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DEPARTMENT OF ENERGY

10 CFR Part 590

Including Short-Term Export Authority in Long-Term Authorizations for the Export of Natural Gas on a Non-Additive Basis

AGENCY: Office of Fossil Energy, Department of Energy.

ACTION: Policy statement.

SUMMARY: The Department of Energy's (DOE) Office of Fossil Energy (FE) is discontinuing its practice of issuing separate long-term and short-term authorizations for exports of domestically produced natural gas from the same facility (or facilities). DOE is instead establishing a practice that certain long-term authorizations to export domestically produced natural gas—including liquefied natural gas (LNG), compressed natural gas, and compressed gas liquid—include additional authority to export the same approved volume pursuant to transactions with terms of less than two years on a non-additive basis (including non-additive commissioning volumes). By consolidating this authority in a single authorization without any increase in total approved export volumes, this action will streamline DOE's regulatory process and reduce administrative burdens. This policy statement affects only future long-term export authorizations issued by DOE under the Natural Gas Act (NGA). DOE is concurrently issuing a blanket order amending existing export authorizations consistent with this policy statement.

DATES: This policy statement is effective on January 12, 2021.

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SUPPLEMENTARY INFORMATION:

Acronyms and Abbreviations.

Frequently used acronyms and abbreviations are set forth below for reference.

DOE U.S. Department of Energy
EA Environmental Assessment
EIS Environmental Impact Statement
FE Office of Fossil Energy
FTA Free Trade Agreement
LNG Liquefied Natural Gas
NEPA National Environmental Policy Act of 1969
NGA Natural Gas Act

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I. Statutory Background

DOE is responsible for authorizing exports of domestically produced natural gas—including LNG, compressed natural gas, and compressed gas liquid¹—to foreign countries under section 3 of the NGA.² Under section 3(c) of the NGA, exports of natural gas to countries with which the United States has entered into a free trade agreement (FTA) requiring national treatment for trade in natural

¹ In referring to natural gas in this policy statement, DOE refers primarily, but not exclusively, to LNG. Several DOE proceedings have involved other types of natural gas: Compressed natural gas (or CNG) in FE Docket Nos. 13-157-CNG and 20-57-CNG, and compressed gas liquid (or CGL) in FE Docket Nos. 14-83-CGL, 16-22-CGL, and 19-147-CGL. See 15 U.S.C. 717a(5) (definition of natural gas); 10 CFR 590.102(i) (same).

² 15 U.S.C. 717b. The authority to regulate the imports and exports of natural gas, including LNG, under NGA section 3 has been delegated to the Assistant Secretary for FE in Redelegation Order No. 00-002.04G, issued on June 4, 2019.

gas (FTA countries) are “deemed to be consistent with the public interest.”³ Therefore, applications authorizing exports of natural gas to FTA countries must be granted “without modification or delay.”⁴ Section 3(a) of the NGA governs exports to any other country with which trade is not prohibited by U.S. law or policy (non-FTA countries).⁵ DOE, as affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, has consistently interpreted NGA section 3(a) as creating a rebuttable presumption that a proposed export of natural gas is in the public interest.⁶ Accordingly, DOE will conduct an informal adjudication and grant a non-FTA application unless DOE finds that the proposed exportation will not be consistent with the public interest.⁷

Before reaching a final decision on a non-FTA application, DOE must also comply with the National Environmental Policy Act of 1969 (NEPA).⁸ DOE's environmental review process under NEPA may result in the preparation or adoption of an environmental impact statement (EIS) or environmental assessment (EA) describing the potential environmental impacts associated with the application.⁹ In other cases, DOE may

³ *Id.* at 15 U.S.C. 717b(c). The United States currently has FTAs requiring national treatment for trade in natural gas with Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Republic of Korea, and Singapore. FTAs with Israel and Costa Rica do not require national treatment for trade in natural gas.

⁴ *Id.*

⁵ *Id.* at 15 U.S.C. 717b(a).

⁶ See *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 203 (D.C. Cir. 2017) (“We have construed [NGA section 3(a)] as containing a ‘general presumption favoring [export] authorization.’”) (quoting *W. Va. Pub. Serv. Comm'n v. U.S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)).

⁷ See *id.* (“there must be ‘an affirmative showing of inconsistency with the public interest’ to deny the application” under NGA section 3(a)) (quoting *Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1111 (D.C. Cir. 1987)). Additionally, qualifying small-scale exports of natural gas to non-FTA countries are deemed to be consistent with the public interest under NGA section 3(a). See 10 CFR 590.102(p); 10 CFR 590.208(a); see also U.S. Dep't of Energy, Small-Scale Natural Gas Exports; Final Rule, 83 FR 35106 (July 25, 2018).

⁸ 42 U.S.C. 4321 *et seq.*

⁹ Typically, the federal agency responsible for permitting the export facility—either the Federal Energy Regulatory Commission or the U.S. Department of Transportation's Maritime Administration—serves as the lead agency in the

Continued

determine that an application is eligible for a categorical exclusion from the preparation or adoption of an EIS or EA, pursuant to DOE's regulations implementing NEPA.¹⁰

II. Regulatory Background

A. DOE Regulations Involving Contract Terms

DOE's regulations implementing section 3 of the NGA are codified in 10 CFR part 590. In relevant part, any person applying to export natural gas from the United States or to amend an existing export authorization¹¹ is required to provide DOE with "a copy of all relevant contracts and purchase agreements"¹² and to identify any "contract volumes" related to the supply of natural gas to be exported.¹³ DOE's regulations, however, do not address the terms of contracts for the supply or export of natural gas, or distinguish between types of export authorizations based on the contract term.

B. Long-Term Export Authority

Because of the time, complexity, and expense of commercializing, financing, and constructing LNG export terminals, authorization holders typically apply to DOE for long-term authority to export LNG (or other types of natural gas) from their export facility to FTA and non-FTA countries.¹⁴ Since 2010, DOE has issued more than 100 long-term authorizations approving the export of natural gas in the form of LNG, compressed natural gas, or compressed gas liquid to either FTA countries, non-FTA countries, or both under consolidated FTA and non-FTA orders. These long-term authorizations—which originally ranged in duration from 20 to 30 years (depending on the type of order) and which now may extend through the year 2050¹⁵—are supported

by the authorization holders' natural gas supply and sales contracts that often have similarly lengthy terms. In the long-term orders issued to date, DOE specifies that the authorization holder is authorized to export the natural gas "pursuant to one or more long-term contracts (a contract greater than two years)."¹⁶

C. Short-Term Export Authority

In 2015, DOE received the first application requesting short-term (or "blanket") authorization to export domestically produced LNG over a two-year period to both FTA and non-FTA countries under NGA section 3.¹⁷ In the application, filed by Sabine Pass Liquefaction, LLC (Sabine Pass), Sabine Pass noted that it held (at that time) two long-term FTA orders and one long-term non-FTA order authorizing it to export domestically produced LNG from the Sabine Pass Liquefaction Project, then under construction in Cameron Parish, Louisiana.¹⁸ Sabine Pass requested to export a subset of its total export volume approved under its long-term authorizations for the two-year period. Sabine Pass explained that, in anticipation of the start of liquefaction operations at the Liquefaction Project, it sought "to engage in short-term exports of LNG produced both prior to commercial operations as well as subsequent to commercial operations if and when appropriate market opportunities arise."¹⁹ Sabine Pass further stated that the requested short-term authorization would provide it with "enhanced operational flexibility and the ability to export produced LNG cargoes that may be rejected by customers under one or more long-term contracts."²⁰

In January 2016, in DOE/FE Order No. 3767, DOE granted Sabine Pass's application to export LNG by vessel "on

a short-term or spot market basis" from the Sabine Pass Liquefaction Project.²¹ In evaluating the non-FTA portion of the application, DOE stated that it already had "conducted a full public interest review under NGA section 3(a)" for Sabine Pass's long-term non-FTA authorization.²² Next, DOE noted that Sabine Pass was seeking only to export a non-additive portion of its total export volume over the two-year period. DOE found:

Provided that the volumes proposed for export . . . when added to any volumes exported under Sabine Pass' long-term export authorization, do not exceed [the approved long-term export volume] on an annual (*i.e.*, consecutive 12 month) basis, *the public interest impacts of the total exports will not increase as a consequence of our approval of the Application in this proceeding.*²³

On this basis, DOE concluded that "no additional public interest review beyond that conducted in the earlier non-FTA export proceedings is warranted."²⁴

In the ordering paragraphs for Sabine Pass's short-term order, DOE specified that Sabine Pass was authorized to export the requested LNG "pursuant to transactions that have terms of no longer than two years."²⁵ DOE also required that "[t]he volume of LNG authorized for export to non-FTA countries in this Order, when combined with the volume of LNG approved for export in [Sabine Pass's long-term non-FTA order] shall not exceed [the total approved non-FTA volume] during any consecutive 12-month period."²⁶

Under this framework, DOE has issued 13 additional short-term authorizations to supplement one or more existing long-term authorizations for the same facility (or facilities) and authorization holder. To maintain this export authority, authorization holders are required to apply for new short-term orders—and DOE is required to process and review those applications—every two years.²⁷ Five of these short-term orders are currently active, including Sabine Pass's most recent short-term

NEPA review process, and DOE serves as a cooperating agency. Where no other federal agency is responsible for permitting the export facility, DOE serves as the lead agency in the NEPA review process.

¹⁰ See 10 CFR part 1021, subpart D, appendix B (listing of categorical exclusions from preparation of either an EA or EIS under NEPA).

¹¹ 10 CFR 590.201(a). For purposes of this policy statement, DOE uses the terms "authorization" and "order" interchangeably.

¹² *Id.* at 10 CFR 590.202(c).

¹³ *Id.* at 10 CFR 590.202(b)(2).

¹⁴ This policy statement does not apply to long-term export authorizations involving modes of transport other than by marine vessel, including but not limited to orders authorizing exports of natural gas by pipeline.

¹⁵ Effective August 25, 2020, DOE discontinued its practice of granting a standard 20-year export term for long-term authorizations to export domestically produced natural gas from the lower-48 states to non-FTA countries. DOE adopted a term

through December 31, 2050, as the standard export term for long-term non-FTA authorizations, unless a shorter term is requested by the applicant. See U.S. Dep't of Energy, Extending Natural Gas Export Authorizations to Non-Free Trade Agreement Countries Through the Year 2050, Notice of Final Policy Statement and Response to Comments, 85 FR 52237 (Aug. 25, 2020) [hereinafter Term Extension Policy Statement].

¹⁶ See, e.g., *Epsilon LNG LLC*, DOE/FE Order No. 4629, FE Docket No. 20–31–LNG, Opinion and Order Granting Long-Term Authorization to Export Natural Gas to Mexico for Liquefaction, and to Re-Export U.S.-Sourced Natural Gas in the Form of Liquefied Natural Gas from Mexico to Free Trade Agreement and Non-Free Trade Agreement Nations, at 55 (Dec. 8, 2020) (Ordering Para. A).

¹⁷ Sabine Pass Liquefaction, LLC, FE Docket No. 15–171–LNG, Application for Blanket Authorization to Export Liquefied Natural Gas (Nov. 6, 2015).

¹⁸ *Id.* at 2–3.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 6.

²¹ *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 3767, FE Docket No. 15–171–LNG, Order Granting Blanket Authorization to Export Liquefied Natural Gas by Vessel from the Sabine Pass LNG Terminal Located in Cameron Parish, Louisiana, at 2 (Jan. 13, 2016).

²² *Id.* at 9.

²³ *Id.* at 9–10 (emphasis added).

²⁴ *Id.* at 10.

²⁵ *Id.* at 13 (Ordering Para. A).

²⁶ *Id.* at 13–14 (Ordering Para. B).

²⁷ See U.S. Dep't of Energy, Office of Fossil Energy, "How to Obtain Authorization to Import and/or Export Natural Gas and LNG—Types of Authorizations and Requests," available at: <https://www.energy.gov/fe/services/natural-gas-regulation/how-obtain-authorization-import-and-or-export-natural-gas-and-lng>.

order issued in January 2020.²⁸ As indicated, each of these orders approves the requested short-term exports on a non-additive basis to the previously approved long-term exports for each authorization holder—meaning without any increase in the total export volume for the respective facility (or facilities).

Additionally, in every short-term order issued for non-FTA exports under NGA section 3(a), DOE has evaluated its obligations under NEPA. In each order, DOE determined that the approval of the application “will not result in any incremental environmental impacts as compared to the environmental impacts previously reviewed” for the corresponding long-term authorization(s).²⁹ DOE also found that approval of each application would not require additional construction or modification to the previously approved facilities.³⁰ Accordingly, in every short-term order for non-FTA exports to date, DOE has granted the non-FTA portion of the application, in part, based on a categorical exclusion from the preparation of an EA or EIS under NEPA³¹ (specifically, categorical exclusion B5.7 under DOE’s regulations at 10 CFR part 1021, subpart D, appendix B).³²

III. Policy Statement

Nearly five years ago, in January 2016, DOE issued its first short-term LNG export authorization to Sabine Pass to supplement its existing long-term LNG export authorizations.³³ Since that time, the U.S. market for natural gas—and, in particular, the LNG export market—has matured, as has DOE’s understanding of the administrative burdens associated with implementing its regulatory program under NGA section 3. Upon review, DOE has determined that it is no longer necessary to issue separate long-term and short-term authorizations to export natural gas from the same facility (or facilities) for the same authorization

holder. If an authorization holder has a long-term export order tied to contracts of two years or longer, but wishes to export a subset of that approved volume on a short-term or spot market basis under transactions with terms of less than two years (including commissioning volumes prior to the start of a facility’s commercial operations³⁴), DOE finds that it is beneficial to provide both types of authority in a single consolidated order going forward.

As an initial matter, DOE’s regulations implementing NGA section 3 do not address the terms of an applicant’s natural gas supply or sales contracts, nor do they distinguish between types of export authority on this basis.³⁵ Therefore, there is no legal requirement for DOE to continue issuing separate short-term and long-term authorizations on a non-additive basis from the same facility.

DOE also finds that there are no practical benefits to continuing to separate these types of authorizations. DOE developed this approach in 2016 during a rapidly evolving regulatory period for exports of LNG and other forms of natural gas. At this point, however, DOE’s regulatory practice is well established, U.S. companies have been exporting domestically produced LNG from the lower 48-states around the globe for nearly five years,³⁶ and the need for U.S. exporters to have operational flexibility to compete in the global marketplace is greater than ever.³⁷ Based on its analysis of the U.S. natural gas market, DOE/FE believes this action is in the public interest under NGA section 3.

Accordingly, under this policy statement, DOE is establishing that certain long-term authorizations to export domestically produced natural gas—including LNG, compressed natural gas, and compressed gas

liquid—will include authority to export the same approved volume pursuant to transactions with terms of less than two years on a non-additive basis (including non-additive commissioning volumes to be exported prior to the start of a facility’s commercial operations).

This policy statement applies only to future long-term authorizations to export natural gas.³⁸ Concurrently with this policy statement, DOE is issuing a blanket order that (i) amends existing long-term export authorizations to include short-term export authority under NGA section 3(a) and (c), and (ii) vacates DOE’s existing short-term orders (and short-term export authority granted in other orders) in light of DOE’s action to consolidate this authority in each corresponding long-term authorization.³⁹ DOE has included a list of the affected export authorizations in that order.

IV. Administrative Benefits

In this policy statement, DOE is not proposing any new requirements for applicants or authorization holders under 10 CFR part 590. Rather, DOE’s objective to streamline DOE’s administrative process and to minimize administrative burdens and uncertainty on the U.S. natural gas industry by conserving resources that would be utilized to apply for and process short-term export authorizations, respectively, without any incremental benefit to the public.

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this policy statement.

Signing Authority

This document of the Department of Energy was signed on December 18, 2020, by Steven Winberg, Assistant Secretary, Office of Fossil Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the

²⁸ *Sabine Pass Liquefaction, LLC*, DOE/FE Order No. 4487, FE Docket No. 19–133–LNG, Order Granting Blanket Authorization to Export Liquefied Natural Gas to Free Trade Agreement and Non-Free Trade Agreement Nations, at 14–15 (Jan. 15, 2020) (Ordering Paras. A, B).

²⁹ See, e.g., *id.* at 12.

³⁰ See, e.g., *id.* at 12–13.

³¹ See, e.g., *id.* at 12–13, 14 (Findings Para. (3)).

³² 10 CFR part 1021, Subpt. D, App. B, Categorical Exclusion B5.7 (providing a categorical exclusion where approvals or disapprovals of authorizations to import or export natural gas under NGA section 3 involve minor operational changes, but not new construction). DOE notes that, on January 4, 2021, an amended form of this B5.7 categorical exclusion will take effect. See U.S. Dep’t of Energy, National Environmental Policy Act Implementing Procedures; Final Rule, 85 FR 78197 (Dec. 4, 2020) (effective date of Jan. 4, 2021).

³³ See *supra* note 21.

³⁴ Cf. U.S. Dep’t of Energy, Office of Fossil Energy, *LNG Monthly*, at 38 (Nov. 2020), available at: https://www.energy.gov/sites/prod/files/2020/11/f80/LNG%20Monthly%202020_4.pdf (defining “commissioning cargoes” as “pre-commercial cargos loaded while export facility operations are still undergoing final testing and inspection,” and stating that “[c]ommissioning cargos may occur multiple times for the same facility as individual LNG trains enter service”).

³⁵ See *supra* § II.A (discussing DOE’s regulations implementing NGA section 3 at 10 CFR part 590).

³⁶ Indeed, after four years exporting at market-based levels, the United States has become one of the top three LNG exporters in the world. See Term Extension Policy Statement, 85 FR 52244 (Aug. 25, 2020).

³⁷ DOE recently discussed the benefits associated with increasing operational flexibility for U.S. exporters, including but not limited to providing economic benefits and improving energy security for the United States and its allies. See *id.* at 85 FR 52244 (Aug. 25, 2020).

³⁸ As noted, this policy statement does not apply to long-term export authorizations involving modes of transport other than by marine vessel, including but not limited to orders authorizing exports of natural gas by pipeline.

³⁹ See U.S. Dep’t of Energy, DOE/FE Order No. 4641, FE Docket Nos. 10–85–LNG, *et al.*, Order Amending Long-Term Authorizations for the Export of Natural Gas to Include Short-Term Export Authority on a Non-Additive Basis, and Vacating Related Short-Term Authority in Separate Orders (Dec. 18, 2020).

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 21, 2020.

Treena V. Garrett,

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

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 308

RIN 3064-AF69

FDIC Rules of Practice and Procedure; Technical Revisions

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is amending its rules of practice and procedure to codify the agency's longstanding practice of having certain adjudicative functions performed by an inferior officer of the United States appointed by the FDIC's Board of Directors (Board). Additionally, the FDIC is making other technical edits to its rules of practice and procedure to update references to certain positions within the FDIC Legal Division whose titles are outdated.

DATES: The final rule is effective on January 12, 2021.

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SUPPLEMENTARY INFORMATION:

I. Background

Administrative enforcement proceedings brought by the FDIC are subject to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and the FDIC Rules of Practice and Procedure, 12 CFR part 308. Under part 308, evidentiary hearings and related proceedings are generally presided over by an Administrative Law Judge (ALJ). *See generally*, 5 U.S.C. 556; 12 CFR 308.5, and 308.3. Additionally, part 308 provides that certain procedural and adjudicative functions are reserved to

the Executive Secretary of the FDIC. These functions include but are not limited to: (1) Serving in place of an ALJ when no ALJ has jurisdiction over an administrative proceeding; (2) issuing rulings in certain administrative proceedings; and (3) serving as the custodian of records for administrative proceedings. *See generally*, 12 CFR 308.102(b) and 308.105.

On June 21, 2018, the U.S. Supreme Court held that the ALJs employed by the U.S. Securities and Exchange Commission (SEC) were “inferior officers” of the United States under the Appointments Clause of the United States Constitution because these ALJs hold a continuing office established by law, and they exercise “significant discretion” in connection with certain “important functions” when presiding over administrative hearings. *Lucia v. SEC*, 138 S. Ct. 2044, 2053–2054 (2018) (*Lucia*). As inferior officers, the Supreme Court held that the SEC's ALJs are “subject to the Appointments Clause and as such, can only be appointed by the President, “Courts of Law” or “Heads of Departments.” *See, Lucia*, 138 S. Ct. 2044, 2046.

Although the *Lucia* decision did not directly affect the FDIC or the ALJs for the FDIC, the Board nevertheless elected to formally appoint the ALJs that preside over FDIC enforcement proceedings. The ALJs who were serving at the time of the *Lucia* decision were appointed by the Board on July 19, 2018. *See* FDIC Board Resolution 085152. Since that time, the Board has appointed all ALJs that preside over FDIC enforcement proceedings.

Since the *Lucia* decision, the FDIC has received questions regarding whether the FDIC's Executive Secretary was also appointed in a manner consistent with the Supreme Court's ruling in *Lucia*. In fact, the Board duly appointed the FDIC's current Executive Secretary as an inferior officer on June 22, 1997, pursuant to Article II of the United States Constitution and 12 U.S.C. 1819(a) (Fifth) (allowing the FDIC to “appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter”). Nonetheless, in the interest of transparency and to assuage any outstanding concerns about this issue, we are amending part 308 to clarify and to expressly provide that such adjudicative functions will continue to be performed by an inferior officer of the United States (Administrative Officer) that has been duly appointed by the Board.

In addition to clarifying that these adjudicative functions are performed by an Administrative Officer that is duly

appointed by the Board, the FDIC is making technical changes to part 308 to update outdated references to certain position titles.

II. Exemption From Public Notice and Comment

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553) sets forth requirements for providing the general public notice of, and the opportunity to comment on, proposed agency rules. However, unless notice or hearing is required by statute, those requirements do not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice. *See* 5 U.S.C. 553(b)(A).

The FDIC is updating part 308, its rules of practice and procedure, to substitute the Administrative Officer for the Executive Secretary in multiple places. Since the changes relate to agency organization, procedure, or practice, the rules are being published in final form without public notice and comment.

III. Regulatory Analysis

A. Congressional Review Act

Under the Congressional Review Act (CRA), “[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.”¹ The CRA further defines the term “rule” as having “the meaning given such term in section 551, except that such term does not include—(A) any rule of particular applicability . . . ; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.”²

The FDIC is updating part 308, its rules of practice and procedure, to clarify that certain adjudicative functions, specified in part 308 as being performed by the FDIC's Executive Secretary or Assistant Executive Secretary, will be performed by an “Administrative Officer” or “Assistant Administrative Officer” who has been duly appointed by the Board. Additionally, the FDIC is updating outdated references to certain position titles in part 308. These amendments do not constitute substantive changes, but merely conform the titles in the

¹ 5 U.S.C. 801(a)(1)(A).

² 5 U.S.C. 804(3).