically adrenals, liver, ovary, and heart in mammals. These hazard statements are not based on a systematic review of the available literature and information may exist that could refine the hazard characterization. Additional

information about PIP (3:1) health effects, use, and exposure is in Unit II.C. and is further detailed in EPA's Hazard Summary (Ref. 8) and Exposure and Use Assessment (Ref. 4).

2. The benefits of the chemical substance or mixture for various uses.

PIP (3:1) has multiple functional uses, including as a plasticizer, flame retardant, anti-wear additive, or as an anti-compressibility additive (Ref. 4). When PIP (3:1) is included in a formula, it is often for a combination of these functional uses; for example, as a flame retardant and an anti-wear additive. Additionally, PIP (3:1) is an isomer mixture, and through manufacturing, the proportion of various isomers can be manipulated to achieve specific properties which can affect the performance of a formula (Ref. 16). As an additional benefit, when used as an intermediate in the processing of cyanoacrylate glues, PIP (3:1) aids in the ability of these glues to meet the requisite performance standards for specialized markets (EPA–HQ–OPPT–2019–0080–0538).

3. The reasonably ascertainable economic consequences of the rule.

i. *Overview of cost methodology.* EPA has evaluated the potential costs of the final action for PIP (3:1). Costs of the final rule were estimated based on the assumption that under regulatory limitations on PIP (3:1), processors that use PIP (3:1) in their products would switch to available alternative chemicals to manufacture the product, or to products that do not contain PIP (3:1). Substitution costs were estimated on the industry level using the price differential between the cost of the chemical product and identified substitutes. Costs for rule familiarization and recordkeeping were estimated based on burdens estimated for other similar rulemakings. Costs were annualized over a 25-year period. Other potential costs include, but are not limited to, those associated with testing, reformulation, release prevention, imported articles, and some portion of potential revenue loss. However, these costs are discussed only qualitatively, due to lack of data availability to estimate quantified costs. More details of this analysis are presented in the Economic Analysis (Ref. 3).

ii. *Estimated costs of this final rule.* Total quantified annualized industry costs for the final rule is $23.6 million at a 3% discount rate and $22.8 million at a 7% discount rate annualized over 25 years. Total annualized Agency costs associated with implementation of the final rule were based on EPA's best judgment and experience with other similar rules. For the final regulatory action, EPA estimates it will require 1 FTE at $155,152 per year (Ref. 3).

Total quantified annualized social costs for the final rule are $23.8 million at a 3% discount rates, and $23.0 million at a 7% discount rate. As described earlier in Unit III.B.3, potential costs such as testing, reformulation, release prevention, and imported articles, could not be quantified due to lack of data availability to estimate quantified costs. These costs are discussed qualitatively in the Economic Analysis (Ref. 3).

iii. *Benefits.* As discussed in Unit II.A. and the Response to Comments Document, while EPA reviewed hazard and exposure information for the PBT chemicals, this information did not provide a basis for EPA to develop scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present a risk of injury to health or the environment. Benefits were not quantified due to the lack of risk estimates. A qualitative discussion of the potential benefits associated with the final action for PIP (3:1) is provided. PIP (3:1) is a neurotoxicant and aquatic toxicant with high persistence and high potential for bioaccumulation. Under this final rule, PIP (3:1) is prohibited for processing and distribution in all uses except for those specifically excluded from the prohibition, as detailed in Unit I.C. Additionally, releases to water are prohibited during manufacturing, processing, and distribution, and are restricted during commercial use. EPA anticipates that these requirements will result in decreased potential for occupational exposures, decreased potential for PIP (3:1) releases, and reduce potential for exposures to the general population, potentially exposed or susceptible subpopulations, and the environment.

iv. *Cost effectiveness, and effect on national economy, small business, and technological innovation.* With respect to the cost effectiveness of the final regulatory action and the primary alternative regulatory action, EPA is unable to perform a traditional cost-effectiveness analysis of the actions and alternatives for the PBT chemicals. As discussed in the proposed rule, the cost effectiveness of a policy option would properly be calculated by dividing the annualized costs of the option by a final outcome, such as cancer cases avoided, or to intermediate outputs such as tons of emissions of a pollutant curtailed. Without the supporting analyses for a risk determination, EPA is unable to calculate either a health-based or environment-based denominator. Thus, EPA is unable to perform a quantitative cost-effectiveness analysis of the final and alternative regulatory actions. However, by evaluating the practicability of the final and alternative regulatory actions, EPA believes that it has considered elements related to the cost effectiveness of the actions, including the cost and the effect on exposure to the PBT chemicals of the final and alternative regulatory actions.

EPA considered the anticipated effect of this rule on the national economy and concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 3). EPA analyzed the expected impacts on small business and found that no small entities are expected to experience impacts of more than 1% of revenues (Ref. 3). Finally, EPA has determined that this rule is unlikely to have significant impacts on technological innovation, although the rule may create some incentives for chemical manufacturers to develop new chemical alternatives to PIP (3:1).

4. Consideration of alternatives.

EPA believes there are viable substitutes for PIP (3:1), except for the specified processing and distribution in commerce activities excluded from the final rule. In addition, EPA conducted an analysis of three identified potential substitutes for PIP (3:1) based on the process described in the TSCA Work Plan Chemicals: Methods Document (Ref. 2). Those potential substitutes all scored lower than PIP (3:1) in at least one criterion, indicating lower concern for hazard, exposure, or bioaccumulation/persistence. The economic feasibility of alternatives for all activities other than those excluded from the final rule is discussed in the Economic Analysis (Ref. 3).

C. TSCA Section 26 Considerations

In accordance with TSCA section 26(h) and taking into account the requirements of TSCA section 6(h), EPA has used scientific information, technical procedures, measures, and methodologies that are fit for purpose and consistent with the best available science. For example, EPA based its determination that human and environmental exposures are likely with PIP (3:1) on the Exposure and Use Assessment (Ref. 4) discussed in Unit II.A.2., which underwent a peer review and public comment process, as well as using best available science and methods sufficient to make that determination. The extent to which the various information, procedures, measures, and methodologies, as applicable, used in EPA's decision making have been subject to independent verification or peer review

is adequate to justify their use, collectively, in the record for this rule. Additional information on the peer review and public comment process, such as the peer review plan, the peer review report, and the Agency's Response to Comments document, are in the public docket for the peer review (Docket ID Number EPA–HQ–OPPT–2018–0314). In addition, in accordance with TSCA section 26(i), and taking into account the requirements of TSCA section 6(h), EPA has made scientific decisions based on the weight of the scientific evidence.

IV. References

The following is a list of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. TSCA Work Plan for Chemical Assessments: 2014 Update. October 2014. *https://www.epa.gov/assessingand-managing-chemicals-under-tsca/tsca-work-plan-chemical-ssessments-2014-update.* Accessed March 1, 2019.
2. EPA. TSCA Work Plan Chemicals: Methods Document. February 2012. *https://www.epa.gov/sites/production/files/2014-03/documents/work_plan_methods_document_web_final.pdf.* Accessed March 1, 2019.
3. EPA. Economic Analysis for Regulation of Phenol, isopropylated phosphate (3:1) (PIP (3:1)) Under TSCA Section 6(h). December 2020.
4. EPA. Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals. December 2020.
5. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under TSCA Section 6(h), Response to Public Comments. July 2020.
6. EPA. Public Database 2012 Chemical Data Reporting.
7. EPA. Public Database 2016 Chemical Data Reporting.
8. EPA. Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals. December 2020.
9. International Union of Pure and Applied Chemistry. Compendium of Chemical Terminology, 2nd ed. (the ''Gold Book''). Compiled by A. D. McNaught and A. Wilkinson. Blackwell Scientific Publications, Oxford (1997). Online version (2019-) created by S. J. Chalk. ISBN 0–9678550–9–8. *https://doi.org/10.1351/goldbook.* Search terms: ''Isomer'' and ''congener.''
10. EPA. (2015). TSCA New Chemicals Review Program Standard Review Assessment on Medium-Chain Chlorinated Parafins (PMN P–12–0282, P–12–0283) and Long-Chain Chlorinated Parafins (PMN P–12–0284). December 22, 2015. *https://www.epa.gov/sites/production/files/2015-12/documents/dover_-_standard_review_risk_assessment_p-12-0282-0284_docket_0.pdf.* Accessed March 1, 2019.
11. EPA. Stakeholder Meeting with Akin Gump. September 27, 2018. EPA Docket ID EPA–HQ–OPPT–2019–0080.
12. EPA. Stakeholder Meeting with Boeing. May 2, 2018. EPA Docket ID EPA–HQ–OPPT–2019–0080.
13. U.S. Department of Defense. Detail Specification Hydraulic & Lubricating Oil, Synthetic Hydrocarbon Base. MIL–DTL–32353A (August 24, 2012). Downloaded from *https://quicksearch.dla.mil/qsSearch.aspx.* December 8, 2020.
14. EPA. Instructions for Reporting 2016 TSCA Chemical Data Reporting. June 2016.
15. EPA. Stakeholder Meeting with Fujifilm. February 12, 2017. EPA Docket ID EPA–HQ–OPPT–2019–0080.
16. EPA. Stakeholder Meeting with ICL. August 30, 2018. EPA Docket ID EPA–HQ–OPPT–2019–0080.
17. Keweenaw Bay Indian Community. Re: Notification of Consultation and Coordination on a Rulemaking Under the Toxic Substances Control Act: Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h). September 25, 2018.
18. Harper, Barbara and Ranco, Darren, in collaboration with the Maine Tribes. Wabanaki Traditional Cultural Lifeways Exposure Scenario. July 9, 2009.

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866 (58 FR 51735, October 4, 1993) and Executive Order 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket for this action as required by section 6(a)(3)(E) of Executive Order 12866.

EPA prepared an economic analysis of the potential costs and benefits associated with this action. A copy of this economic analysis, entitled *Economic Analysis for Regulation of Phenol, isopropylated phosphate (3:1) (PIP (3:1)) Under TSCA Section 6(h)* (Ref. 3) is in the docket and is briefly summarized in Unit III.B.3.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is considered a regulatory action under Executive Order 13771 (82 FR 9339, February 3, 2017). Details on the estimated costs of this final rule can be found in the Economic Analysis (Ref. 3), which is briefly summarized in Unit.III.B.3.

C. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2599.02 and OMB Control No. 2070–0213. A copy of the ICR is available in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

Respondents/affected entities: Entities potentially affected by paperwork requirements of this final rule include five manufacturers/importers, 14 processors, and 13 distributors.

Respondent's obligation to respond: Mandatory (40 CFR 751.407).

Estimated number of respondents: 32.

Frequency of response: On occasion.

Total estimated burden: 36 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $2,831 (per year), includes $0 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are small businesses that manufacture/import, process, or distribute PIP (3:1). In total, four small businesses are expected to be

affected by the final action. Of the four small entities assessed, none (0%) are expected to experience impacts of more than 1% of revenues. Because only four small businesses are directly impacted and impacts are less than 1% for all small entities, EPA presumes no significant economic impact on a substantial number of small entities (no SISNOSE). Details of this analysis are presented in the Economic Analysis (Ref. 3).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and will not significantly or uniquely affect small governments. The final rule is not expected to result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (when adjusted annually for inflation) in any one year. Accordingly, this final rule is not subject to the requirements of sections 202, 203, or 205 of UMRA. The total quantified annualized social costs for this final rule are approximately $23.8 million at a 3% discount rates, and $23.0 million at a 7% discount rate, which does not exceed the inflation-adjusted unfunded mandate threshold of $160 million.

F. Executive Order 13132: Federalism

This action does not have federalism implications because it is not expected to have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications because it is not expected to have substantial direct effects on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this final rule.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, EPA consulted with tribal officials during the development of this action. EPA consulted with representatives of Tribes via teleconference on August 31, 2018, and September 6, 2018, concerning the prospective regulation of the five PBT chemicals under TSCA section 6(h).

Tribal members were encouraged to provide additional comments after the teleconferences. EPA received two comments from the Keweenaw Bay Indian Community and Maine Tribes (Refs. 17 and 18).

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866. Although the action is not subject to Executive Order 13045, the Agency considered the risks to infants and children under EPA's Policy on Evaluating Health Risks to Children. EPA did not perform a risk assessment or risk evaluation of PIP (3:1), however available data indicate the potential for reproductive and developmental effects from PIP (3:1). More information can be found in the Exposure and Use Assessment (Ref. 4) and the ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 8). This regulation will reduce exposure to PIP (3:1) for the general population and for potentially exposed or susceptible subpopulations such as workers and children.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve any technical standards. Therefore, NTTAA section 12(d), 15 U.S.C. 272 *note,* does not apply to this action.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Economic Analysis (Ref. 3), which is in the public docket for this action.

L. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects 40 CFR Part 751

Environmental protection, Chemicals, Export Notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Andrew Wheeler,

Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR part 751 is amended as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.403 by adding in alphabetical order the terms ''Lubricants and grease'' and ''PIP (3:1)'' to read as follows:

§ 751.403 Definitions.

* * * * *

Lubricants and grease mean any product used to reduce friction, heat, or wear between moving or adjacent solid surfaces, or that enhance the lubricity of other substances.

PIP (3:1) means the chemical substance phenol, isopropylated phosphate (3:1) (CASRN 68937–41–7).

* * * * *

■ 3. Add § 751.407 to read as follows:

§ 751.407 PIP (3:1).

(a) *Prohibitions.* (1) *General.* Except as provided in paragraphs (a)(2) and (b) of this section, all persons are prohibited from all processing and distributing in commerce of PIP (3:1), including in PIP (3:1)-containing products or articles after March 8, 2021.

(2) *Phase-in Prohibitions for Specific uses of PIP (3:1) and PIP (3:1)-containing products and articles.* (i) After January 6, 2025, all persons are

prohibited from all processing and distributing in commerce of PIP (3:1) for use in adhesives and sealants, PIP (3:1)-containing products for use in adhesives and sealants, and PIP (3:1)-containing adhesives and sealants.

(ii) After January 1, 2022, all persons are prohibited from all processing and distributing in commerce of PIP (3:1) for use in photographic printing articles and PIP (3:1)-containing photographic printing articles.

(b) *Exclusions.* The following activities are not subject to the prohibitions in paragraph (a) of this section.

(1) Processing and distribution in commerce of:

(i) PIP (3:1) for use in hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements, PIP (3:1)-containing products for use in such hydraulic fluids, and PIP (3:1)-containing hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements.

(ii) PIP (3:1) for use in lubricants and greases, PIP (3:1) containing products for use in lubricants and greases, and PIP (3:1)-containing lubricants and greases.

(iii) PIP (3:1) and PIP (3:1)-containing products for use in new and replacement parts for motor and aerospace vehicles, the new and replacement parts to which PIP (3:1) has been added for such vehicles, and the motor and aerospace vehicles that contain new and replacement parts to which PIP (3:1) has been added;

(iv) PIP (3:1) and PIP (3:1)-containing products for use as an intermediate in a closed system to produce cyanoacrylate adhesives;

(v) PIP (3:1) for use in specialized engine air filters for locomotive and marine applications, PIP (3:1) containing products for use in specialized engine air filters for locomotive and marine applications, and PIP (3:1)-containing specialized engine air filters for locomotive and marine applications;

(vi) Plastic for recycling from products or articles containing PIP (3:1), where no new PIP (3:1) is added during the recycling process; and

(vii) Finished products or articles made of plastic recycled from products or articles containing PIP (3:1), where no new PIP (3:1) was added during the production of the products or articles made of recycled plastic.

(2) Reserved.

(c) *Prohibition on releases to water.* After March 8, 2021, all persons are prohibited from releasing PIP (3:1) to water during manufacturing, processing and distribution in commerce of PIP (3:1) and PIP (3:1) containing products, and all persons are required to follow all applicable regulations and best management practices for preventing the release of PIP (3:1) and PIP (3:1)-containing products to water during commercial use.

(d) *Recordkeeping.* (1) After March 8, 2021, persons who manufacture, process, or distribute in commerce PIP (3:1) or PIP (3:1)-containing products or articles must maintain ordinary business records, such as invoices and bills-of-lading, related to compliance with the prohibitions, restrictions, and other provisions of this section. These records must be maintained for a period of three years from the date the record is generated.

(2) These records must include a statement that the PIP (3:1), or the PIP (3:1)-containing products or articles, are in compliance with 40 CFR 751.407(a).

(3) These records must be made available to EPA within 30 calendar days upon request.

(4) The recordkeeping requirements in this paragraph (d)(1) do not apply to the activities described in paragraphs (b)(1)(vi) and (vii) of this section.

(e) *Downstream notification.* (1) Each person who manufactures PIP (3:1) for any use after March 8, 2021 must, prior to or concurrent with the shipment, notify persons to whom PIP (3:1) is shipped, in writing, of the restrictions described in this subpart.

(2) Each person who processes or distributes in commerce PIP (3:1) or PIP (3:1)-containing products for any use after July 6, 2021 must, prior to or concurrent with the shipment, notify persons to whom PIP (3:1) is shipped, in writing, of the restrictions described in this subpart.

(3) Notification must occur by inserting the text in paragraphs (e)(3)(i) and (e)(3)(ii) in the Safety Data Sheet (SDS) or by including on the label of any PIP (3:1) or PIP (3:1)-containing product the label language in paragraph (e)(3)(iii):

(i) SDS Section 1.(c): ''The Environmental Protection Agency prohibits processing and distribution of this chemical/product for any use other than: (1) In hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements, (2) lubricants and greases, (3) new or replacement parts for motor and aerospace vehicles, (4) as an intermediate in the manufacture of cyanoacrylate glue, (5) in specialized engine air filters for locomotive and marine applications, and (6) in adhesives and sealants before January 6, 2025, after which use in adhesives and sealants is prohibited. In addition, all persons are prohibited from releasing PIP (3:1) to water during manufacturing, processing and distribution in commerce, and must follow all existing regulations and best practices to prevent the release of PIP (3:1) to water during the commercial use of PIP (3:1).''; and

(ii) SDS Section 15: ''The Environmental Protection Agency prohibits processing and distribution of this chemical/product for any use other than: (1) In hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements, (2) lubricants and greases, (3) new or replacement parts for motor and aerospace vehicles, (4) as an intermediate in the manufacture of cyanoacrylate glue, (5) in specialized engine air filters for locomotive and marine applications, and (6) in adhesives and sealants before January 6, 2025, after which use in adhesives and sealants is prohibited. In addition, all persons are prohibited from releasing PIP (3:1) to water during manufacturing, processing and distribution in commerce, and must follow all existing regulations and best practices to prevent the release of PIP (3:1) to water during the commercial use of PIP (3:1).''; or

(iii) Labeling: ''The Environmental Protection Agency prohibits processing and distribution of this chemical/product for any use other than: (1) In hydraulic fluids either for the aviation industry or to meet military specifications for safety and performance where no alternative chemical is available that meets U.S. Department of Defense specification requirements, (2) lubricants and greases, (3) new or replacement parts for motor and aerospace vehicles, (4) as an intermediate in the manufacture of cyanoacrylate glue, (5) in specialized engine air filters for locomotive and marine applications, and (6) in adhesives and sealants before January 6, 2025, after which use in adhesives and sealants is prohibited. In addition, all persons are prohibited from releasing PIP (3:1) to water during manufacturing, processing and distribution in commerce, and must follow all existing

regulations and best practices to prevent the release of PIP (3:1) to water during the commercial use of PIP (3:1).''

(4) The downstream notification requirements in this paragraph (e) do not apply to the activities described in paragraphs (b)(1)(vi) and (vii) of this section.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2019–0080; FRL–10018–89]

RIN 2070–AK60

Pentachlorothiophenol (PCTP); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is finalizing a rule under the Toxic Substances Control Act (TSCA) to address its obligations under TSCA for pentachlorothiophenol (PCTP) (CASRN 133–49–3), which EPA has determined meets the requirements for expedited action under TSCA. This final rule prohibits all manufacturing (including import), processing, and distribution in commerce of PCTP and PCTP-containing products or articles for any use, unless PCTP concentrations are at or below 1% by weight. This rule will result in lower amounts of PCTP being manufactured, processed, and distributed, which will impact the amount that will be available for use or disposal, thus reducing the exposures to humans and the environment.

DATES: This final rule is effective February 5, 2021. For purposes of judicial review and 40 CFR 23.5, this rule shall be promulgated at 1 p.m. eastern standard time on January 21, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0080, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

Please note that due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Brooke Porter, Existing Chemical Management Division, Office of Pollution Prevention and Toxics, (7404T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–6388; email address: *porter.brooke@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture (including import), process, distribute in commerce, or use pentachlorothiophenol (PCTP) or products or articles that contain PCTP, especially rubber products. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Sporting and Athletic Goods Manufacturing (NAICS Code 339920);
- Sporting and Recreational Goods and Supplies Merchant Wholesale (NAICS Code 423910);
- Sporting Goods Stores (NAICS Code 451110);
- All Other Rubber Product Manufacturing (NAICS Code 326299).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT**.

B. What is the Agency's authority for taking this action?

Section 6(h) of TSCA, 15 U.S.C. 2601 *et seq.,* directs EPA to issue a final rule under TSCA section 6(a) on certain persistent, bioaccumulative, and toxic (PBT) chemical substances. PCTP (CASRN 87–86–5), primarily found as an impurity in the zinc salt of PCTP, is one such chemical substance. EPA must take action on those chemical substances identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1) that, among other factors, EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the TSCA Work Plan Chemicals: Methods Document (Ref. 2). TSCA section 6(h) directs EPA to take expedited action on these chemical substances, regardless of whether that substance is primarily found as an impurity or byproduct, to reduce exposure to the substance, including to exposure to the substance as an impurity or byproduct, to the extent practicable. This final rule is final agency action for purposes of judicial review under TSCA section 19(a).

C. What action is the Agency taking?

EPA published a proposed rule on July 29, 2019 to address the five PBT chemicals EPA identified pursuant to TSCA section 6(h) (84 FR 36728; FRL–9995–76). After publication of the proposed rule, EPA determined to address each of the five PBT chemicals in separate final actions. This final rule prohibits the manufacture (including import), processing, and distribution in commerce of PCTP and products and articles containing PCTP, unless PCTP concentrations are at or below 1% by weight. Specifically, all persons are prohibited from all manufacturing and processing of PCTP or PCTP-containing products or articles, unless PCTP concentrations are at or below 1% by weight after March 8, 2021, and all persons are prohibited from all distribution in commerce of PCTP or PCTP-containing products or articles, unless PCTP concentrations are at or below 1% by weight after January 6, 2022. In addition, after March 8, 2021, persons manufacturing, processing, and distributing in commerce PCTP and articles and products containing PTCP must maintain, for three years from the date the record is generated, ordinary business records related to compliance with the prohibitions and restrictions that include the name of the purchaser and list the products or articles. This

provision is not intended to require subject companies to retain records in addition to those specified herein, expect as needed pursuant to normal business operations.

D. Why is the Agency taking this action?

EPA is issuing this final rule to fulfill EPA's obligations under TSCA section 6(h) to take timely regulatory action on PBT chemicals, including PCTP, ''to address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and to reduce exposure to the substance to the extent practicable.'' As required by the statute, the Agency is finalizing this rule to reduce exposures to PCTP to the extent practicable.

E. What are the estimated incremental impacts of this action?

EPA has evaluated the potential costs of these restrictions and prohibitions and the associated reporting and recordkeeping requirements. The ''Economic Analysis for Regulation of Pentachlorothiophenol (PCTP) Under TSCA Section 6(h)'' (Economic Analysis) (Ref. 3), is available in the docket and is briefly summarized here.

- *Benefits.* EPA was not able to quantify the benefits of reducing the potential for human and environmental exposures to PCTP. As discussed in more detail in Unit II.A., EPA did not perform a risk evaluation for PCTP, nor did EPA develop quantitative risk estimates. Therefore, the Economic Analysis (Ref. 3) qualitatively discusses the benefits of reducing the exposure under the final rule for PCTP, as summarized in Unit III.B.2.
- *Costs.* Total quantified annualized social costs for this final rule are approximately $108,000 (at both 3% and 7% discount rates). Potential unquantified costs and are those associated with testing, reformulation, importation of articles, foregone profits, and indirect costs. The limited data available for those costs prevents EPA from constructing a quantitative assessment.
- *Small entity impacts.* This final rule will impact approximately one small business of which the one small entity is not expected to incur impacts of 1% of their revenue or greater.
- *Environmental Justice.* This final rule will increase the level of protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population or children.
- *Effects on State, local, and Tribal governments.* This final rule will not have any significant or unique effects on small governments, or federalism or tribal implications.

F. Children's Environmental Health

Executive Order 13045 applies if the regulatory action is economically significant and concerns an environmental health risk or safety risk that may disproportionately affect children. While the action is not subject to Executive Order 13045, the Agency's Policy on Evaluating Health Risks to Children (*https://www.epa.gov/children/epas-policy-evaluating-risk-children*) is to consider the risks to infants and children consistently and explicitly during its decision making process. This final rule will reduce the exposure to PCTP that could occur from activities now prohibited under this final rule for the general population and for potentially exposed or susceptible subpopulations such as children. More information can be found in the Exposure and Use Assessment (Ref. 5).

II. Background

A. History of This Rulemaking

TSCA section 6(h) requires EPA to take expedited regulatory action under TSCA section 6(a) for certain PBT chemicals identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1). As required by the statute, EPA issued a proposed rule to address five PBT chemicals identified pursuant to TSCA section 6(h) (84 FR 36728, July 29, 2019). The statute required that this be followed by promulgation of a final rule no later than 18 months after the proposal. Although EPA proposed regulatory actions on each chemical substance in one proposal, in response to public comments (EPA–HQ–OPPT–2019–0080–0544), (EPA–HQ–OPPT–2019–0080–0553), (EPA–HQ–OPPT–2019–0080–0556), (EPA–HQ–OPPT–2019–0080–0562) requesting these five actions be separated, EPA is finalizing five separate actions to individually address each of the PBT chemicals. EPA intends for the five separate final rules to publish in the same issue of the **Federal Register**. More discussion on these comments is in the Response to Comments document which is available in the docket (Ref. 4). The details of the proposal for PCTP are described in more detail in Unit II.D.

Under TSCA section 6(h)(1)(A), the chemical substances subject to expedited action are those that:

- EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the 2012 TSCA Work Plan Chemicals: Methods Document or a successor scoring system;
- Are not a metal or a metal compound; and
- Are chemical substances for which EPA has not completed a TSCA Work Plan Problem Formulation, initiated a review under TSCA section 5, or entered into a consent agreement under TSCA section 4, prior to June 22, 2016, the date that TSCA was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. 114–182, 130 Stat. 448).

In addition, in order for a chemical substance to be subject to expedited action, TSCA section 6(h)(1)(B) states that EPA must find that exposure to the chemical substance under the conditions of use is likely to the general population or to a potentially exposed or susceptible subpopulation identified by the Administrator (*e.g.,* infants, children, pregnant women, workers, or the elderly) or to the environment, on the basis of an exposure and use assessment conducted by the Administrator. TSCA section 6(h)(2) further provides that the Administrator shall not be required to conduct risk evaluations on chemical substances that are subject to TSCA section 6(h)(1).

Based on the criteria set forth in TSCA section 6(h), EPA proposed to determine that five chemical substances meet the TSCA section 6(h)(1)(A) criteria for expedited action, and PCTP is one of these five chemical substances. In addition, and in accordance with the statutory requirements to demonstrate that exposure to the chemical substance is likely under the conditions of use, EPA conducted an Exposure and Use Assessment for PCTP. As described in the proposed rule, EPA conducted a review of available literature with respect to PCTP to identify, screen, extract, and evaluate reasonably available information on use and exposures. This information is in the document entitled ''Exposure and Use Assessment of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 5). Based on this review, which was subject to peer review and public comment, EPA proposed to find that exposure to PCTP is likely based on information detailed in the Exposure and Use Assessment.

B. Other Provisions of TSCA Section 6

1. EPA's approach for implementing TSCA section 6(h)(4).

TSCA section 6(h)(4) requires EPA to issue a final TSCA section 6(a) rule to

''address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and reduce exposure to the substance to the extent practicable.'' EPA reads this text to require action on the chemical, not specific conditions of use.

The approach EPA takes is consistent with the language of TSCA section 6(h)(4) and its distinct differences from other provisions of TSCA section 6 for chemicals that are the subject of required risk evaluations. First, the term ''condition of use'' is only used in TSCA section 6(h) in the context of the TSCA section 6(h)(1)(B) finding relating to likely exposures under ''conditions of use'' to ''the general population or to a potentially exposed or susceptible subpopulation . . . or the environment.'' In contrast to the risk evaluation process under TSCA section 6(b), this TSCA section 6(h)(1)(B) threshold criterion is triggered only through an Exposure and Use Assessment regarding the likelihood of exposure and does not require identification of every condition of use. As a result, EPA collected all the information it could on the use of each chemical substance, without regard to whether any chemical activity would be characterized as ''known, intended or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of,'' and from that information created use profiles and then an Exposure and Use Assessment (Ref. 4) to make the TSCA section 6(h)(1)(B) finding for at least one or more ''condition of use'' activities where some exposure is likely. EPA did not attempt to precisely classify all activities for each chemical substance as a ''condition of use'' and thus did not attempt to make a TSCA section 6(h)(1)(B) finding for all chemical activities summarized in the Exposure and Use Assessment (Ref. 4). Second, TSCA section 6 generally requires a risk evaluation under TSCA section 6(b) for chemicals based on the identified conditions of use. However, pursuant to TSCA section 6(h)(2), for chemical substances that meet the criteria of TSCA section 6(h)(1), a risk evaluation is neither required nor contemplated to be conducted for EPA to meet its obligations under TSCA section 6(h)(4). Rather, as noted in Unit II.B.3., if a previously prepared TSCA risk assessment exists, EPA would have authority to use that risk assessment to ''address risks'' under TSCA section 6(h)(4), but even that risk assessment would not necessarily be focused on whether an activity is ''known, intended or reasonably foreseen,'' as those terms were not used in TSCA prior to the 2016 amendments and a preexisting assessment of risks would have had no reason to use such terminology or make such judgments. It is for this reason EPA believes that the TSCA section 6(h)(4) ''address risk'' standard refers to the risks the Administrator determines ''are presented by the chemical substance'' and makes no reference to ''conditions of use.'' Congress did not contemplate or require a risk evaluation identifying the conditions of use as defined under TSCA section 3(4). The kind of analysis required to identify and evaluate the conditions of use for a chemical substance is only contemplated in the context of a TSCA section 6(b) risk evaluation, not in the context of an expedited rulemaking to address PBT chemicals.

Similarly, the TSCA amendments require EPA to ''reduce *exposure to the substance* to the extent practicable,'' without reference to whether the exposure is found ''likely'' pursuant to TSCA section 6(h)(1)(B).

Taking all of this into account, EPA reads its TSCA section 6(h)(4) obligation to apply to the chemical substance generally, thus requiring EPA to address risks and reduce exposures to the chemical substance without focusing on whether the measure taken is specific to an activity that might be characterized as a ''condition of use'' as that term is defined in TSCA section 3(4) and interpreted by EPA in the Risk Evaluation Rule, 82 FR 33726 (July 20, 2017). This approach ensures that any activity involving a TSCA section 6(h) PBT chemical, past, present or future, is addressed by the regulatory approach taken. Thus, under this final rule, manufacturing, processing, and distribution in commerce activities that are not specifically excluded are prohibited. The specified excluded activities are those which EPA determined were not appropriate to regulate under TSCA section 6(h)(4) standard. Consistently, based on the Exposure and Use Assessment, activities associated with PCTP are that are no longer occurring are addressed by this rule and thus the prohibitions adopted in this rule reduce the exposures that will result with resumption of past activities or the initiation of similar or other activities in the future. Therefore, EPA has determined that prohibiting these activities will reduce exposures to the extent practicable. The approach taken for this final rule is limited to implementation of TSCA section 6(h) and is not relevant to any other action under TSCA section 6 or other TSCA statutory actions.

2. EPA's interpretation of ''practicable.''

The term ''practicable'' is not defined in TSCA. EPA interprets this requirement as generally directing the Agency to consider such factors as achievability, feasibility, workability, and reasonableness. In addition, EPA's approach to determining whether particular prohibitions or restrictions are practicable is informed in part by certain other provisions in TSCA section 6, such as TSCA section 6(c)(2)(A), which requires the Administrator to consider health effects, exposure, and environmental effects of the chemical substance; benefits of the chemical substance; and the reasonably ascertainable economic consequences of the rule. In addition, pursuant to TSCA section 6(c)(2)(B), in selecting the appropriate TSCA section 6(a) regulatory approach, the Administrator is directed to ''factor in, to the extent practicable'' those same considerations.

EPA received comments on the proposed rule regarding this interpretation of ''practicable.'' EPA has reviewed these comments and believes the interpretation described previously within this Unit is consistent with the intent of TSCA and has not changed that interpretation. EPA's interpretation of an ambiguous statutory term receives deference. More discussion on these comments can be found in the Response to Comments document for this rulemaking (Ref. 4).

3. EPA did not conduct a risk evaluation or risk assessment.

As EPA explained in the proposed rule, EPA does not interpret the ''address risk'' language to require EPA to determine, through a risk assessment or risk evaluation, whether risks are presented. EPA believes this reading gives the Administrator the flexibility Congress intended for issuance of expedited rules for PBTs and is consistent with TSCA section 6(h)(2) which makes clear risk evaluation is not required to support this rulemaking.

EPA received comments on the proposed rule regarding its interpretation of TSCA section 6(h)(4) and regarding EPA's lack of risk assessment or risk evaluation of PCTP. A number of commenters asserted that while EPA was not compelled to conduct a risk evaluation, EPA should have conducted a risk evaluation under TSCA section 6(b) regardless. The rationales provided by the commenters for such a risk assessment or risk evaluation included that one was needed for EPA to fully quantify the benefits to support this rulemaking, and that without a risk evaluation, EPA would not be able to determine the

benefits, risks, and cost effectiveness of the rule in a meaningful way. As described by the commenters, EPA would therefore not be able to meet the TSCA section 6(c)(2) requirement for a statement of these considerations. Regarding the contradiction between the mandate in TSCA section 6(h) to expeditiously issue a rulemaking and the time needed to conduct a risk evaluation, some commenters stated that EPA would have had enough time to conduct a risk evaluation and issue a proposed rule by the statutory deadline.

EPA disagrees with the commenters' interpretation of EPA's obligations with respect to chemicals subject to TSCA section 6(h)(4). TSCA section 6(h)(4) provides that EPA shall: (1) ''Address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance'' and (2) ''reduce exposure to the substance to the extent practicable.'' With respect to the first requirement, that standard is distinct from the ''unreasonable risk'' standard for all other chemicals for which a section 6(a) rule might be issued. EPA does not believe that TSCA section 6(h) contemplates a new evaluation of any kind, given evaluations to determine risks are now addressed through the TSCA section 6(b) risk evaluation process and TSCA section 6(h)(2) explicitly provides that no risk evaluation is required. Moreover, it would have been impossible to prepare a meaningful evaluation under TSCA and subsequently develop a proposed rule in the time contemplated for issuance of a proposed rule under TSCA section 6(h)(1). Although EPA does not believe the statute contemplates a new evaluation of any kind for these reasons, EPA reviewed the hazard and exposure information on the five PBT chemicals EPA had compiled. However, while this information appropriately addresses the criteria of TSCA section 6(h)(1)(A) and (B), it did not provide a basis for EPA to develop sufficient and scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present an identifiable risk of injury to health or the environment.

Rather than suggesting a new assessment is required, EPA reads the ''address risk'' language in TSCA section 6(h)(4) to contemplate reliance on an existing EPA assessment under TSCA, similar to a risk assessment that may be permissibly used under TSCA section 26(l)(4) to regulate the chemical under TSCA section 6(a). This interpretation gives meaning to the ''address risk'' phrase, without compelling an evaluation contrary to TSCA section 6(h)(2) and would allow use of an existing determination, or development of a new determination based on such an existing risk assessment, in the timeframe contemplated for issuance of a proposed rule under TSCA section 6(h). However, there were no existing EPA assessments of risk for any of the PBT chemicals. Thus, because EPA had no existing EPA risk assessments or determinations of risk, the regulatory measures addressed in this final rule focus on reducing exposures ''to the extent practicable.''

In sum, because neither the statute nor the legislative history suggests that a new evaluation is compelled to identify and thereby provide a basis for the Agency to ''address risks'' and one could not be done prior to preparation and timely issuance of a proposed rule, and no existing TSCA risk assessment exists for any of the chemicals, EPA has made no risk determination finding for any of the PBT chemicals. Instead, EPA implements the requirement of TSCA section 6(h)(4) by reducing exposures of each PBT chemical ''to the extent practicable.'' For similar reasons, EPA does not believe that TSCA section 6(c)(2) requires a quantification of benefits, much less a specific kind of quantification. Under TSCA section 6(c)(2)(A)(iv), EPA must consider and publish a statement, based on reasonably available information, on the reasonably ascertainable economic consequences of the rule, but that provision does not require quantification, particularly if quantification is not possible. EPA has reasonably complied with this requirement by including a quantification of direct costs and a qualitative discussion of benefits in each of the preambles to the final rules. EPA was unable to quantify the indirect costs associated with the rule. More discussion on the issue raised is in the Response to Comments document (Ref. 4).

4. Replacement parts and articles.

In the preamble to the proposed rule, EPA explained that it did not read provisions of TSCA that conflict with TSCA section 6(h) to apply to TSCA section 6(h) rules. Specifically, TSCA sections 6(c)(2)(D) and (E) require a risk finding pursuant to a TSCA section 6(b) risk evaluation to regulate replacement parts and articles. Yet, TSCA section 6(h) neither compels nor contemplates a risk evaluation to precede or support the compelled regulatory action to ''address the risks. . .'' and ''reduce exposures to the substance to the extent practicable''. TSCA section 6(h)(2) makes clear no risk evaluation is required, and the timing required for conducting a risk evaluation is not consistent with the timing compelled for issuance of a proposed rule under TSCA section 6(h). Moreover, even assuming a prior risk assessment might allow a risk determination under the TSCA section 6(h)(4) ''address risk'' standard, such assessment would still not satisfy the requirement in TSCA section 6(c)(2)(D) and (E) for a risk finding pursuant to a TSCA section 6(b) risk evaluation. Because of the clear conflict between these provisions, EPA determined that those provisions of TSCA section 6(c) that assume the existence of a TSCA section 6(b) risk evaluation do not apply in the context of this TSCA section 6(h) rulemaking. Instead, EPA resolves this conflict in these provisions by taking into account the TSCA section 6(c) considerations in its determinations as to what measures ''reduce exposure to the substance to the extent practicable''.

Commenters contended that TSCA section 6(c)(2)(D) and (E) bar a TSCA section 6(h) rule in the absence of a risk evaluation, representing Congress's recognition of the special burdens associated with regulating replacement parts and articles and the difficulty importers face in knowing what chemicals are present in the articles they import. As noted earlier in this Unit and further discussed in the Response to Comment document, while EPA determined that provisions of TSCA section 6(c)(2)(D) and (E) do not apply because they conflict with the requirements of TSCA section 6(h), EPA interpreted the ''practicability'' standard in TSCA section 6(h)(4) to reasonably contemplate the considerations embodied by TSCA section 6(c)(2)(D) and (E). As a result, EPA disagrees with any suggestions that the clear conflict between Congress' mandates in TSCA section 6(h) and TSCA section 6(c)(2)(D) and (E) must be read to bar regulation of replacement parts and articles made with chemicals that Congress believed were worthy of expedited action under TSCA section 6(h) and in the absence of a risk evaluation. The statute does not clearly communicate that outcome. Instead, Congress left ambiguous how best to address the conflict in these provisions, and EPA's approach for taking into consideration the TSCA section 6(c)(2)(D) and (E) concepts in its TSCA section 6(h)(4) ''practicability'' determinations is a reasonable approach. In addition, with respect to comments that TSCA section 6(c)(2)(D) and (E) were intended to address Congress's concerns regarding burdens associated with regulation of replacement parts and articles, EPA agrees that these concerns are relevant

and takes them into account in its implementation of the TSCA section 6(h)(4) mandate, with respect to the circumstances for each chemical. Finally, EPA does not believe that Congress intended, through the article provisions incorporated into the TSCA amendments, to absolve importers of the duty to know what they are importing. Importers can and should take steps to determine whether the articles they are importing contain chemicals that are prohibited or restricted. Therefore, as discussed earlier in this Unit and in the Response to Comment document, EPA is continuing to interpret TSCA sections 6(c)(2)(D) and 6(c)(2)(E) to be inapplicable to this rulemaking. While this interpretation has not changed, EPA has reviewed the practicability of regulating replacement parts and articles in accordance with the statutory directive in TSCA section 6(h)(4) to reduce exposures to the PBT chemicals to the extent practicable. This is discussed further in Unit III.A.

C. PCTP Overview, Health Effects, and Exposure

Historically, PCTP was used in rubber manufacturing as a peptizer, or a chemical that makes rubber more amenable to processing. As described in the proposed rule, there are few data on end-use products and articles that contain PCTP. For years, PCTP was produced in the United States, but domestic manufacture appears to have ceased (Ref. 6). Although it is likely that PCTP is no longer used as a peptizer, it can be found as an impurity in the zinc salt of PCTP (zinc PCTP) (CASRN 117–97–5) after zinc PCTP manufacturing (Ref. 7). As shown by a number of patents, zinc PCTP can be used as a peptizer in rubber manufacturing and as an ingredient in the rubber core of golf balls to enhance certain performance characteristics of the ball, such as spin, rebound, and distance (Ref. 8, 9, and 10). EPA considers the presence of PCTP in rubber during manufacturing, whether as a peptizer or an impurity, to be processing under TSCA. Zinc PCTP is imported into the United States, with approximately 65,000 lbs. imported in 2017 (Ref. 3). EPA believes that some or all of the zinc PCTP could contain PCTP. The importation of PCTP, including as an impurity with zinc PCTP, is considered manufacturing under TSCA.

There is likely exposure to the general population, workers, and the environment, including water releases from process water and from cleaning the processing area and equipment, and worker exposure during unloading and transfer of the chemical. Women of childbearing age exposed in the workplace may transfer PCTP to infants via breastmilk. Exposure information for PCTP is detailed in EPA's Exposure and Use Assessment (Ref. 5) and the proposed rule.

PCTP is toxic to protozoa, fish, terrestrial plants, and birds. Data for analogous chemicals (pentachloronitrobenzene and hexachlorobenzene) indicate the potential for liver effects in mammals and systemic (body weight) effects for PCTP in mammals (no repeated-dose animal or human epidemiological data were identified for PCTP) (Ref. 11). The studies presented in the document entitled ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals (Hazard Summary) (Ref. 11) demonstrate these hazardous endpoints. EPA did not perform a systematic review or a weight of the scientific evidence assessment for the hazard characterization of these chemicals. As a result, this hazard characterization is not definitive or comprehensive. Other hazard information on these chemicals may exist in addition to the studies summarized in the Hazard Summary that could alter the hazard characterization.

In the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1), PCTP scored high (3) for hazard (based on toxicity for acute and chronic exposures); low (1) for exposure (based on 2012 CDR data); and high (3) for persistence and bioaccumulation (based on high environmental persistence and high bioaccumulation potential). The overall screening score for PCTP was high (7).

In consideration of the production and use of PCTP, the environmental and human health hazards of PCTP, and the public comments on the proposed rule that are further discussed in Unit III.A., EPA determines that PCTP meets the TSCA section 6(h)(1)(A) criteria. In addition, EPA determines, in accordance with TSCA section 6(h)(1)(B), that, based on the Exposure and Use Assessment and other reasonably available information, exposure to PCTP under the conditions of use is likely to the general population, to a potentially exposed or susceptible subpopulation, or to the environment. EPA's determination is based on the opportunities for exposure throughout the lifecycle of PCTP, including the potential for consumer exposures. EPA did not receive any significant comments or information to call the exposure finding into question.

D. EPA's Proposed Rule Under TSCA Section 6(h) for PCTP

In the proposed rule, EPA proposed to prohibit all manufacturing, processing, and distribution of PCTP and PCTP-containing products and articles for any use, unless PCTP concentrations are at or below 1% by weight.

In addition, EPA proposed to require, that all persons who manufacture, process, or distribute in commerce PCTP and articles and products containing PCTP maintain ordinary business records, such as invoices and bills-of-lading, that demonstrate compliance with the prohibitions and restrictions. EPA proposed that these records will have to be maintained for a period of three years from the date the record is generated.

E. Public Comments and Other Public Input

The proposed rule provided a 60-day public comment period, with a 30-day extension provided (Ref. 4). The comment period closed on October 28, 2019. EPA received a total of 48 comments, with three commenters sending multiple submissions with attached files, for a total of 58 submissions. This includes the previous request for a comment period extension (EPA–HQ–OPPT–2019–0080–0526). Two commenters submitted confidential business information (CBI) or copyrighted documents with information regarding economic analysis and market trends. Copies of all the non-CBI documents, or redacted versions without CBI, are available in the docket for this action.

In this preamble, EPA has responded to the major comments relevant to the PCTP final rule. Of the comment submissions, 10 directly addressed EPA's proposed regulation of PCTP. Additional discussion related to this final action can be found in the Response to Comments document (Ref. 4).

F. Activities Not Directly Regulated by This Rule

EPA is not regulating all activities or exposures to PCTP, even though the Exposure and Use Assessment (Ref. 5) identified potential for exposures under many conditions of use. One such activity is disposal. EPA generally presumes compliance with federal and state laws and regulations, including, for example, the Resource Conservation and Recovery Act (RCRA) and its implementing regulations and state laws, as well as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act (SDWA). As described in the

proposed rule, regulations promulgated under the authority of RCRA, govern the disposal of hazardous and non-hazardous wastes. Although PCTP is not a listed hazardous waste under RCRA, it is subject to the requirements applicable to solid waste under Subtitle D of RCRA. This means there is a general prohibition on open dumping, which includes a prohibition on open burning. Wastes containing this chemical that do not otherwise meet the criteria for hazardous waste would be disposed of in municipal solid waste landfills (MSWLFs), industrial nonhazardous, or, in a few instances, construction/demolition landfills. Non-hazardous solid waste is regulated under Subtitle D of RCRA, and states play a lead role in ensuring that the federal requirements are met. The requirements for MSWLFs include location restrictions, composite liners, leachate collection and removal systems, operating practices, groundwater monitoring, closure and post-closure care, corrective action provisions, and financial assurance. Industrial waste (non-hazardous) landfills and construction/demolition waste landfills are primarily regulated under state regulatory programs, and in addition they must meet the criteria set forth in federal regulations which may include requirements such as siting, groundwater monitoring and corrective action depending upon what type of wastes are accepted. Disposal by underground injection is regulated under both RCRA and SDWA. In view of these comprehensive, stringent programs for addressing disposal, EPA determined that it is not practicable to impose additional requirements under TSCA on the disposal of the PBT chemicals, including PCTP.

EPA received a number of comments on this aspect of its proposal. Some commenters agreed with EPA's proposed determination that it is not practicable to regulate disposal, while others disagreed. However, in EPA's view, establishing an entirely new disposal program for PCTP-containing wastes would be expensive and difficult to establish and administer. A requirement to treat these wastes as if they were listed as hazardous wastes would have impacts on hazardous waste disposal capacity and be very expensive for states and local governments, as well as for affected industries. Therefore, EPA has determined that it is not practicable to further regulate PCTP-containing wastes. More information on the comments received and EPA's responses can be found in the Response to Comments document (Ref. 4).

EPA proposed not to use its TSCA section 6(a) authorities to directly regulate occupational exposures. As explained in the proposed rule, as a matter of policy, EPA assumes compliance with federal and state requirements, such as worker protection standards, unless case-specific facts indicate otherwise. The Occupational Safety and Health Administration (OSHA) has not established a permissible exposure limit (PEL) for PCTP. However, under section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), each employer has a legal obligation to furnish to each of its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm. The OSHA Hazard Communication Standard at 29 CFR 1910.1200 requires chemical manufacturers and importers to classify the hazards of chemicals they produce or import, and all employers to provide information to employees about hazardous chemicals to which they may be exposed under normal conditions of use or in foreseeable emergencies. The OSHA standard at 29 CFR 1910.134(a)(1) requires the use of feasible engineering controls to prevent atmospheric contamination by harmful substances and requires the use of respirators where effective engineering controls are not feasible. The OSHA standard at 29 CFR 1910.143(c) details the required respiratory protection program. The OSHA standard at 29 CFR 1910.132(a) requires the use of personal protective equipment (PPE) by workers when necessary due to a chemical hazard; 29 CFR 1910.133 requires the use of eye and face protection when employees are exposed to hazards including liquid chemicals; and 29 CFR 1910.138 requires the use of PPE to protect employees' hands including from skin absorption of harmful substances. The provisions of 29 CFR 1910.132(d) and (f) address hazard assessment, PPE selection, and training with respect to PPE required under 29 CFR 1910.133, 1910.135, 1910.136, 1910.138, and 1910.140. EPA assumes that employers will require, and workers will use, appropriate PPE consistent with OSHA standards, taking into account employer-based assessments, in a manner sufficient to prevent occupational exposures that are capable of causing injury.

EPA assumes compliance with other federal requirements, including OSHA standards and regulations. EPA does not read TSCA section 6(h)(4) to direct EPA to adopt potentially redundant or conflicting requirements. Not only would it be difficult to support broadly applicable and safe additional measures for each specific activity without a risk evaluation and in the limited time for issuance of this regulation under TSCA section 6(h), but imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations. Furthermore, EPA cannot conclude that broadly imposing specific measures is practicable for all of the varied workplaces. Rather, where EPA has identified worker exposures and available substitutes, EPA is finalizing measures to reduce those exposures. As discussed in the proposed rule, EPA assumes that the worker protection methods used by employers, including in response to existing OSHA standards, in addition to the regulatory measures taken for each chemical, meaningfully reduce the potential for occupational exposures. Although some commenters agreed with this approach, others thought EPA should establish worker protection requirements for those uses that would be allowed to continue under the final rule. Information provided to EPA before and during the public comment period on the proposed rule indicates that employers are using engineering and process controls and providing appropriate personal protective equipment (PPE) to their employees consistent with these requirements and EPA received no information on PCTP to suggest this is not the case. Further, EPA has not conducted a risk evaluation on PCTP or any of the other PBT chemicals. Without a risk evaluation and given the time allotted for this rulemaking, EPA cannot identify additional engineering or process controls or PPE requirements that would be appropriate to each chemical-specific circumstance. For these reasons, EPA has determined that it is not practicable to regulate worker exposures in this rule through additional engineering or process controls or PPE requirements.

EPA received comments regarding the use of PBT chemicals in research and development and lab use. Lab use is addressed under newly established 40 CFR 751.401(b) as the manufacturing, processing, distribution-in-commerce and use of any chemical substance, or products and articles that contain the chemical substance, for research and development, as defined in new 40 CFR 751.403. ''Research and Development'' is defined in new 40 CFR 751.403 to mean laboratory and research use only for purposes of scientific

experimentation or analysis, or chemical research on, or analysis of, the chemical substance, including methods for disposal, but not for research or analysis for the development of a new product, or refinement of an existing product that contains the chemical substance. This will allow, for example, for samples of environmental media containing PBTs, such as contaminated soil and water, to be collected, packaged and shipped to a laboratory for analysis. Laboratories also must obtain reference standards containing PBTs to calibrate their equipment, otherwise they may not be able to accurately quantify these chemical substances in samples being analyzed. However, research to develop new products that use PBTs subject to 40 CFR part 751, subpart E, or the refinement of existing uses of those chemicals, is not included in this definition, and those activities remain potentially subject to the chemical specific provisions in 40 CFR part, 751 subpart E. EPA believes it is not practicable to limit research and development activity as defined, given the critical importance of this activity to the detection, quantification, and control of these chemical substances.

Finally, EPA received comments regarding requirements for recycling and resale of PCTP-containing products and articles, as well as other PBT chemicals undergoing Section 6(h) rulemaking. One commenter stated that because the proposed definition of ''person'' includes ''any natural person,'' the proposed prohibitions would seem to apply to anyone selling golf balls containing PCTP above the 1% concentration by weight threshold at a garage or yard sale (EPA–HQ–OPPT–2019–0080–0559). EPA did not intend to impose these final PCTP regulations on yard sales or used golf ball sales and has added a provision in 40 CFR 751.401 to clarify this issue. Distribution in commerce of PCTP, or products and articles that contain PCTP, that have previously been sold or supplied to an end user are excluded. The prohibition and recordkeeping requirements in this final rule exclude PCTP-containing products and articles that have previously been sold or supplied to an end user for purposes other than resale. An individual or entity that purchased or acquired the finished good in good faith for purposes other than resale are excluded; for example, a consumer who resells a product they no longer intend to use or donates a product or article to charity, such as a golf course that resells used PCTP-containing golf balls it no longer intends to use, or donates used PCTP-containing golf balls to charity.

III. Provisions of This Final Rule

A. Scope and Applicability

EPA carefully considered all public comments related to the proposal. This rule finalizes EPA's proposal to prohibit the manufacturing, processing, and distribution in commerce of PCTP or PCTP-containing products and articles, unless PCTP concentrations are at or below 1% by weight, with changes being made from the proposal to the compliance date of distribution in commerce of PCTP and PCTP-containing products and articles.

1. Banning PCTP.

EPA received numerous comments regarding the practicability of regulating PCTP. Specifically, commenters expressed concern with EPA's statement that it would be ''unreasonable, because of the low concentrations of PCTP in golf balls, for example, and thus, impracticable to prohibit or otherwise restrict the continued commercial use of the products'' (84 FR 145). Some commenters stated that a ban would be practicable given that EPA had already identified the sole golf ball manufacturer using PCTP. Commenters also discussed practicability in the context of availability of PCTP alternatives. Other commenters supported EPA's proposed rule and stated that EPA's regulation will allow manufacturers to continue the safe use of zinc PCTP while restricting potentially more dangerous uses of PCTP in greater concentrations or in its pure form.

EPA received comments from one processor of PCTP (*i.e.,* a golf ball manufacturer) stating that its processes are currently within the proposed 1% concentration by weight threshold. This commenter provided data regarding potential exposures, showing little to no exposure to humans or the environment. This commenter stated that even if the PCTP product (*e.g.,* within the rubber of the golf ball's core) is ''exposed to the environment through some mechanism, the [zinc-PCTP] compound is bound-up in the solid rubber that makes up the core material'' (EPA–HQ–OPPT–2019–0080–0566). This commenter also provided EPA with information from tests assessing leachability of the core material using U.S. EPA Method 1311 (*i.e.,* the toxicity characteristic leaching procedure (TCLP)). The TCLP test resulted in non-detectable levels of PCTP leaching from the rubber cores of golf balls when they were cut in half or quartered. These study results were provided in EPA Docket EPA–HQ–OPPT–2016–0738.

EPA believes restricting the allowable concentration will result in limited use options for PCTP and will encourage the use of available PCTP alternatives, if other PCTP-related production occurs. EPA does not expect any domestic production of PCTP or domestic use of PCTP to prepare zinc PCTP, which is the only known intermediate use of PCTP. Import of zinc PCTP may occur but only if meeting the concentration threshold of 1% by weight or less of PCTP. As a result, EPA believes these stringent measures will result in limited use of PCTP and encourage the use of alternatives, if that has not already occurred.

To the extent there are continued manufacturing and processing of products and articles, within the permitted 1% threshold, the potential for consumer exposures is not expected from these known activities or products, *e.g.,* as a component of golf ball cores. Therefore, EPA does not believe it is practicable to impose a ban on all manufacture and processing of PCTP at this time.

2. 1% Concentration limit.

EPA requested comment on the proposed concentration limit, including whether the option is practicable, and whether further exposure reductions would be practicable. EPA specifically requested comment on the practicability of a lower limit on the PCTP content in zinc PCTP, and whether it is possible to completely eliminate unreacted PCTP in the manufacture of zinc PCTP. EPA did not receive comments on an alternative or lower concentration limit. However, some commenters did express concern that EPA has not demonstrated that levels below 1% by weight do not present risks. Comments regarding eliminating the concentration limit altogether and issuing a total ban are discussed in Unit III.A.1. Other commenters supported the proposed concentration limit and one commenter provided information on studies to support their opinion that ''the 1% concentration threshold provides a more-than-adequate level of safety for workers and the public, and the available science does not support any further restrictions'' (EPA–HQ–OPPT–2019–0080–0566).

As noted earlier, zinc PCTP is manufactured using PCTP, by reacting PCTP with zinc oxide, and depending on the yield of the reaction, zinc PCTP may contain PCTP as an impurity. Zinc PCTP is sold with varying concentrations of zinc salt, including at a purity of 99% (Ref. 12). According to several patents, golf balls can be made

using zinc PCTP at this purity (Ref. 9). Since manufacturing or processing zinc PCTP at 99% purity will comply with the proposed concentration limit, as will zinc PCTP at lower purities that contains PCTP at or below 1% concentration by weight, EPA believes that the proposed concentration limit is practicable and is finalizing a limit prohibiting manufacturing, processing, and distribution in commerce of PCTP or PCTP-containing products and articles, unless PCTP concentrations are at or below 1% by weight. Any manufacturing, including import, or processing of zinc PCTP containing PCTP above the 1% concentration by weight threshold would not be permitted, including for use in the manufacture of golf balls. In addition, any manufacturing, including import, or processing of PCTP above the 1% concentration by weight threshold to create zinc PCTP would not be permitted. Thus, the manufacture and processing of PCTP and the presence of PCTP in any products and articles is significantly impacted by the prohibitions codified in the final rule. EPA believes restricting the allowable concentration will result in limited use options for PCTP and will encourage the use of available PCTP alternatives, if other PCTP-related production occurs. EPA is finalizing a limit for PCTP concentrations above 1% by weight rather than prohibiting any manufacture or processing of PCTP for this reason.

3. Compliance date for the prohibitions.

The proposed rule did not delay the compliance date beyond the rule's effective date; the manufacturing and processing bans would come into effect 60 days after publication of the final rule notice. EPA stated in the proposed rule that at that time it had no information indicating that a compliance date of 60 days after publication of the final rule is not practicable for the activities that would be prohibited, or that additional time is needed for products to clear the channels of trade. The phrases ''as soon as practicable'' and ''reasonable transition period'' as used in TSCA section 6(d)(1) are undefined, and the legislative history on TSCA section 6(d) is limited. Given the ambiguity in the statute, for purposes of this expedited rulemaking, EPA presumed a 60-day compliance date was ''as soon as practicable,'' unless there was support for a lengthier period of time on the basis of reasonable available information, such as information submitted in comments on the Exposure and Use Assessment or in stakeholder dialogues. Such a presumption ensures the compliance schedule is ''as soon as practicable,'' particularly in the context of the TSCA section 6(h) rules for chemicals identified as persistent, bioaccumulative and toxic, and given the expedited timeframe for issuing a TSCA section 6(h) proposed rule did not allow time for collection and assessment of new information separate from the comment opportunities during the development of and in response to the proposed rule. Such presumption also allows for submission of information from the sources most likely to have the information that will impact an EPA determination on whether or how best to adjust the compliance deadline to ensure that the final compliance deadline chosen is both ''as soon as practicable'' and provides a ''reasonable transition period.''

EPA received public comments regarding the 60-day compliance date for the prohibition in the proposed rule. Commenters stated that this date would be unrealistic and requested that EPA phase in the compliance deadlines for the bans on importation or distribution of products and articles containing PCTP over a longer period following promulgation of the final rule (EPA–HQ–OPPT–2019–0080–0549, EPA–HQ–OPPT–2019–0080–0557). In addition, one commenter requested EPA allow products or articles containing PCTP that are manufactured and imported prior to the compliance deadlines to be distributed thereafter without restriction (EPA–HQ–OPPT–2019–0080–0549). Commenters stated this would be needed to prevent an untold number of lawfully manufactured and imported articles from suddenly becoming unsaleable, which would result in significant costs for retailers and importers. Other commenters supported the compliance date (EPA–HQ–OPPT–2019–0080–0566).

However, in response to commenters requesting additional time for products and articles to clear the channels of trade, *e.g.,* given complex supply chains, including the request for a sell-through provision to clear products and articles containing PCTP prior to the compliance deadlines, EPA is extending the compliance date for the prohibition on distribution in commerce to one year. Extending the compliance date to one year will, as commenters note, allow additional time for products and articles containing PCTP that were produced prior to the compliance date for the prohibition on manufacture and processing to clear channels of trade.

EPA is not extending the compliance date for the prohibition on manufacture and therefore is not extending the compliance deadline for the prohibition on import which under TSCA section 3 is a subset of manufacture activities. Unless reasonably available information otherwise supports that it is not practicable to impose a 60-day compliance deadline for manufacture, which includes import, or for processing of PCTP and PCTP-containing products and articles, for purposes of meeting EPA's obligations under TSCA section 6(h), EPA presumes a compliance date of 60 days is ''as soon as practicable.'' EPA received only general comments taking the position, without support, that the 60-day compliance period for the prohibition on manufacture or processing is not practicable, while also receiving more specific support from a manufacturer of PCTP-containing products for the proposed 60-day timeframe (EPA–HQ–OPPT–2019–0080–0566).

Therefore, this final rule includes a compliance date of 60 days after publication of the final rule for the restrictions on manufacturing and processing and, to address commenters' concerns, a compliance date of one year after the publication of this final rule for the restrictions on distribution in commerce of PCTP and PCTP-containing products and articles, unless PCTP concentrations are at or below 1% by weight.

4. Recordkeeping.

In addition, EPA is requiring that all persons who manufacture, process, or distribute in commerce PCTP and articles and products containing PCTP maintain ordinary business records related to compliance with the prohibitions and restrictions, such as invoices and bills-of-lading. EPA revised this language slightly from the proposal to improve clarity. These records will have to be maintained for a period of three years from the date the record is generated, beginning on March 8, 2021.

B. TSCA Section 6(c)(2) Considerations

1. Health effects, exposure, and environmental effects.

PCTP is toxic to protozoa, fish, terrestrial plants, and birds, with data for analogous chemicals indicating the potential for liver effects in mammals and systemic effects for PCTP in mammals. These hazard statements are not based on a systematic review of the available literature and information may exist that could refine the hazard characterization. Additional information about PTCP's health effects, use, and exposure is in Unit II.C. and is further detailed in EPA's Hazard Summary (Ref. 11) and Exposure and Use Assessment (Ref. 5).

2. The benefits of the chemical substance or mixture for various uses.

During the manufacture of rubber, PCTP has been used as a peptizer to reduce the viscosity of rubber during processing. PCTP has been used as a mastication agent in the rubber industry and, more specifically, a peptizing agent for natural rubber viscosity reduction in the early stages of rubber manufacturing (Ref. 13). Mastication and peptization are processing stages during which the viscosity of rubber is reduced to a level facilitating further processing (Ref. 14). It is possible to reduce the viscosity of natural and synthetic rubbers through solely mechanical efforts, but peptizers allow this process to be less sensitive to varying time and temperature, which improves the uniformity between batches (Ref. 13).

3. The reasonably ascertainable economic consequences of the rule.

a. Overview of cost methodology. EPA has evaluated the potential costs of the final action for PCTP. Costs of the final rule were estimated based on the assumption that under regulatory limitations on PCTP, processors that use PCTP in their products would switch to available alternative chemicals to manufacture the product, or to products and articles that do not contain PCTP. Costs were assessed based on the assumption that manufacturers will use an alternative chemical, rather than an evaluation of the pricing of pre-existing PCTP-free products. For PCTP, the costs were assessed based on chemical substitutes only. Substitution costs were estimated on the industry level using the price differential between the cost of the chemical (or chemical product) and identified substitutes. Costs for rule familiarization and recordkeeping were estimated based on burdens estimated for other similar rulemakings. Costs were annualized over a 25-year period. Other potential costs include, but are not limited to, those associated with testing, reformulation, release prevention, imported articles, and some portion of potential revenue loss. However, these costs are discussed only qualitatively, due to lack of data availability to estimate quantified costs. More details of this analysis are presented in the Economic Analysis (Ref. 3).

b. Estimated costs of this final rule. Total quantified annualized industry costs for the final rule are approximately $30,000 (at both 3% and 7% discount rates annualized over 25 years). Total annualized Agency costs associated with implementation of the final rule were based on EPA's best judgment and experience with other similar rules. For the final regulatory action, EPA estimates it will require 0.5 FTE at $77,600 per year (Ref. 3).

Total quantified annualized social costs for the final rule are approximately $108,000 (at both 3% and 7% discount rates). As described earlier in Unit III.B.3, potential costs such as testing, reformulation, release prevention, and imported articles, could not be quantified due to lack of data availability to estimate quantified costs. These costs are discussed qualitatively in the Economic Analysis (Ref. 3).

c. Benefits. As discussed in Unit II.A., while EPA reviewed hazard and exposure information for the PBT chemicals, this information did not provide a basis for EPA to develop scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present a risk of injury to health or the environment. Benefits were not quantified due to the lack of risk estimates. A qualitative discussion of the potential benefits associated with the final action for PCTP is provided. PCTP is persistent, bioaccumulative, and an aquatic toxicant. There are limited data on the potential effects of PCTP in mammals and no data were identified on the potential effects of PCTP in humans. Under the final regulatory action, manufacture and processing of PCTP and PCTP-containing products and articles will be limited to PCTP concentrations of 1% by weight or lower. With the final rule, there will be lower concentrations of PCTP in products and articles. These impacts will decrease the potential for dermal and inhalation PCTP exposures in workers involved in the manufacturing and processing of PCTP-containing products and articles, *e.g.,* rubber products and golf balls, and decrease the potential for releases of PCTP to the environment, including through disposal activities. With decreased potential for releases to the environment and reduced presence of PCTP in products and articles, there will also be a decrease of the potential for exposures in the general population and potentially exposed or susceptible subpopulations, including through consumption of food from the persistence and bioaccumulation of food in animals or through persistence and uptake in agricultural food products. Thus, by reducing the concentration threshold for manufacturing and processing of PCTP for use in products and articles overall, the final regulatory action will have benefits for the environment, general population, and potentially exposed or susceptible subpopulations, such as workers.

d. Cost effectiveness, and effect on national economy, small business, and technological innovation. With respect to the cost effectiveness of the final regulatory action and the primary alternative regulatory action, EPA is unable to perform a traditional cost-effectiveness analysis of the actions and alternatives for the PBT chemicals. As discussed in the proposed rule, the cost effectiveness of a policy option would properly be calculated by dividing the annualized costs of the option by a final outcome, such as cancer cases avoided, or to intermediate outputs such as tons of emissions of a pollutant curtailed. Without the supporting analyses for a risk determination, EPA is unable to calculate either a health-based or environment-based denominator. Thus, EPA is unable to perform a quantitative cost-effectiveness analysis of the final and alternative regulatory actions. However, by evaluating the practicability of the final and alternative regulatory actions, EPA believes that it has considered elements related to the cost effectiveness of the actions, including the cost and the effect on exposure to the PBT chemicals of the final and alternative regulatory actions.

EPA considered the anticipated effect of this rule on the national economy and concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 3). EPA analyzed the expected impacts on small business and found that no small entities are expected to experience impacts of more than 1% of revenues (Ref. 3). Finally, EPA has determined that this rule is unlikely to have significant impacts on technological innovation, although the rule may create some incentives for chemical manufacturers to develop new chemical alternatives to PCTP.

4. Consideration of alternatives.

As the result of a screening level analysis of likely alternatives based on the TSCA Work Plan Chemicals: Methods Document (Ref. 2), EPA believes that there are viable substitutes for PCTP in rubber manufacturing. Although this final rule is not prohibiting the manufacture or processing of PCTP and PCTP-containing products and articles for any use when PCTP concentrations are at or below 1% by weight, it is possible that some manufacturers and processors may choose to use alternatives instead of using PCTP at the concentration limit. At this time, EPA does not know whether products, including golf balls, are currently being made with halogenated organosulfur compound substitutes instead of PCTP. Based on information from patents, EPA believes

that use of these substitutes may be occurring in golf ball manufacturing (Ref. 8, 9, and 15). Further, only one golf ball manufacturer has confirmed that it incorporates PCTP into its golf balls. EPA believes this limited use of PCTP is sufficient evidence of the availability of substitutes.

The potential alternatives were evaluated and scored on three characteristics: Hazard, exposure and the potential for persistence and/or bioaccumulation. Two chemicals, diphenyldisulfide and 2,2′-dibenzamidodiphenyl disulfide, scored lower for at least one characteristic (Ref. 3). With respect to pentafluorothiophenol, there was not enough information available to score each characteristic (Ref. 16).

C. TSCA Section 26(h) Considerations

In accordance with TSCA section 26(h) and taking into account the requirements of TSCA section 6(h), EPA has used scientific information, technical procedures, measures, and methodologies that are fit for purpose and consistent with the best available science. For example, EPA based its determination that human and environmental exposures to PCTP are likely in the Exposure and Use Assessment (Ref. 5) discussed in Unit II.A.2, which underwent a peer review and public comment process, as well as using best available science and methods sufficient to make that determination. The extent to which the various information, procedures, measures, and methodologies, as applicable, used in EPA's decision making have been subject to independent verification or peer review is adequate to justify their use, collectively, in the record for this rule. Additional information on the peer review and public comment process, such as the peer review plan, the peer review report, and the Agency's response to comments, are in the public docket for this action (EPA–HQ–OPPT–2018–0314). In addition, in accordance with TSCA section 26(i) and taking into account the requirements of TSCA section 6(h), EPA has made scientific decisions based on the weight of the scientific evidence.

IV. References

The following is a list of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. All records in docket EPA–HQ–OPPT–2019–0080 are part of the record for this rulemaking. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. TSCA Work Plan for Chemical Assessments: 2014 Update. October 2014. *https://www.epa.gov/assessingand-managing-chemicals-under-tsca/tsca-work-plan-chemical-ssessments-2014-update.* Accessed March 1, 2019.
2. EPA. TSCA Work Plan Chemicals: Methods Document. February 2012. *https://www.epa.gov/sites/production/files/2014-03/documents/work_plan_methods_document_web_final.pdf.* Accessed March 1, 2019.
3. EPA. Economic Analysis for Regulation of Pentachlorothiophenol (PCTP) Under TSCA Section 6(h). December 2020.
4. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h); *Response to Public Comments.* December 2020. (Docket EPA–HQ–OPPT–2019–0080).
5. EPA. Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals. December 2020. (EPA–HQ–OPPT–2019–0080–0518).
6. EPA. Public Database 2016 Chemical Data Reporting. Washington, DC: US Environmental Protection Agency, Office of Pollution Prevention and Toxics.
7. Lucas, CR; Peach, ME. (1970). Reactions of Pentachlorothiophenol. Canadian Journal of Chemistry. 48:1869.
8. Watanabe, Hideo; Kasashima, Atuski, Multi-piece solid golf ball. US Patent Number US7367901B2, filed January 11, 2007, and published May 6, 2008.
9. Kennedy III, Thomas J., Binette, Mark L., Golf ball, US Patent Number 20060019771, filed July 20, 2004, and published January 26, 2006.
10. EPA. *Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Pentachlorothiophenol.* August 2017. (EPA–HQ–OPPT–2016–0739–0003).
11. EPA. Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals. December 2020.
12. American Elements. Los Angeles, CA. Zinc Chlorothiophenolate. *https://www.americanelements.com/zincchlorothiophenolate-117-97-5.* Accessed March 3, 2019.
13. National Library of Medicine. ToxNet, Hazardous Substance Data Bank. Pentachlorothiophenol: CASRN: 133–49–3. *https://toxnet.nlm.nih.gov/cgi-bin/sis/search2/f?./temp/~ebPHHj:1* Accessed March 4, 2019.
14. Struktol Company of America, LLC. Stow, OH. Rubber Handbook. 2004. *http://www.struktol.com/pdfs/RubberHB.pdf.* Accessed March 4, 2019.
15. Voorheis PR, Rajagopalan M. Golf ball core compositions comprising unsaturated long chain organic acids and their salts. US Patent Number: US6762247B2, filed September 9, 2002, published July 13, 2004.
16. EPA. Persistence, Bioaccumulation, Environmental Hazard and Human Health Hazard Ratings for Alternatives to PBT Chemicals Proposed for Regulation. April 2019.
17. Keweenaw Bay Indian Community. Re: Notification of Consultation and Coordination on a Rulemaking Under the Toxic Substances Control Act: Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h). September 25, 2018.
18. Harper, Barbara and Ranco, Darren, in collaboration with the Maine Tribes. Wabanaki Traditional Cultural Lifeways Exposure Scenario. July 9, 2009.

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Order 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket for this action as required by section 6(a)(3)(E) of Executive Order 12866.

EPA prepared an economic analysis of the potential costs and benefits associated with this action. A copy of this economic analysis, *Economic Analysis for Pentachlorothiophenol*

(PCTP) Regulation of Under TSCA Section 6(h) (Ref. 3), is in the docket and is briefly summarized in Unit III. B.3.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is considered a regulatory action under Executive Order 13771 (82 FR 9339, February 3, 2017). Details on the estimated costs of this final rule can be found in the Economic Analysis (Ref. 3), which is briefly summarized in Unit III.B.3.

C. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2599.02 and OMB Control No. 2070–0213. A copy of the ICR is available in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

Respondents/affected entities: Entities potentially affected by paperwork requirements of this final rule include 4 processors and 1 distributor.

Respondent's obligation to respond: Mandatory (40 CFR 751.411).

Estimated number of respondents: 5.

Frequency of response: On occasion.

Total estimated burden: 2.5 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $196.50 (per year), includes $0 annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* The small entities subject to the requirements of this action are small businesses that manufacture/import, process, or distribute PCTP. In total, only one small business is expected to be affected by the final action. This small business is not expected to experience negative impacts of more than 1% of revenue. Because there is only one small business directly impacted and negative impacts are less than 1%, EPA presumes no significant economic impact on a substantial number of small entities (no SISNOSE). No small entities are expected to experience impacts of more than 1% of revenues. Details of this analysis are presented in the Economic Analysis (Ref. 3).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and will not significantly or uniquely affect small governments. The final rule is not expected to result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (when adjusted annually for inflation) in any one year. Accordingly, this final rule is not subject to the requirements of sections 202, 203, or 205 of UMRA. The requirements of this action will primarily affect processors, and a distributor of PCTP. The total quantified annualized social costs for this final rule under are approximately $108,000 (at both 3% and 7% discount rate), which does not exceed the inflation-adjusted unfunded mandate threshold of $160 million.

F. Executive Order 13132: Federalism

This action does not have federalism implications because it is not expected to have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications because it is not expected to have substantial direct effects on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this final rule.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, EPA consulted with tribal officials during the development of this action. EPA consulted with representatives of Tribes via teleconference on August 31, 2018, and September 6, 2018, concerning the prospective regulation of the five PBT chemicals under TSCA section 6(h).

Tribal members were encouraged to provide additional comments after the teleconferences. EPA received two comments from the Keweenaw Bay Indian Community and Maine Tribes (Ref. 17 and 18).

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866. Although the action is not subject to Executive Order 13045, the Agency considered the risks to infants and children under EPA's Policy on Evaluating Health Risks to Children. EPA did not perform a risk assessment or risk evaluation of PTCP. More information can be found in the Exposure and Use Assessment (Ref. 5). This regulation will reduce the exposure to PCTP for the general population and for potentially exposed or susceptible subpopulations such as workers and children.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not otherwise been designated as a significant energy action by the Administrator of the Office of Information and Regulatory Affairs (OIRA).

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve any technical standards. Therefore, NTTAA section 12(d), 15 U.S.C. 272 *note,* does not apply to this action.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse health or environmental effects on minority populations, low-income populations and/or indigenous peoples,

as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Economic Analysis (Ref. 3), which is in the public docket for this action. EPA believes that the restrictions on PCTP in this final rule will reduce exposure in the United States, thus benefitting all communities, including environmental justice communities.

L. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects 40 CFR Part 751

Environmental protection, Chemicals, Export Notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Andrew Wheeler,

Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR part 751 is amended as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.403 by adding in alphabetical order the term ''PCTP'' to read as follows:

Subpart E—Persistent, Bioaccumulative, and Toxic Chemicals

§ 751.403 Definitions.

* * * * *

PCTP means the chemical substance pentachlorothiophenol (CASRN 133–49–3).

* * * * *

■ 3. Add § 751.411 to read as follows:

§ 751.411 PCTP.

(a) *Prohibition.* After March 8, 2021, all persons are prohibited from all manufacturing and processing of PCTP or PCTP-containing products or articles, unless PCTP concentrations are at or below 1% by weight. After January 6, 2022, all persons are prohibited from all distribution in commerce of PCTP or PCTP-containing products or articles, unless PCTP concentrations are at or below 1% by weight.

(b) *Recordkeeping.* After March 8, 2021, manufacturers, processors and distributors of PCTP or PCTP-containing products or articles must maintain ordinary business records related to compliance with the prohibitions, restrictions and other provisions of this section, such as invoices and bills-of-lading. These records must be maintained for a period of three years from the date the record is generated.

[FR Doc. 2020–28689 Filed 1–5–21; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 751

[EPA–HQ–OPPT–2019–0080; FRL 10018–91]

RIN 2070–AK61

Hexachlorobutadiene (HCBD); Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing a rule under the Toxic Substances Control Act (TSCA) to address its obligations under TSCA for hexachlorobutadiene (HCBD) (CASRN 87–68–3), which EPA has determined meets the requirements for expedited action under TSCA. This final rule prohibits all manufacturing (including import), processing, and distribution in commerce of HCBD and HCBD-containing products or articles, recognizing that there is unintentional production of HCBD as a byproduct during the production of chlorinated solvents, and that results in distribution in commerce of a very limited subset of that byproduct for burning as a waste fuel. These requirements will impact the amount of HCBD that will be manufactured, processed, distributed in commerce, used or disposed, thus reducing the exposures to humans and the environment from those activities prohibited under this final rule.

DATES: This final rule is effective February 5, 2021. For purposes of judicial review and 40 CFR 23.5, this rule shall be promulgated at 1 p.m. eastern standard time on January 21, 2021.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPPT–2019–0080, is available at *http://www.regulations.gov* or at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW, Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

Please note that due to the public health emergency, the EPA Docket Center (EPA/DC) and Reading Room was closed to public visitors on March 31, 2020. Our EPA/DC staff will continue to provide customer service via email, phone, and webform. For further information on EPA/DC services, docket contact information and the current status of the EPA/DC and Reading Room, please visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Victoria Ellenbogen, Existing Chemicals Risk Management Division, Office of Pollution Prevention and Toxics, (7404T), Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–2053; email address: *ellenbogen.victoria@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Does this action apply to me?

You may be potentially affected by this action if you manufacture (including import), process, distribute in commerce, or use hexachlorobutadiene (HCBD) and HCBD-containing products or articles. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Petroleum Lubricating Oil and Grease Manufacturing (NAICS Code 324191);
- Other Basic Inorganic Chemical Manufacturing (NAICS Code 325180);
- All Other Basic Organic Chemical Manufacturing (NAICS Code 325199);
- Plastics Material and Resin Manufacturing (NAICS Code 325211);

- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS Code 325998);
- All Other Plastics Product Manufacturing (NAICS Code 326199);
- All Other Rubber Product Manufacturing (NAICS Code 326299);
- Cement Manufacturing (NAICS Code 327310);
- Hazardous Waste Treatment and Disposal (NAICS Code 562211);
- Hazardous Waste Collection (562112);
- Solid Waste Combustors and Incinerators (NAICS Code 562213);
- Other Chemical and Allied Products Merchant Wholesalers (NAICS Code 424690);
- Crude Petroleum Extraction (NAICS Code 211120);
- Facilities Support Services (NAICS Code 561210);
- All Other Miscellaneous Chemical Product and Preparation Manufacturing (NAICS Code 325998).

If you have any questions regarding the applicability of this action to a particular entity, consult the technical information contact listed under **FOR FURTHER INFORMATION CONTACT.**

B. What is the Agency's authority for taking this action?

Section 6(h) of TSCA, 15 U.S.C. 2601 *et seq.,* directs EPA to issue a final rule under TSCA section 6(a) on certain persistent, bioaccumulative, and toxic (PBT) chemical substances. HCBD (CASRN 87–68–3), which is produced only as a byproduct in the production of chlorinated solvents, is one such chemical substance. More specifically, EPA must take action on those chemical substances identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1) that, among other factors, EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the TSCA Work Plan Chemicals: Methods Document. (Ref. 2) TSCA section 6(h) directs EPA to take expedited action on the substance to reduce exposure to the substance, including to exposure to the substance as an impurity or byproduct, to the extent practicable. This final rule is final agency action for purposes of judicial review under TSCA section 19(a).

C. What action is the Agency taking?

EPA published a proposed rule on July 29, 2019 to address the five PBT chemicals EPA identified pursuant to TSCA section 6(h) (84 FR 36728; FRL–9995–76). After publication of the proposed rule, EPA determined to address each of the five PBT chemicals in separate final actions. This final rule prohibits the manufacturing (including import), processing, and distribution in commerce of HCBD and HCBD-containing products or articles after March 8, 2021, except for the unintentional production of HCBD as a byproduct during the production of chlorinated solvents and the processing and distribution of the byproduct for burning as a waste fuel. In addition, after March 8, 2021, manufacturers, processors and distributors of HCBD or HCBD-containing products or articles must maintain, for three years from the date the record is generated, ordinary business records related to compliance with the prohibitions and restrictions. This provision is not intended to require subject companies to retain records in addition to those specified herein, except as needed pursuant to normal business operations.

D. Why is the Agency taking this action?

EPA is issuing this final rule to fulfill EPA's obligations under TSCA section 6(h) to take timely regulatory action on PBT chemicals, including HCBD, ''to address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and to reduce exposure to the substance to the extent practicable.'' Consistent with that requirement, the Agency is finalizing this rule to reduce exposures to HCBD that could occur from prohibited activities to the extent practicable.

E. What are the estimated incremental impacts of this action?

EPA has evaluated the potential costs of these restrictions and prohibitions and the associated reporting and recordkeeping requirements. The ''Economic Analysis for Regulation of Hexachlorobutadiene (HCBD) Under TSCA Section 6(h)'' (Economic Analysis) (Ref. 3), is available in the docket and is briefly summarized here.

- *Benefits.* EPA was not able to quantify the benefits of reducing the potential for human and environmental exposures to HCBD. As discussed in more detail in Unit II., EPA did not perform a risk evaluation for HCBD, nor did EPA develop quantitative risk estimates. Therefore, the Economic Analysis (Ref. 3) qualitatively discusses the benefits of reducing the potential for exposure under the final rule for HCBD.
- *Costs.* Total quantified annualized social costs for this final rule are approximately $77,900 (at both 3% and 7% discount rates). Potential unquantified costs and are those associated with testing, reformulation, importation of articles, foregone profits, and indirect costs. The limited data available for those costs prevents EPA from constructing a quantitative assessment.
- *Small entity impacts.* This final rule will impact approximately one small entity; which is not expected to incur impacts of 1% or greater of their revenue.
- *Environmental Justice.* This final rule will increase the level of protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population or children.
- *Effects on State, local, and Tribal governments.* This final rule will not have any significant or unique effects on small governments, or federalism or tribal implications.

F. Children's Environmental Health

Executive Order 13045 applies if the regulatory action is economically significant and concerns an environmental health risk or safety risk that may disproportionately affect children. While the action is not subject to Executive Order 13045, the Agency's Policy on Evaluating Health Risks to Children (*https://www.epa.gov/children/epas-policy-evaluating-risk-children*) is to consider the risks to infants and children consistently and explicitly during its decision making process. This final rule will reduce the exposure that could occur from activities now prohibited under this final rule to HCBD for the general population and for potentially exposed or susceptible subpopulations such as children. More information can be found in the Exposure and Use Assessment (Ref. 5).

II. Background

A. History of This Rulemaking

TSCA section 6(h) requires EPA to take expedited regulatory action under TSCA section 6(a) for certain PBT chemicals identified in the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1). As required by the statute, EPA issued a proposed rule to address five PBT chemicals identified pursuant to TSCA section 6(h) (84 FR 36728, July 29, 2019). The statute required that this be followed by promulgation of a final rule no later than 18 months after the proposal. Although EPA proposed regulatory actions on each chemical substance in one proposal, in response to public comments (EPA–HQ–OPPT–2019–

0080–0544), (EPA–HQ–OPPT–2019–0080–0553), (EPA–HQ–OPPT–2019–0080–0556), (EPA–HQ–OPPT–2019–0080–0562) requesting these five actions be separated, EPA is finalizing five separate actions to individually address each of the PBT chemicals. EPA intends for the five separate final rules to publish in the same issue of the **Federal Register**. More discussion on these comments is in the Response to Comments document which is available in the docket (Ref. 4). The details of the proposal for HCBD are described in more detail in Unit II.D.

Under TSCA section 6(h)(1)(A), the chemical substances subject to expedited action are those that:

- EPA has a reasonable basis to conclude are toxic and that with respect to persistence and bioaccumulation score high for one and either high or moderate for the other, pursuant to the 2012 TSCA Work Plan Chemicals: Methods Document or a successor scoring system;
- Are not a metal or a metal compound; and
- Are chemical substances for which EPA has not completed a TSCA Work Plan Problem Formulation, initiated a review under TSCA section 5, or entered into a consent agreement under TSCA section 4, prior to June 22, 2016, the date that TSCA was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act (Pub. L. 114–182, 130 Stat. 448).

In addition, in order for a chemical substance to be subject to expedited action, TSCA section 6(h)(1)(B) states that EPA must find that exposure to the chemical substance under the conditions of use is likely to the general population or to a potentially exposed or susceptible subpopulation identified by the Administrator (such as infants, children, pregnant women, workers, or the elderly), or to the environment on the basis of an exposure and use assessment conducted by the Administrator. TSCA sections 6(h)(2) further provides that the Administrator shall not be required to conduct risk evaluations on chemical substances that are subject to TSCA section 6(h)(1).

Based on the criteria set forth in TSCA section 6(h), EPA proposed to determine that five chemical substances meet the TSCA section 6(h)(1)(A) criteria for expedited action, and HCBD is one of these five chemical substances. In addition, in accordance with the statutory requirements to demonstrate that exposure to the chemical substance is likely under the conditions of use, EPA conducted an Exposure and Use Assessment for HCBD. As described in the proposed rule, EPA conducted a literature review with respect to HCBD to identify, screen, extract, and evaluate the reasonably available information on use and exposures. This information is in the document entitled ''Exposure and Use Assessment of Five Persistent, Bioaccumulative and Toxic Chemicals'' (Ref. 5). Based on this review, which was subject to peer review and public comment, EPA proposed to find that exposure to HCBD is likely, based on information detailed in the Exposure and Use Assessment.

B. Other Provisions of TSCA Section 6

1. EPA's approach for implementing TSCA section 6(h)(4).

TSCA section 6(h)(4) requires EPA to issue a final TSCA section 6(a) rule to ''address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance and reduce exposure to the substance to the extent practicable.'' EPA reads this text to require action on the chemical, not specific conditions of use.

The approach EPA takes is consistent with the language of TSCA section 6(h)(4) and its distinct differences from other provisions of TSCA section 6 for chemicals that are the subject of required risk evaluations. First, the term ''condition of use'' is only used in TSCA section 6(h) in the context of the TSCA section 6(h)(1)(B) finding relating to likely exposures under ''conditions of use'' to ''the general population or to a potentially exposed or susceptible subpopulation . . . or the environment.'' In contrast to the risk evaluation process under TSCA section 6(b), this TSCA section 6(h)(1)(B) threshold criterion is triggered only through an Exposure and Use Assessment regarding the likelihood of exposure and does not require identification of every condition of use. As a result, EPA collected all the information it could on the use of each chemical substance, without regard to whether any chemical activity would be characterized as ''known, intended or reasonably foreseen to be manufactured, processed, distributed in commerce, used, or disposed of,'' and from that information created use profiles and then an Exposure and Use Assessment (Ref. 4) to make the TSCA section 6(h)(1)(B) finding for at least one or more ''condition of use'' activities where some exposure is likely. EPA did not attempt to precisely classify all activities for each chemical substance as a ''condition of use'' and thus did not attempt to make a TSCA section 6(h)(1)(B) finding for all chemical activities summarized in the Exposure and Use Assessment (Ref. 4). Second, TSCA section 6 generally requires a risk evaluation under TSCA section 6(b) for chemicals based on the identified conditions of use. However, pursuant to TSCA section 6(h)(2), for chemical substances that meet the criteria of TSCA section 6(h)(1), a risk evaluation is neither required nor contemplated to be conducted for EPA to meet its obligations under TSCA section 6(h)(4). Rather, as noted in Unit II.B.3., if a previously prepared TSCA risk assessment exists, EPA would have authority to use that risk assessment to ''address risks'' under TSCA section 6(h)(4), but even that risk assessment would not necessarily be focused on whether an activity is ''known, intended or reasonably foreseen,'' as those terms were not used in TSCA prior to the 2016 amendments and a preexisting assessment of risks would have had no reason to use such terminology or make such judgments. It is for this reason EPA believes that the TSCA section 6(h)(4) ''address risk'' standard refers to the risks the Administrator determines ''are presented by the chemical substance'' and makes no reference to ''conditions of use.'' Congress did not contemplate or require a risk evaluation identifying the conditions of use as defined under TSCA section 3(4). The kind of analysis required to identify and evaluate the conditions of use for a chemical substance is only contemplated in the context of a TSCA section 6(b) risk evaluation, not in the context of an expedited rulemaking to address PBT chemicals. Similarly, the TSCA amendments require EPA to ''reduce *exposure to the substance* to the extent practicable,'' without reference to whether the exposure is found ''likely'' pursuant to TSCA section 6(h)(1)(B).

Taking all of this into account, EPA reads its TSCA section 6(h)(4) obligation to apply to the chemical substance generally, thus requiring EPA to address risks and reduce exposures to the chemical substance without focusing on whether the measure taken is specific to an activity that might be characterized as a ''condition of use'' as that term is defined in TSCA section 3(4) and interpreted by EPA in the Risk Evaluation Rule, 82 FR 33726 (July 20, 2017). This approach ensures that any activity involving a TSCA section 6(h) PBT chemical, past, present or future, is addressed by the regulatory approach taken. Thus, under this final rule, manufacturing, processing, and distribution in commerce activities that are not specifically excluded are prohibited. The specified excluded activities are those which EPA determined were not appropriate to

regulate under the TSCA section 6(h)(4) standard. Consistently, based on the Exposure and Use Assessment, activities associated with HCBD that are no longer occurring are addressed by this rule and thus the prohibitions adopted in this rule reduce the exposures that will result with resumption of past activities or the initiation of similar or other activities in the future. Therefore, EPA has determined that prohibiting these activities will reduce exposures to the extent practicable. The approach taken for this final rule is limited to implementation of TSCA section 6(h) and is not relevant to any other action under TSCA section 6 or other TSCA statutory actions.

2. EPA's interpretation of ''practicable.''

The term ''practicable'' is not defined in TSCA. EPA interprets this requirement as generally directing the Agency to consider such factors as achievability, feasibility, workability, and reasonableness. In addition, EPA's approach to determining whether particular prohibitions or restrictions are practicable is informed in part by certain other provisions in TSCA section 6, such as TSCA section 6(c)(2)(A), which requires the Administrator to consider health effects, exposure, and environmental effects of the chemical substance; benefits of the chemical substance; and the reasonably ascertainable economic consequences of the rule. In addition, pursuant to TSCA section 6(c)(2)(B), in selecting the appropriate TSCA section 6(a) regulatory approach, the Administrator is directed to ''factor in, to the extent practicable'' those same considerations.

EPA received comments on the proposed rule regarding this interpretation of ''practicable.'' EPA has reviewed these comments and believes the interpretation described previously within this Unit is consistent with the intent of TSCA and has not changed that interpretation. EPA's interpretation of an ambiguous statutory term receives deference. More discussion on these comments is in the Response to Comments document for this rulemaking (Ref. 4).

3. EPA did not conduct a risk evaluation or assessment.

As EPA explained in the proposed rule, EPA does not interpret the ''address risk'' language to require EPA to determine, through a risk assessment or risk evaluation, whether risks are presented. EPA believes this reading gives the Administrator the flexibility Congress intended for issuance of expedited rules for PBTs and is consistent with TSCA section 6(h)(2), which makes clear a risk evaluation is not required to support this rulemaking.

EPA received comments on the proposed rule regarding its interpretation of TSCA section 6(h)(4) and regarding EPA's lack of risk assessment or risk evaluation of HCBD. A number of commenters asserted that while EPA was not compelled to conduct a risk evaluation, EPA should have conducted a risk evaluation under TSCA section 6(b) regardless. The rationales provided by the commenters for such a risk assessment or risk evaluation included that one was needed for EPA to fully quantify the benefits to support this rulemaking, and that without a risk evaluation, EPA would not be able to determine the benefits, risks, and cost effectiveness of the rule in a meaningful way. As described by the commenters, EPA would therefore not be able to meet the TSCA section 6(c)(2) requirement for a statement of these considerations. Regarding the contradiction between the mandate in TSCA section 6(h) to expeditiously issue a rulemaking and the time needed to conduct a risk evaluation, some commenters stated that EPA would have had enough time to conduct a risk evaluation and issue a proposed rule by the statutory deadline.

EPA disagrees with the commenters' interpretation of EPA's obligations with respect to chemicals subject to TSCA section 6(h)(4). TSCA section 6(h)(4) provides that EPA shall: (1) ''Address the risks of injury to health or the environment that the Administrator determines are presented by the chemical substance'' and (2) ''reduce exposure to the substance to the extent practicable.'' With respect to the first requirement, that standard is distinct from the ''unreasonable risk'' standard for all other chemicals for which a section 6(a) rule might be issued. EPA does not believe the TSCA section 6(h) contemplates a new evaluation of any kind, given evaluations to determine risks are now addressed through the TSCA section 6(b) risk evaluation process and TSCA section 6(h)(2) explicitly provides that no risk evaluation is required. Moreover, it would have been impossible to prepare a meaningful evaluation under TSCA and subsequently develop a proposed rule in the time contemplated for issuance of a proposed rule under TSCA section 6(h)(1). Although EPA does not believe the statute contemplates a new evaluation of any kind for these reasons, EPA reviewed the hazard and exposure information on the five PBT chemicals EPA had compiled. However, while this information appropriately addresses the criteria of TSCA section 6(h)(1)(A) and (B), it did not provide a basis for EPA to develop sufficient and scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present an identifiable risk of injury to health or the environment.

Rather than suggesting a new assessment is required, EPA reads the ''address risk'' language in TSCA section 6(h)(4) to contemplate reliance on an existing EPA assessment under TSCA, similar to a risk assessment that may be permissibly used under TSCA section 26(l)(4) to regulate the chemical under TSCA section 6(a). This interpretation gives meaning to the ''address risk'' phrase, without compelling an evaluation contrary to TSCA section 6(h)(2) and would allow use of an existing determination, or development of a new determination based on such an existing risk assessment, in the timeframe contemplated for issuance of a proposed rule under TSCA section 6(h). However, there were no existing EPA assessments of risk for any of the PBT chemicals. Thus, because EPA had no existing EPA risk assessments or determinations of risk, the regulatory measures addressed in this final rule focus on reducing exposures ''to the extent practicable.''

In sum, because neither the statute nor the legislative history suggests that a new evaluation is compelled to identify and thereby provide a basis for the Agency to ''address risks'' and one could not be done prior to preparation and timely issuance of a proposed rule, and no existing TSCA risk assessment exists for any of the chemicals, EPA has made no risk determination finding for any of the PBT chemicals. Instead, EPA implements the requirement of TSCA section 6(h)(4) by reducing exposures of each PBT chemical ''to the extent practicable.''

For similar reasons, EPA does not believe that TSCA section 6(c)(2) requires a quantification of benefits, much less a specific kind of quantification. Under TSCA section 6(c)(2)(A)(iv), EPA must consider and publish a statement, based on reasonably available information, on the reasonably ascertainable economic consequences of the rule, but that provision does not require quantification, particularly if quantification is not possible. EPA has reasonably complied with this requirement by including a quantification of direct costs and a qualitative discussion of benefits in each of the preambles to the final rules. EPA was unable to quantify the indirect costs associated with the rule. Further discussion on these issues raised in the

comments is in the Response to Comment document. (Ref. 4)

C. HCBD Overview, Health Effects, and Exposure

HCBD is a halogenated aliphatic hydrocarbon that is produced as a byproduct during the manufacture of chlorinated hydrocarbons, particularly perchloroethylene, trichloroethylene, and carbon tetrachloride (Ref. 6). As described in the proposed rule, the majority of HCBD that is unintentionally produced as a byproduct is destroyed via incineration by the manufacturer, which EPA views as being consistent with the approach taken at the international level under Article 6 of the Stockholm Convention. The remainder of the HCBD byproduct is sent off-site for incineration or for burning as a waste fuel by cement manufacturers in cement kilns (EPA–HQ–OPPT–2016–0738–0012), an identified source category under Annex C of the Stockholm Convention. EPA views this burning of such waste as consistent with the approach taken at the international level under Article 6 of the Stockholm Convention. EPA has not identified any current intentional use of HCBD. The destruction and removal efficiency from incineration of the HCBD byproduct is expected to be significant but not complete, resulting in potential for air releases from incinerator flue gas and land releases from disposal of ash and slag. Minor water releases from equipment cleaning are possible (Ref. 5). According to EPA Toxics Release Inventory (TRI) data, over 9 million lbs of HCBD byproduct were generated by chemical manufacturers in reporting year 2017, with almost 8.9 million lbs treated for destruction on-site via incineration. TRI reports show other waste management activities of HCBD byproduct including 58,000 lbs being treated for destruction off-site, 33,000 lbs burned for energy recovery off-site, and 2,400 lbs released to air (Ref. 7). Exposure information for HCBD is further detailed in EPA's Exposure and Use Assessment (Ref. 5) and discussed in the Response to Comments (Ref. 4).

As described in EPA's Environmental and Human Health Hazards of Five Persistent, Bioaccumulative, and Toxic Chemicals, HCBD is considered a possible human carcinogen (Ref. 8). Inhalation and oral animal data for HCBD indicate renal, reproductive, and developmental effects in rats (Ref. 8). Health effects included renal adenomas and carcinomas, reduced body weight in adults, and reduced fetal body weight. Women who are occupationally exposed may transfer HCBD to infants via breastmilk (Ref. 5).

HCBD is toxic to aquatic life following acute and chronic exposures at very low concentrations (Ref. 8). Data show acute toxicity in aquatic invertebrates, fish and algae, and chronic toxicity in fish. A single toxicity test was identified for terrestrial organisms, showing reduced chick survival in quail. The Hazard Summary provides more information on these hazardous endpoints (Ref. 8). The studies presented in the document entitled ''Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals (Hazard Summary) (Ref. 8) demonstrate these hazardous endpoints. EPA did not perform a systematic review or a weight of the scientific evidence assessment for the hazard characterization of these chemicals. As a result, this hazard characterization is not definitive or comprehensive. Other hazard information on these chemicals may exist in addition to the studies summarized in the Hazard Summary that could alter the hazard characterization.

In the 2014 Update to the TSCA Work Plan for Chemical Assessments (Ref. 1), HCBD scored high (3) for hazard (possible human carcinogen); moderate (2) for exposure (based on TRI data); and high (3) for persistence and bioaccumulation (based on high environmental persistence and high bioaccumulation potential). The overall screening score for HCBD was high (8) (Ref. 1).

In consideration of the production, use, and destruction of HCBD, the environmental and human health hazards of HCBD, and the public comments on the proposed rule that are further discussed in Unit III.A., EPA determines that HCBD meets the TSCA section 6(h)(1)(A) criteria. EPA determines in accordance with TSCA section 6(h)(1)(B) that, based on the Exposure and Use Assessment and the reasonably available information, exposure to HCBD under the conditions of use is likely to the general population, to a potentially exposed or susceptible subpopulation, or to the environment. EPA's determination is based on the opportunities for exposure throughout the lifecycle of HCBD, including the potential for exposures, and EPA did not receive any significant comments or information to call the exposure finding into question.

D. EPA's Proposed Rule Under TSCA Section 6(h) for HCBD

EPA did not propose to regulate HCBD under TSCA section 6(h) because of the limited releases and given that the potential for exposure from uses of this chemical is already addressed by actions taken under other statutes and EPA determined further measures would not be practicable. As discussed in the proposed rule, HCBD is regulated under various statutes implemented by the Federal Government, such as the Clean Air Act (CAA) and Resource Conservation and Recovery Act (RCRA). According to TRI data, most of the HCBD manufactured in the United States is subsequently destroyed via incineration.

EPA, however, proposed an alternative regulatory action of prohibiting the manufacture of HCBD, which is further discussed in the proposed rule.

E. Public Comments and Other Public Input

The proposed rule provided a 60-day public comment period, with a 30-day extension provided. (Ref. 4). The comment period closed on October 28, 2019. EPA received a total of 48 comments, with three commenters sending multiple submissions with attached files, for a total of 58 submissions on the proposal for all the PBT chemicals. This includes the previous request for a comment period extension (EPA–HQ–OPPT–2019–0080–0526). Two commenters submitted confidential business information (CBI) or copyrighted documents with information regarding economic analysis and market trends. Copies of all the non-CBI documents, or redacted versions without CBI, are available in the docket for this action.

In this preamble, EPA has responded to the major comments relevant to the HCBD final rule. Of the comment submissions, 10 directly addressed EPA's proposal regarding HCBD. Additional discussion related to this final action can be found in the Response to Comments document (Ref. 4).

F. Activities Not Directly Regulated by This Final Rule

EPA is not regulating all activities or exposures to HCBD in this rule, even though the Exposure and Use Assessment (Ref. 5) identified potential for exposures under conditions of use. One such activity is disposal. EPA generally presumes compliance with federal and state laws and regulations, including, for example, RCRA and its implementing regulations and state laws, as well as the CAA, the Clean Water Act, and the Safe Drinking Water Act (SDWA). As described in the proposed rule, regulations promulgated under the authority of the RCRA govern the disposal of hazardous and non-hazardous wastes. HCBD is listed as a

hazardous constituent under Appendix VIII of 40 CFR part 261 and Appendix IX of part 264, providing EPA with authority to regulate wastes containing this chemical, and to address releases from RCRA-permitted treatment, storage and disposal facilities. HCBD is listed as a hazardous waste under RCRA in 40 CFR 261.33, Hazard Waste Code U128. In addition, HCBD is a constituent that may also cause a waste to be defined as a characteristic hazardous waste under 40 CFR 261.24. As a hazardous waste, HCBD is subject to regulation under 40 CFR parts 262 through 265, 268, and parts 270 and 271. HCBD is also a hazardous constituent under 40 CFR part 258, Appendix II (Criteria for Municipal Solid Waste Landfills, or MSWLF), which is part of the groundwater assessment program for corrective action at MSWLFs. Industrial waste (non-hazardous) landfills and construction/demolition waste landfills are primarily regulated under state regulatory programs, and in addition they must meet the criteria set forth in federal regulations which may include requirements for siting, groundwater monitoring and corrective action depending upon what types of wastes are accepted. Disposal by underground injection is regulated under both RCRA and SDWA.

In addition, the CAA requires EPA to regulate hazardous air pollutants (HAP) such as HCBD. CAA section 112 requires that the Agency establish National Emission Standards for Hazardous Air Pollutants (NESHAP) for the control of hazardous air pollutants from both new and existing major sources. The CAA requires the NESHAP to reflect the maximum degree of reduction in emissions of HAP that is achievable, taking into consideration the cost of achieving the emissions reductions, any non-air quality health and environmental impacts, and energy requirements. This level of control is commonly referred to as maximum achievable control technology (MACT). The CAA also establishes a minimum control level for MACT standards known as the MACT ''floor.'' The MACT floor is the minimum control level allowed for NESHAP and is defined under the CAA section 112(d)(3) (Ref. 9). The chemical manufacturers that produce HCBD are in NAICS group 325 and therefore fall under the NESHAP regulations for miscellaneous organic chemical manufacturing found at 40 CFR part 63 subpart FFFF. These regulations require facilities to treat chemicals in their waste streams at high efficiencies. For example, emissions from process vents must be reduced by greater than or equal to 99% by weight depending on the chemical in the waste stream. According to TRI data, chemical manufacturers that submit reports for HCBD are treating the byproduct via incineration at greater than 99.99% treatment efficiency with some reporting an efficiency greater than 99.9999%. Under the CAA, facilities in certain industries are required to implement a Leak Detection and Repair (LDAR) program to reduce fugitive air emissions. Included in those industries are synthetic organic chemical manufacturers that produce the HCBD byproduct. The LDAR program requires these facilities to monitor components such as pumps, valves, connectors and compressors for leaks. When leaks are detected, the facility is required to repair or replace the leaking component.

In view of these comprehensive, stringent programs for addressing disposal and air releases, EPA determined that it is not practicable to impose additional requirements under TSCA on the disposal and air releases of the HCBD byproduct.

In addition, EPA proposed not to use its TSCA section 6(a) authorities to directly regulate occupational exposures. As explained in the proposed rule, as a matter of policy, EPA assumes compliance with federal and state requirements, such as worker protection standards, unless case-specific facts indicate otherwise. The Occupational Safety and Health Administration (OSHA) has not established a permissible exposure limit (PEL) for HCBD. However, under section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1), each employer has a legal obligation to furnish to each of its employees employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm. The OSHA Hazard Communication Standard at 29 CFR 1910.1200 requires chemical manufacturers and importers to classify the hazards of chemicals they produce or import, and all employers to provide information to employees about hazardous chemicals to which they may be exposed under normal conditions of use or in foreseeable emergencies. The OSHA standard at 29 CFR 1910.134(a)(1) requires the use of feasible engineering controls to prevent atmospheric contamination by harmful substances and requires the use of respirators where effective engineering controls are not feasible. The OSHA standard at 29 CFR 1910.134(c) details the required respiratory protection program. The OSHA standard at 29 CFR 1910.132(a) requires the use of personal protective equipment (PPE) by workers when necessary due to a chemical hazard; 29 CFR 1910.133 requires the use of eye and face protection when employees are exposed to hazards including liquid chemicals; and 29 CFR 1910.138 requires the use of PPE to protect employees' hands including from skin absorption of harmful substances. The provisions of 29 CFR 1910.132(d) and (f) address hazard assessment, PPE selection, and training with respect to PPE required under 29 CFR 1910.133, 1910.135, 1910.136, 1910.138, and 1910.140. EPA assumes that employers will require, and workers will use, appropriate PPE consistent with OSHA standards, taking into account employer-based assessments, in a manner sufficient to prevent occupational exposures that are capable of causing injury.

EPA assumes compliance with other federal requirements, including OSHA standards and regulations. EPA does not read TSCA section 6(h)(4) to direct EPA to adopt potentially redundant or conflicting requirements. Not only would it be difficult to support broadly applicable and safe additional measures for each specific activity without a risk evaluation and in the limited time for issuance of this regulation under TSCA section 6(h), but imposing such measures without sufficient analysis could inadvertently result in conflicting or confusing requirements and make it difficult for employers to understand their obligations. Furthermore, EPA cannot conclude that broadly imposing specific measures is practicable for all of the varied workplaces. Rather, where EPA has identified worker exposures and available substitutes, EPA is finalizing measures to reduce those exposures. As discussed in the proposed rule, EPA assumes that the worker protection methods used by employers, including in response to existing OSHA standards, in addition to the regulatory measures taken for each chemical, meaningfully reduce the potential for occupational exposures. Although some commenters agreed with this approach, others thought that EPA should establish worker protection requirements for those uses that would be allowed to continue under the final rule. Information provided to EPA before and during the public comment period on the proposed rule indicates that employers are using engineering and process controls and providing appropriate personal protective equipment (PPE) to their employees consistent with these requirements, and EPA received no information on HCBD to suggest this is not the case. Further,

EPA has not conducted a risk evaluation on HCBD or any of the other PBT chemicals. Without a risk evaluation and given the time allotted for this rulemaking, EPA cannot identify additional engineering or process controls or PPE requirements that would be appropriate to each chemical-specific circumstance. For these reasons, EPA has determined that it is not practicable to regulate worker exposures in this rule through additional engineering or process controls or PPE requirements.

Finally, EPA received comments regarding the use of PBT chemicals in research and development and laboratory use. Laboratory use is addressed under newly established 40 CFR 751.401(b) as the manufacturing, processing, distribution-in-commerce and use of any chemical substance, or products and articles that contain the chemical substance, for research and development, as defined in new 40 CFR 751.403. *Research and Development* is defined in new 40 CFR 751.403 to mean laboratory and research use only for purposes of scientific experimentation or analysis, or chemical research on, or analysis of, the chemical substance, including methods for disposal, but not for research or analysis for the development of a new product, or refinement of an existing product that contains the chemical substance. This will allow, for example, for samples of environmental media containing PBTs, such as contaminated soil and water, to be collected, packaged and shipped to a laboratory for analysis. Laboratories also must obtain reference standards containing PBTs to calibrate their equipment, otherwise they may not be able to accurately quantify these chemical substances in samples being analyzed. However, research to develop new products that use PBTs subject to 40 CFR part 751, subpart E, or the refinement of existing uses of those chemicals, is not included in this definition, and those activities remain potentially subject to the chemical specific provisions in 40 CFR part 751 subpart E. EPA believes it is not practicable to limit research and development activity as defined, given the critical importance of this activity to the detection, quantification and control of these chemical substances.

More information on the comments received and EPA's responses can be found in the Response to Comments document (Ref. 4).

III. Provisions of This Final Rule

A. Scope and Applicability

EPA carefully considered all public comments related to the proposal. This final rule differs from EPA's proposal by finalizing a prohibition on the manufacturing (including import), processing, and distribution in commerce of HCBD, and HCBD-containing products and articles, except for the unintentional production of HCBD as a byproduct during the production of chlorinated solvents, and the limited processing and distribution of HCBD for burning as a waste fuel. The effective date is 30 days after publication of the final rule.

1. Regulating HCBD.

EPA received comments disagreeing with EPA's proposal not to regulate HCBD. One commenter stated that EPA must act under TSCA section 6(h) to include a total phase-out of the chemical (EPA–HQ–OPPT–2019–0080–0575). Another commenter stated that by not prohibiting uses of HCBD, EPA's approach allowed ongoing exposures, including to potentially exposed and susceptible subpopulations, and potential expansion of uses (EPA–HQ–OPPT–2019–0080–0567). Three commenters noted that HCBD was listed in the Stockholm Convention on Persistent Organic Pollutant (POPs) which prohibits the intentional manufacture of HCBD and stated that the manufacture of HCBD should be eliminated (EPA–HQ–OPPT–2019–0080–0570) (EPA–HQ–OPPT–2019–0080–0567) (EPA–HQ–OPPT–2019–0080–0531). EPA received one comment supporting EPA's proposal and finding that no new risk management measures are required to reduce exposure of HCBD to the extent practicable (EPA–HQ–OPPT–2019–0080–0557).

In response to comments, EPA is finalizing a prohibition on the manufacturing, processing, and distribution of HCBD and HCBD-containing products or articles, recognizing that there is unintentional production of HCBD as a byproduct during the production of chlorinated solvents, that results in processing and distribution in commerce of a very limited subset of that byproduct for burning as a waste fuel. However, as explained below, EPA disagrees with commenters that a total ban of HCBD production as a byproduct is practicable. The potential for exposure from incineration and distribution for incineration of the byproduct is substantially addressed by actions taken under other statutes. As discussed in EPA's proposed rule and in Unit II.F., HCBD is regulated under various statutes implemented by the Federal Government, such as CAA and RCRA. According to TRI data, most of the byproduct HCBD manufactured in the United States is subsequently destroyed via incineration due in large part to the high waste treatment efficiencies achieved by the chemical manufacturers. Chemical manufacturers that submit TRI reports for HCBD byproduct are treating the chemical via incineration at greater than 99.99% treatment efficiency with some reporting an efficiency greater than 99.9999%.

Given the known uses and efficiency of the destruction of HCBD created as a byproduct, EPA is issuing a final rule to prohibit all manufacturing, processing, and distribution in commerce of HCBD and products and articles containing HCBD, while recognizing the continuation of the production of HCBD as a byproduct during the production of chlorinated solvents, and the resulting processing and distribution of HCBD for burning as a waste fuel. This final rule allows the current, highly regulated, unintentional production as a byproduct and incineration and distribution for incineration of such byproduct to continue and ensures that other uses do not commence.

2. HCBD uses.

Multiple commenters submitted comments to EPA discussing HCBD uses. Commenters pointed out that EPA's website had previously identified uses of HCBD as a solvent in rubber manufacturing and in hydraulic, heat transfer, or transformer fluid (EPA–HQ–OPPT–2019–0080–0575) (EPA–HQ–OPPT–2019–0080–0546). Commenters further noted that EPA's Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal for HCBD document identified numerous uses for HCBD beyond its production as a byproduct (Ref. 4) (EPA–HQ–OPPT–2019–0080–0575) (EPA–HQ–OPPT–2019–0080–0546). According to one commenter, EPA had not addressed these activities in its proposed rule, much less established that it would be impracticable to ban these uses to reduce exposure. This commenter stated that EPA should ban these past uses (EPA–HQ–OPPT–2019–0080–0546). Another commenter felt that EPA's proposed rule neglected to discuss or mention legacy uses and legacy disposals of PBT chemicals, and other commenters stated that HCBD has been listed in Annex A of the Stockholm Convention in order to avoid new possible future uses of HCBD (EPA–HQ–OPPT–2019–0080–0541) (EPA–HQ–OPPT–2019–0080–0531) (EPA–HQ–OPPT–2019–0080–0575).

In addition, multiple commenters expressed concerns about EPA's conclusion that ''a prohibition on the manufacture of HCBD would effectively prohibit the manufacture of the three

solvents'' (trichloroethylene, carbon tetrachloride, and perchloroethylene) and therefore that a ban was impracticable. The commenters made recommendations for alternative regulatory approaches. One commenter stated that EPA had failed to consider banning HCBD, except as a byproduct to the manufacture of other chemicals, to reduce exposure to the extent practicable (EPA–HQ–OPPT–2019–0080–0546). The commenter further stated that EPA could have considered banning all manufacture except as a byproduct of manufacture of perchloroethylene, trichloroethylene, and carbon tetrachloride, to ensure that HCBD is not manufactured for a purpose other than its incidental production as a byproduct (EPA–HQ–OPPT–2019–0080–0546).

EPA appreciates the comments provided regarding HCBD. EPA's Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal for HCBD document was a preliminary summary of available information on uses, past and present, of HCBD (Ref. 4). EPA requested comment on the document but did not receive confirmation of ongoing uses other than those discussed in the proposed rule. EPA has not identified any uses of HCBD. The only activity involving HCBD is burning as a waste fuel as a result of unintentional HCBD production as a byproduct.

However, recognizing commenters' concern about prohibiting HCBD uses that are not currently ongoing to avoid, for example, the return of past uses, EPA is finalizing a change from the proposal and is prohibiting all manufacturing, processing, and distribution in commerce of HCBD and products and articles containing HCBD, but allowing the continuation of the unintentional production of HCBD as a byproduct during the production of chlorinated solvents and the resulting processing and distribution of HCBD for burning as a waste fuel. This approach ensures that the types of allowable activities involving HCBD are severely limited by precluding the manufacture, processing, or distribution of HCBD for a purpose other than its incidental and unintentional production as a byproduct and allows burning of that byproduct as a waste fuel. Any other activity involving HCBD is prohibited by the final rule, and thus the final requirements are consistent with restrictions on the intentional production and use of HCBD under Annex A of the Stockholm Convention. Moreover, the highly regulated burning of the byproduct as a waste fuel is also consistent with Article 6 of the same Convention. Thus, the final rule requirements reduce the exposures to humans and the environment that could occur with any activity involving HCBD not directly related to its manufacture as a byproduct or burning as a waste fuel.

3. Chlorinated Solvents Resulting in HCBD as a Byproduct.

EPA received comments regarding the chlorinated solvents that unintentionally produce HCBD as a byproduct. One commenter recommended that EPA consider whether viable alternative synthetic routes exist that do not result in such production (EPA–HQ–OPPT–2019–0080–0541). One commenter stated that EPA should solicit information, regarding whether HCBD-free production methods for chlorinated solvents exist from industry before concluding that a ban on HCBD would entail a ban on chlorinated solvents (EPA–HQ–OPPT–2019–0080–0551). Another commenter stated that EPA must act under section 6(h) to include a total phase-out of the chemical and any processes that lead to creation of HCBD as a byproduct (EPA–HQ–OPPT–2019–0080–0575). Others requested EPA require best available techniques and environmental practices to control emissions and releases from sources of HCBD, and suggested EPA develop a plan to eliminate HCBD to the extent practicable through alternative chlorinated solvent manufacturing (EPA–HQ–OPPT–2019–0080–0567).

EPA appreciates the comments regarding alternatives and actions to be taken on chlorinated hydrocarbons, particularly perchloroethylene, trichloroethylene, and carbon tetrachloride, that unintentionally create HCBD as a byproduct. EPA is not aware of alternative methods for the production of chlorinated solvents that do not unintentionally produce HCBD as a byproduct and did not receive additional information in the comments on the proposal. As discussed in the proposed rule, prohibiting all manufacture of HCBD would effectively preclude the manufacture of trichloroethylene, carbon tetrachloride and perchloroethylene and EPA does not believe precluding manufacture of these solvents to reduce the exposure to the HCBD byproduct is practicable at this time. EPA is not addressing these three solvents during this TSCA section 6(h) rule making, which applies solely to PBT chemicals. Additionally, the solvents are the subject of the risk evaluation process pursuant to TSCA section 6(b). Where unreasonable risks are identified as part of those risk evaluations, EPA is required to take action under TSCA section 6(a) to address unreasonable risk. In addition, these chlorinated solvents are widely used in dry cleaning, metal degreasing, and other industries. To broadly assess the economic impact of a prohibition of the manufacture of these three chemicals, EPA estimated the potential market value loss by multiplying the national production volume of each of these chemicals by an average price per pound. This resulted in an estimated impact $213 million to $541 million (average $368 million) worth of production (see the Economic Analysis for the proposed rule for details on this estimation) (Ref. 10). Therefore, EPA's final rule allows the continuation of the unintentional production of HCBD as a byproduct during the production of chlorinated solvents and processing and distribution of the HCBD byproduct for burning as a waste fuel, and prohibits all other manufacturing, processing, and distribution in commerce of HCBD and products and articles containing HCBD.

4. Recordkeeping.

In addition, EPA is requiring that all persons who manufacture, process, or distribute in commerce HCBD and HCBD-containing products or articles maintain ordinary business records related to compliance with the prohibitions and restrictions, such as invoices and bills-of-lading. EPA revised this language slightly from the proposal to improve clarity. These records will have to be maintained for a period of three years from the date the record is generated, beginning on March 8, 2021.

B. TSCA Section 6(c)(2) Considerations

1. Health effects, exposure, and environmental effects.

HCBD is toxic to aquatic invertebrates, fish, and birds. Data indicate the potential for renal, liver, and developmental effects in mammals. HCBD has been identified as a possible human carcinogen. The studies presented in the Hazard Summary (Ref. 8) demonstrate these hazardous endpoints. These hazard statements are not based on a systematic review of the available literature and information may exist that could refine the hazard characterization. Additional information about HCBD health effects, use, and exposure is in Unit II.C. and further detailed in the Hazard Summary (Ref. 8). Information on use and exposures is also in Unit II.C. and is further detailed in EPA's Exposure and Use Assessment (Ref. 5, Ref. 8).

2. The benefits of the chemical substance or mixture for various uses.

HCBD is unintentionally manufactured as a waste byproduct by chemical manufacturers. The majority of

what is manufactured is destroyed via incineration by the manufacturer. A small percentage of the HCBD is sent off-site for burning as a waste fuel by cement manufacturers.

3. The reasonably ascertainable economic consequences of the rule.

a. Overview of cost methodology.

EPA has evaluated the potential costs of the final action for HCBD. Costs of the final rule were estimated based on the assumption that under regulatory limitations on HCBD, processors that use HCBD in their products would switch to available alternative chemicals to manufacture the product, or to products that do not contain HCBD. Costs for rule familiarization and recordkeeping were estimated based on burdens estimated for other similar rulemakings. Costs were annualized over a 25-year period. Other potential costs include, but are not limited to, those associated with testing, reformulation, imported articles, and some portion of potential revenue loss. However, these costs are discussed only qualitatively, due to lack of data availability to estimate quantified costs. More details of this analysis are presented in the Economic Analysis (Ref. 3).

b. Estimated costs of this final rule.

Total quantified annualized industry costs for the final rule is $354. Total annualized Agency costs associated with implementation of the final rule were based on EPA's best judgment and experience with other similar rules. For the final regulatory action, EPA estimates it will require 0.5 FTE at $77,576 per year (Ref. 3).

Total quantified annualized social costs for the final rule are estimated to be $77,930 (at both 3% and 7% discount rates annualized over 25 years). As described earlier in Unit III.B.3, potential costs such as testing, reformulation, and imported articles, could not be quantified due to lack of data availability to estimate quantified costs. These costs are discussed qualitatively in the Economic Analysis (Ref. 3).

c. Benefits.

As discussed in Unit II., although EPA reviewed hazard and exposure information for the PBT chemicals, this information did not provide a basis for EPA to develop scientifically robust and representative risk estimates to evaluate whether or not any of the chemicals present a risk of injury to health or the environment. Benefits were not quantified due to the lack of risk estimates. A qualitative discussion of the potential benefits associated with the final action for HCBD is provided. HCBD is persistent, bioaccumulative, and a possible human carcinogen. It is not intentionally manufactured in the United States. Since EPA is effectively excluding from prohibition all current activities involving HCBD as a byproduct, no benefits to human health or the environment are expected; the benefit is the prevention of individuals from being occupationally exposed to HCBD via the inhalation and dermal routes in the future. The toxicity of potential substitutes for HCBD has not been assessed at this time.

d. Cost effectiveness, and effect on national economy, small business, and technological innovation.

With respect to the cost effectiveness of the final regulatory action and the primary alternative regulatory action, EPA is unable to perform a traditional cost-effectiveness analysis of the actions and alternatives for the PBT chemicals. As discussed in the proposed rule, the cost effectiveness of a policy option would properly be calculated by dividing the annualized costs of the option by a final outcome, such as cancer cases avoided, or to intermediate outputs such as tons of emissions of a pollutant curtailed. Without the supporting analyses for a risk determination, EPA is unable to calculate either a health-based or environment-based denominator. Thus, EPA is unable to perform a quantitative cost-effectiveness analysis of the final and alternative regulatory actions. However, by evaluating the practicability of the final and alternative regulatory actions, EPA believes that it has considered elements related to the cost effectiveness of the actions, including the cost and the effect on exposure to the PBT chemicals of the final and alternative regulatory actions.

EPA considered the anticipated effect of this rule on the national economy and concluded that this rule is highly unlikely to have any measurable effect on the national economy (Ref. 3). EPA analyzed the expected impacts on small business and found that no small entities are expected to experience impacts of more than 1% of revenues (Ref. 3). Finally, EPA has determined that this rule is unlikely to have significant impacts on technological innovation.

4. Consideration of alternatives.

EPA has not identified any uses of HCBD. Therefore, chemical alternatives were not considered.

C. TSCA Section 26(h) Considerations

In accordance with TSCA section 26(h) and taking into account the requirements of TSCA section 6(h), EPA has used scientific information, technical procedures, measures, and methodologies that are fit for purpose and consistent with the best available science. For example, EPA based its determination that human and environmental exposures to the HCBD byproduct are likely in the Exposure and Use Assessment (Ref. 5) discussed in Unit II.A.2, which underwent a peer review and public comment process, as well as using best available science and methods sufficient to make that determination. The extent to which the various information, procedures, measures, and methodologies, as applicable, used in EPA's decision making have been subject to independent verification or peer review is adequate to justify their use, collectively, in the record for this final rule. Additional information on the peer review and public comment process, such as the peer review plan, the peer review report, and the Agency's response to comments, are in the public docket for this action (EPA–HQ–OPPT–2019–0080). In addition, in accordance with TSCA section 26(i), and taking into account the requirements of TSCA section 6(h), EPA has made scientific decisions based on the weight of the scientific evidence.

IV. References

The following is a list of the documents that are specifically referenced in this document. The docket includes these documents and other information considered by EPA, including documents that are referenced within the documents that are included in the docket, even if the referenced document is not physically located in the docket. All records in docket EPA–HQ–OPPT–2019–0080 are part of the record for this rulemaking. For assistance in locating these other documents, please consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

1. EPA. TSCA Work Plan for Chemical Assessments: 2014 Update. October 2014. *https://www.epa.gov/assessingand-managing-chemicals-under-tsca/tsca-work-plan-chemical-ssessments-2014-update.* Accessed March 1, 2019.
2. EPA. TSCA Work Plan Chemicals: Methods Document. February 2012. *https://www.epa.gov/sites/production/files/2014-03/documents/work_plan_methods_document_web_final.pdf.* Accessed March 1, 2019.
3. EPA. Economic Analysis for Regulation of Hexachlorobutadiene (HCBD) Under TSCA Section 6(h). December 2020.
4. EPA. Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h). *Response to Public Comments.* December 2020. (Docket EPA–HQ–OPPT–2019–0080).

5. EPA. Exposure and Use Assessment of Five Persistent, Bioaccumulative, and Toxic Chemicals. December 2020.
6. United Nations Environment Program Stockholm Convention on Persistent Organic Pollutants (2012). Risk profile on hexachlorobutadiene. Report of the Persistent Organic Pollutants Review Committee on the work of its eighth meeting.
7. EPA. *Preliminary Information on Manufacturing, Processing, Distribution, Use, and Disposal: Hexachlorobutadiene.* August 2017. (EPA–HQ–OPPT–2016–0738–0004).
8. EPA. Environmental and Human Health Hazards of Five Persistent, Bioaccumulative and Toxic Chemicals. December 2020.
9. EPA. National Emission Standards for Hazardous Air Pollutants: Miscellaneous Organic Chemical Manufacturing; Final Rule. **Federal Register** (63 FR 63852, Nov. 10, 2003) (FRL–7551–3)
10. EPA. Economic Analysis for Proposed Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under TSCA section 6(h). June 2019.
11. Keweenaw Bay Indian Community. Re: Notification of Consultation and Coordination on a Rulemaking Under the Toxic Substances Control Act: Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h). September 25, 2018.
12. Harper, Barbara and Ranco, Darren, in collaboration with the Maine Tribes. Wabanaki Traditional Cultural Lifeways Exposure Scenario. July 9, 2009.

V. Statutory and Executive Order Reviews

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

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulations and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011). Any changes made in response to OMB recommendations have been documented in the docket for this action as required by section 6(a)(3)(E) of Executive Order 12866.

EPA prepared an economic analysis of the potential costs and benefits associated with this action. A copy of this economic analysis, *Economic Analysis for Final Regulation of Hexachlorobutadiene (HCBD) Under TSCA Section 6(h)* (Ref. 3) is in the docket and is briefly summarized in Unit III.B.3.

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

This action is considered a regulatory action under Executive Order 13771 (82 FR 9339, February 3, 2017). Details on the estimated costs of this final rule can be found in the Economic Analysis (Ref. 3), which is briefly summarized in Unit III.B.3.

C. Paperwork Reduction Act (PRA)

The information collection activities in this rule have been submitted for approval to the OMB under the PRA, 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR number 2599.02 and OMB Control No. 2070–0213. A copy of the ICR is available in the docket for this rule, and it is briefly summarized here. The information collection requirements are not enforceable until OMB approves them.

Respondents/affected entities: Entities potentially affected by paperwork requirements of this final rule include manufacturers (including importers), processors, and distributors of HCBD.

Respondent's obligation to respond: Mandatory (40 CFR 751.413).

Estimated number of respondents: 9.

Frequency of response: On occasion.

Total estimated burden: 4.5 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $354 (per year), includes $0 annualized capital or operation & maintenance costs.

The ICR submitted to OMB for approval under OMB Control No. 2070–0213 addresses the paperwork requirements of this final rule as well as the paperwork requirements of the other final rules addressing PBT chemicals under TSCA section 6(h) promulgated by EPA elsewhere in this issue of the **Federal Register**. For the combined paperwork requirements of all five final rules, EPA estimates a total of 102 respondents, 88 burden hours (per year), and a cost of approximately $6,920 (per year) that includes no annualized capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When OMB approves this ICR, the Agency will announce that approval in the **Federal Register** and publish a technical amendment to 40 CFR part 9 to display the OMB control number for the approved information collection activities contained in this final rule and the other final rules addressing PBT chemicals under TSCA section 6(h).

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA, 5 U.S.C. 601 *et seq.* One small business, an importer, is expected to be affected by the rule familiarization and recordkeeping requirements of the final rule. The one small entity assessed is not expected to incur impacts of 1% (or greater) of their revenue. Because this entity's impacts are less than 1%, EPA presumes no significant economic impact on a substantial number of small entities. Details of this analysis are presented in the Economic Analysis (Ref. 3).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and will not significantly or uniquely affect small governments. The final rule is not expected to result in expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (when adjusted annually for inflation) in any one year. Accordingly, this final rule is not subject to the requirements of sections 202, 203, or 205 of UMRA. The total quantified annualized social costs for this final rule are approximately $77,900 (at both 3% and 7% discount rate), which does not exceed the inflation-adjusted unfunded mandate threshold of $160 million.

F. Executive Order 13132: Federalism

This action does not have federalism implications because it is not expected to have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this action.

G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications because it is not expected to have substantial direct effects on tribal governments, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian

tribes as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this final rule.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, EPA consulted with tribal officials during the development of this action. EPA consulted with representatives of Tribes via teleconference on August 31, 2018, and September 6, 2018, concerning the prospective regulation of the five PBT chemicals under TSCA section 6(h).

Tribal members were encouraged to provide additional comments after the teleconferences. EPA received two comments from the Keweenaw Bay Indian Community and Maine Tribes (Refs. 11 and 12).

H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not an economically significant regulatory action as defined by Executive Order 12866. While the action is not subject to Executive Order 13045, the Agency considered the risks to infants and children under EPA's Policy on Evaluating Health Risks to Children. EPA did not perform a risk assessment or risk evaluation of HCBD, the available data indicate exposure to HCBD may disproportionately affect children, and effects information indicating developmental effects. This regulation will reduce the exposure to HCBD that could occur from the prohibited activities for the general population and for potentially exposed or susceptible subpopulations such as children. More information can be found in the Exposure and Use Assessment (Ref. 5).

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not otherwise been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

J. National Technology Transfer and Advancement Act (NTTAA).

This rulemaking does not involve any technical standards. Therefore, NTTAA section 12(d), 15 U.S.C. 272 *note,* does not apply to this action.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). The documentation for this decision is contained in the Economic Analysis (Ref. 3), which is in the public docket for this action. EPA believes that the restrictions on HCBD in this final rule will reduce the potential for exposure in the United States, thus benefitting all communities, including environmental justice communities.

L. Congressional Review Act (CRA)

This action is subject to the CRA, 5 U.S.C. 801 *et seq.,* and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 751

Environmental protection, Chemicals, Export Notification, Hazardous substances, Import certification, Reporting and recordkeeping.

Andrew Wheeler,

Administrator.

Therefore, for the reasons stated in the preamble, 40 CFR part 751 is amended as follows:

PART 751—REGULATION OF CERTAIN CHEMICAL SUBSTANCES AND MIXTURES UNDER SECTION 6 OF THE TOXIC SUBSTANCES CONTROL ACT

■ 1. The authority citation for part 751 continues to read as follows:

Authority: 15 U.S.C. 2605, 15 U.S.C. 2625(l)(4).

■ 2. Amend § 751.403 by adding in alphabetical order the term ''HCBD'' to read as follows:

Subpart E—Persistent, Bioaccumulative, and Toxic Chemicals

§ 751.403 Definitions.

* * * * *

HCBD means the chemical substance hexachlorobutadiene (CASRN 87–68–3).

* * * * *

■ 3. Add § 751.413 to read as follows:

§ 751.413 HCBD.

(a) *Prohibition.* After March 8, 2021, all persons are prohibited from all manufacturing, processing and distribution in commerce of HCBD and HCBD-containing products or articles, except for the following:

(1) Unintentional production of HCBD as a byproduct in the production of chlorinated solvents; and

(2) Processing and distribution in commerce of HCBD for burning as a waste fuel.

(b) Recordkeeping. After March 8, 2021, manufacturers, processors and distributors of HCBD or HCBD-containing products or articles must maintain ordinary business records related to compliance with the prohibitions, restrictions and other provisions of this section, such as invoices and bills-of-lading. These records must be maintained for a period of three years from the date the record is generated.

[FR Doc. 2020–28693 Filed 1–5–21; 8:45 am]

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S. 212/P.L. 116–261
Indian Community Economic Enhancement Act of 2020 (Dec. 30, 2020; 134 Stat. 3306)

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To designate the community-based outpatient clinic of the Department of Veterans Affairs in Bozeman, Montana, as the Travis W. Atkins Department of Veterans Affairs Clinic. (Dec. 30, 2020; 134 Stat. 3315)

S. 2472/P.L. 116–263
Neil A. Armstrong Test Facility Act (Dec. 30, 2020; 134 Stat. 3316)

S. 3257/P.L. 116–264
To designate the facility of the United States Postal Service located at 311 West Wisconsin Avenue in Tomahawk, Wisconsin, as the "Einar 'Sarge' H. Ingman, Jr. Post Office Building". (Dec. 30, 2020; 134 Stat. 3318)

S. 3461/P.L. 116–265
To designate the facility of the United States Postal Service located at 2600 Wesley Street in Greenville, Texas, as the "Audie Murphy Post Office Building". (Dec. 30, 2020; 134 Stat. 3319)

S. 3462/P.L. 116–266
To designate the facility of the United States Postal Service located at 909 West Holiday Drive in Fate, Texas, as the "Ralph Hall Post Office". (Dec. 30, 2020; 134 Stat. 3320)

S. 4126/P.L. 116–267
To designate the facility of the United States Postal Service located at 104 East Main Street in Port Washington, Wisconsin, as the "Joseph G. Demler Post Office". (Dec. 30, 2020; 134 Stat. 3321)

S. 4684/P.L. 116–268
To designate the facility of the United States Postal Service located at 440 Arapahoe Street in Thermopolis, Wyoming, as the "Robert L. Brown Post Office". (Dec. 30, 2020; 134 Stat. 3322)

S. 5036/P.L. 116–269
Secret Service Overtime Pay Extension Act (Dec. 30, 2020; 134 Stat. 3323)

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